Case No. G049903

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT, DIVISION THREE

DARWIN TING and KUEI-MEI TING,

Defendants and Appellants,

vs.

MERI NISHIUCHI, in the right of and for the benefit of ATIA CO., LP,

Plaintiff and Respondent.

Appeal from the Superior Court of California,

County of Orange, Central Justice Center

Case No. 30-2012-00542308-CU-FR-CJC

Honorable Derek W. Hunt, Judge Presiding

RESPONDENT'S BRIEF

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TO BE FILED IN THE COURT OF APPEAL **APP-008**

COURT OF APPEAL, Fourth APPELLATE DISTRICT, DIVISION Three	Court of Appeal Case Number: G049903
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APPELLANT/PETITIONER: Darwin Ting and Kuei-Mei Ting RESPONDENT/REAL PARTY IN INTEREST: Meri Nishiuchi	

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

(Check one): [X] INITIAL CERTIFICATE [ ] SUPPLEMENTAL CERTIFICATE

Notice: Please read rules 8.208 and 8.488 before completing this form. You may use this form for the initial certificate in an appeal when you file your brief or a prebriefing motion, application, or opposition to such a motion or application in the Court of Appeal, and when you file a petition for an extraordinary writ. You may also use this form as a supplemental certificate when you learn of changed or additional information that must be disclosed.

1. This form is being submitted on behalf of the following party (*name*): Darwin Ting and Kuei-Mei Ting

2. a. [ ] There are no interested entities or persons that must be listed in this certificate under rule 8.208.
   b. [X] Interested entities or persons required to be listed under rule 8.208 are as follows:

Full name of interested entity or person	Nature of interest (*Explain*):
(1) Chien Min Shieh	Majority Shareholder of Atia Co. LP
(2) Kenkoko Harakuma	Majority Shareholder of Atia Co. LP
(3)	
(4)	
(5)	

[ ] Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: October 1, 2014

George S. Burns
(TYPE OR PRINT NAME)

▶ _____
(SIGNATURE OF PARTY OR ATTORNEY)

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

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I. SUMMARY

Atia Co., LP, a California limited partnership, is in the business of investing in shopping malls in Southern California. Reporter's Transcript ("RT") 279:20-280:3. The partnership's activities included purchasing commercial real estate and renting to tenants. RT 515:17-19. This appeal arises out of a derivative action under Corp. Code §15910.02 brought by limited partner Meri Nishuichi ("Nishiuchi"), on behalf and for the benefit of Atia Co., LP ("Atia Co."). The *Plaintiff/Respondent* is Atia Co. The *Appellants* are Defendants Darwin Ting and Kuei-Mei Ting ("the Tings"), who are Atia Co.'s general partners. Darwin Ting and Kuei-Mei Ting are husband and wife. RT 367:26 – 368:10. Darwin Ting admits: Atia Co. is a California limited partnership created in 1996. Darwin Ting and Kuei-Mei Ting were designated as general partners. RT 374:6-13. The Tings were continuously the only general partners of Atia Co. since its inception. RT 376:4-14. Darwin Ting is a former accountant and has a Masters Degree in Business Administration. RT 792:17-793:12. The trial court rendered a $6,620,179 verdict against the Tings for stealing money from Atia Co. through various methods and at various times throughout 2005 to 2012. Appellants' Appendix ("AA") 12 AA 2871-2881.

The Tings' appeal did not address the legal issues accurately or state the critical facts fairly. The Tings' Opening Brief states the first issue as: Did the lower court err in ruling that this suit was exempt from the rule that the statute of limitations for breach of fiduciary duty is triggered once plaintiff is **on notice of the facts that are the basis of the suit**? (emphasis added.) In this appeal the Tings contend that in 2006, limited partner Nishiuchi was on notice that the Tings transferred title to a house owned by Atia Co. to themselves without consideration; the house is located at 2142 Liane Lane, Santa Ana, California (herein "the Liane House"). According to the Tings, because suit was not timely filed against them for their breach in transferring the Liane House (which the Tings deny there was any breach of duty), Atia Co. is forever barred by the statute of limitations from suing the Tings for stealing a total of $6,620,179 in numerous unrelated

transactions during 2005 to 2012 from Atia Co. The Tings' claims about the law and facts, upon which the trial court's Judgment is based, are false. The operative complaint alleged the Tings' various wrongful acts committed during the period 2005 through 2012. 2 AA 237-299. The trial court rendered a verdict of $6,620,179 against the Tings for breaching their fiduciary duties in several ways and on numerous occasions during the period 2005 through 2012. 12 AA 2871-2881.

In a derivative action, the real *Plaintiff* is Atia Co. Atia Co. cannot be on notice in 2006 for wrongful acts that did not occur until 2007 and thereafter. Contrary to the Tings' claim that in 2006 Nishiuchi learned of the Tings' 2001 transfer of real property – owned by Atia Co. – to themselves, it does not give the Tings carte blanche to breach their fiduciary duties to Atia Co. because the suit was untimely as to that claim. There were five distinct episodes of the Tings breaching their fiduciary duties from 2005 through 2012 alleged in the operative complaint which resulted in judgment:

1. From 2005 through 2012, the Tings used company credit cards for their personal benefit, totaling $150,000. 2 AA 268:23-28, 7 AA 1484:4, and 12 AA 2873-2874;
2. From 2007 to 2012, the Tings breached their duty by paying themselves unauthorized salary and management fees in the amount of $1,510,000. 2 AA 255:22- 256:10 and 12 AA 2873-2874;
3. From July 2010 to July 2011, the Tings spent Atia Co.'s money for tenant equipment and improvements, and charged no rent for their family bakery business in Atia Co.'s shopping center. 2 AA 274:1-9 and 12 AA 2873-2874.
4. In 2011, the Tings breached their fiduciary duty to Atia Co. in the form of a $3.6 million kickback to themselves during the sale of a shopping mall, owned by Atia Co., known as the Canyon Point Marketplace. 2 AA 258:6-15 and 12 AA 2871- 2873;

5. In 2012, the Tings loaned themselves $3,384,383 interest free from Atia Co.'s bank account. The trial court found, and the Tings admitted, the total amount of the unpaid loans to be $1,390,000. 2 AA 262:4-22 and 12 AA 2873-2874.

(hereinafter collectively "Five Proven Breaches"). These Five Proven Breaches were unrelated to the Tings' transfer of the Liane House of which Nishiuchi and Atia Co. were purportedly on notice in 2006. Although the Tings may have breached their fiduciary duty in 2001 by transferring the Liane House to themselves, they did not receive a license to breach their fiduciary duty to Atia Co. after 2006, i.e. the Five Proven Breaches. If the law were to preclude Atia Co. from bringing an action for wrongful acts not yet committed–the fiduciary would be free to breach fiduciary duties thereafter regardless of the manner, frequency, and resulting injuries. Notably, the Tings never claimed nor offered evidence that they were prejudiced by delay. The result sought by the Tings is a *reductio ad absurdum*. The trial court posed a hypothetical to the Tings' attorney during closing argument that illustrates the absurd result required by the flawed logic of the "principle" on which the Tings rely:

> THE COURT: No, don't worry about that. I'm just going to ask -- you used the credit card numbers as a vehicle for a question. Let's say I misuse -- I'm like Mr. Ting, I misused the credit card flagrantly. I'm buying jewelry for my girlfriend or something like that. I bring her to a party. I introduce my girlfriend to the other limited partners: 'This is my girlfriend; I got her an apartment down the street. This is her jewelry. And by the way, you guys, I got it on a credit card.' Time passes. Three years pass, four years. Nobody sues. Can I now misuse the credit card in all subsequent years because everybody knew that I had an instinct to misuse the credit card?
>
> MR. BURNS: Yes.
>
> THE COURT: Do I get a free pass on all future credit card misuse?
>
> MR. BURNS: Yes, because it's the same thing.

> THE COURT: To the end of my life?
>
> MR. BURNS: Yes. This is not a car accident Statute of Limitations, where there is a certain event that happens. This is investors suspicious of their manager and are therefore -- they are therefore charged with what they could have learned. I mean, you know, you are obviously picking the logical extreme, which I understand that's the way one makes arguments, but let's talk about the facts here.
>
> THE COURT: I'm not really arguing; I'm just sort of testing.
>
> MR BURNS: Good enough. I –
>
> THE COURT: Frankly, I found your answer very refreshing. You did not duck it.

RT 987:13 – 988:17.

With respect to the Tings' second issue, there was substantial circumstantial evidence that there was a $3.6 million kickback to the Tings and their daughter Patricia Ting. Darwin Ting admits that the $3.6 million of remediation expenses were "bogus" and fabricated to justify reducing the sale price from $31.1 to $27.5 million. RT 347:5-10. RT 349:23-350:4. Ray Cai, Kathleen Lek, and Bruce Wong, who were witnesses to Darwin Ting's negotiations in respect to the foregoing sale (and sale price) of the Canyon Plaza property, testified that Mr. Ting asked the brokers for a couple of million dollars cash, i.e. "money under the table" and "off the record", from the sale to be wired to Taiwan. RT 657:20-658:1; RT 659:10-661:1, 670:15-14.

In the argument section below, Atia Co. will first analyze the substantial evidence supporting the $3.6 million verdict relating to the Canyon Point Plaza kickback in 2011. The same facts will be used to support the statute of limitations arguments.

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II. PROCEDURAL HISTORY

On February 2, 2012, Nishiuchi brought an individual action against, among others, the Tings. 1 AA 1-25. On July 3, 2012, Nishiuchi abandoned her individual action and brought a derivative action alleging that the Tings participated in various acts of mismanagement and self-dealing.1 AA 26-80.

Shortly after the derivative complaint was filed, the trial court appointed its own expert witnesses, **Robert Mosier and Craig Collins**. 1 AA 84-87 at 85.

During trial, the court and Mr. Mosier highlighted the complexity of the limited partnership's accounts. The court states:

> "The principle idea of there being an appointment of a referee by a trial court is that the courts resort to that procedure in cases where there are complicated accounts. And I think to say the least, these accounts are complicated -- and Mr. Mosier is nodding his head -- where there are complicated accounts that can be more readily, more efficiently, and better examined or calculated outside the court."

RT 225:9-16.

Mr. Mosier completed his postgraduate work at Harvard Business School. RT 111:16-23. Since 1985, Mr. Mosier has been exclusively appointed as a court's expert in 580 cases:

> MR. COHAN: When was that, sir? From when to when, approximately.
>
> MR. MOSIER: '72 to about '82. Um, then in '83, I formed my company -- Mosier & Company, Inc. -- to serve as a turn-around firm. Since 1985, I have been almost exclusively court - appointed. I have been appointed a court-appointed fiduciary in approximately 580 cases in that 28-year period since 1985.

RT 112:24-113:6.

The trial court's Phase 1 Minute Order highlights its reasons for appointing its own expert and referee:

> "Several months after this suit had been originally commenced, the court determined that the manifold and complex transactions undertaken by the Tings in management of the partnership required a professional to evaluate and it consequently appointed Robert Mosier of Mosier & Co. as referee for that purpose. Mr. Mosier rendered several reports on his findings and was the first witness at the trial".

11 AA 2570.

The operative Partner Third Amended Complaint before trial was filed on October 11, 2012 and alleged causes of action for, inter alia, breach of fiduciary duty. 2 AA 237-299. After various law and motion rulings, the parties proceeded to trial on the breach of fiduciary duty and accounting causes of action. 2 AA 300-303; 4 AA 902; RT 32: 22-33:4. The trial court sua sponte bifurcated the trial into liability and damages phases with phase one commencing in June of 2013 and phase two starting in August of 2013. 11 AA 2568-2569; 12 AA 2870-2871.

The trial court entered a money verdict against Appellants for $6,620,179. 12 AA 2901-2903. Included in that amount are: (1) $3.6 million dollars stemming from the Tings' involvement in a kickback scheme pertaining to the sale of the Canyon Point Shopping Center; (2) $150,000 for personal charges the Tings made against partnership credit cards; (3) $1,510,000 for salary, management fee and alleged bonus payments in violation of Corp. Code section 15904.06; (4) unpaid partnership loans in the amount of $1,390,000; and (5) partnership expenditures denominated "tenant improvements" and rent for a bakery owned by the Tings' daughter and son-in-law in the amount of $125,000. 12 AA 2870 - 2876.

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III. FACTUAL ALLEGATIONS UPON WHICH THE CAUSE OF ACTION FOR BREACH OF FIDUCIARY DUTY WAS BASED

Breach of fiduciary duty was the principal issue at trial. The operative Partner Third Amended Complaint dispositive facts and crucial dates (for purpose of statute of limitations) upon which the breach of fiduciary duty verdict and judgment were based are stated as follows:

> On April 28, 2010, Darwin Ting, individually, and as agent for UNT II, entered into a "Management Agreement" for Canyon Point Plaza…According to UNT II's 2010 Profit and Loss Statements, the purported "Management Fee" was $108,000.00.

2 AA 255:22 - 256:11.

> Divine Creations LLC ([formed] March 2010): Members and Managers: Darwin Ting, his daughter Patricia Ting and Patricia's husband, Michael Lee. Divine Creations (dba: Eat Cake) is a dessert/bakery shop doing business at Canyon Point Plaza. Michael Lee signed a 10-year lease [for the LLC] that commenced on June 1, 2010, at a rate of $4,300.00 per month. Under the lease terms, there was no increase in rent for ten years, thus apparently depriving Atia Co. of income and profit because all the other tenants' rents increase every year. The Tings also spent at least $50,000 of UNT II's money for tenant improvement[s] for [their] bakery. On June 12, 2011, the Tings wrote a $5,000.00 check from UNT II's bank account to Eat Cake for no apparent reason, thus diverting money from Atia Co.

2 AA 273:27- 274:9.

> From 2003 to present, the Tings spent a total of **$330,011.82** using Atia Co.'s credit card(s) at: Victoria's Secret, Ethan Allan, Disney Store ….among various other purchases.

2 AA 268, lines: 23-28.

> In or about February 2011, the Tings agreed to sell Canyon Point Plaza to buyers Yong Zhang and Qing Liang (hereafter "The Zhangs") for $31,100,000.00. For no apparent reason, The Tings and The Zhangs did not close escrow. The Zhangs never purchased the real property.
>
> Agreement to Sell 99% of Atia Co.'s Ownership in UNT II Instead of Real Property. On or about August, 15, 2011, The Tings and The Zhangs agreed to circumvent escrow. The Tings agreed to sell and The Zhangs agreed to buy a 99% limited partnership interest in UNT II,[1] seemingly for $27 million dollars – $4.1 million dollars less than what was originally contracted for to purchase Canyon Point Plaza.

2 AA 258:6-15.

> Presumed $4.1m Secret Profit to The Tings and Zhangs.
>
> Moreover, neither Ting nor Zhang produced any documents to explain the apparent $4.1 million dollar "discount" for Canyon Point Plaza, which seemingly sold for $27 million dollars.

2 AA 258:27 – 259:1.

> From January 1, 2005 to present, Darwin Ting, Kuei-Mei Ting, The Ting Trusts, and UNT I and UNT IT were aware of, agreed to, and intended that

[1] As part of the same transaction the Zhangs acquired ownership of the other 1% by transfer of Atia Colima, LLC, which owned that 1% of UNT II.

> money from Atia Co.' s, UNT I's, and UNT II's general operating bank accounts be fraudulent1y transferred to The Tings' nominees…

2 AA 259:7-10.

> In or about April 2012, The Tings created a secret Atia Co. bank account at Cathay Bank, account number 0030536707 (hereafter "Cathay Acct. No. 6707"). On April 13, 2012, they transferred $2 million dollars from Atia Co.'s Cathay Acct. No. 3351 into Cathay Acct. No. 6707…… The net amount misappropriated by The Tings from Cathay Acct. No. 3351 is $1,286,174.72 because $400,000.00 was returned from Cathay Acct. No. 6707 to Acct. No. 3351.

2 AA 262, lines: 4-23.

IV. DIRECT AND CIRCUMSTANTIAL EVIDENCE AND THE COURT'S FINDING

In Darwin Ting's "Second Supplemental Response to Plaintiff's Special Interrogatories, Set Four" (9 AA 1996-2075), Mr. Ting admits that he took $17 million of interest free "loans," unauthorized "salary", and unauthorized bonuses from Atia Co.:

> Special Interrogatory No. 47:
>
> State the total dollar amount Atia Co., transferred to the Tings from 2005 to present. (As used herein, "Atia Co." refers to Atia Co., LP; and "the Tings" as used herein collectively refers to Darwin Ting, Kuei-Mei Ting, the Ting Family Trust, the First Restatement of the Ting Family Trust, and the Ting Children 1979 Trust.)

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> Supplemental Response to Special Interrogatory No. 47:
>
> In response, Responding Party relies upon and refers to his compilation and summary of information produced concurrently herewith as **Exhibit "B"**.
>
> ….
>
> Based upon the information derived from such documents, Responding Party answers that a total of $17,232,708.75 was transferred from the Atia companies (including Atia Co., UNT Atia Co. LP, and UNT Atia Co. II LP) to the Tings from 2005 to August 2012. Of that amount, $4,457,250 was paid to the Tings, at the discretion of the General Partner of Atia Co., as distributions, taxes and bonus for the period 2005 to August 2012. Also, from the $17,232,708.75 total amount transferred to the Tings, $1,392,370.06 was paid as regular business expenses, (including payroll, auto, phone, travel, etc.), at the discretion of the General Partner of Atia Co., during the period of 2005 to August 2012. From the total $17,232,708.75 transferred from the Atia companies to the Tings, $11,383,088.69 represented loans made to the Tings, at the discretion of the General Partner of Atia Co., during the period of 2005 to August 2012. The Tings [claim that they] repaid the Atia Companies $10,337,909,97 in satisfaction of those loans, during that same period of 2005 to August 2012.
>
> …

(herein "Response to Special Interrogatories 47") 9 AA 1997:11-1998:13, emphasis added.

Even more crucial is **Exhibit B** attached to Mr. Ting's Response to Special Interrogatories 47; Mr. Ting identified one thousand and forty seven (1,047) transactions by date from 2005 to August 14, 2012 from which the Tings benefited. 9 AA 2036-2073.

Mr. Mosier filed his evidentiary report with the court in which he states that Darwin Ting "invented explanations":

> New Insight into Mr. Ting: In the latest round of data presentation by the Parties, the Expert focused on the credibility and character of Mr. Ting in his role as GP of ALP [Atia Co., LP]. **The Expert observes that in many instances, Mr. Ting has testimony under oath that states one thing, and then when confronted with clear evidence to the contrary, Mr. Ting "reconsiders" his position and then amends it with a variety of excuses**. The number of examples presented by the Plaintiff is noteworthy. In at least one transaction, **there is evidence that Mr. Ting invented explanations and numbers that I later proved to be misleading and/or erroneous**. Aside from Mr. Ting's decision not to follow the mandates of the ALP agreement, there is considerable evidence that Mr. Ting used the cash in ALP as his personal bank account taking without authority from the ALP Agreement as follows: (a) Mr. Ting took over one hundred undocumented loans, interest free, worth over $10 million (all but a million dollars was paid back) between 2005 and 2012; and (b) he paid many of his personal expenses with ATIA funds including credit card charges.

9 AA 2180-2185 at 2181:10-25. (emphasis added.)

Mr. Mosier testified that the $1,510,000 bonus to the Tings was in the accounting books and records as illegitimate, “unexplained receivable”, and as “plug numbers”:

> MR. COHAN: And that million dollars was categorized in the same -- quote -- *"unexplained receivable"* category as the $1,510,000 which Mr. Ting took as a bonus, correct?
>
> MR. MOSIER: Yes.
>
> MR. COHAN: So can you explain your reason for not drawing the inference that the additional million dollars was not also owed by the Tings?

MR. MOSIER: Um, it was what I would call an *"accounting anomaly."* It looked like a plug number. It made no sense. As I recall, it was made up of a few parts.

THE COURT: What's a *"plug number*?*"*

MR. MOSIER: That's a number you put in a balance sheet, your Honor, to make it balance and you just put it in. It has no basis, in fact, for being there.

THE COURT: Is it legitimate or illegitimate?

MR. MOSIER: It's illegitimate, and it would be -- it either shows that the accountant was trying to hide something or the accountant didn't take the time to balance his books and figure out where the error was and he put in a plug number.

THE COURT: Go ahead, Mr. Cohan.

MR. COHAN: Is it fair to say that -- is it fair to say that this million dollars was clearly reflected as a debt owed to the partnership by someone?

MR. MOSIER: Yes.

MR. COHAN: And it was in the same category as the $1,510,000 owed by Mr. Ting, correct?

MR. MOSIER: Yes.

RT 269:10-270:11.

MR. COHAN: Can you briefly summarize the basis for your conclusion that the Tings should pay the partnership $1,074,000 based on this item identified as number 6 on Exhibit 704?

MR. MOSIER: Yes. I'm sorry that Mr. Collins isn't here to present this because this is really his item. And as an accountant, he says he is having great difficulty accepting my word -- *a plug number* -- in the balance sheet that is unexplained. And therefore, it's the expert's position that this million-seventy-four, that's the difference between $2,584,000 and the $1,510,000,

which is the bonus which we were able to identify below. That's the amount that would be charged. It's simply too large of a number to overlook. I observed and heard in the testimony that Mr. Ting is a former accountant, um, that he has an MBA. He is certainly knowledgeable about real estate. He provided quarterly accountings to the chairman, and he seems to have run a tight ship in most regards. So an unexplained million-dollar number is *unacceptable* on a balance sheet, and therefore, he should assume accountability for it in the expert's opinion.

RT 792:17 – 793:12.

Mr. Mosier testified that the accounting books from 2007 to 2011 were "nonsensical", "couldn't be explain[ed]", and were "mumbo jumbo":

MR. BURNS: Can we agree -- based on the tax returns -- that this is a receivable category that was being carried on the books for a period of years from 2007 through 2011?

MR. MOSIER: Yes.

MR. BURNS: And there are changes to that receivable from time to time, year after year, correct?

MR. MOSIER: Correct.

MR. BURNS: And would you agree -- I know you're not an accountant, but would you agree that an accountant, by including these numbers in a tax return, as a professional matter, has some level of confidence in them?

MR. MOSIER: Well, I think --

MR. COHAN: Object; it calls for speculation. All this is hypothetical.

THE COURT: Expert witnesses -- which is a description that Mr. Mosier falls under -- are entitled to respond to hypothetical questions. Go ahead.

MR. MOSIER: I recall that there's a page -- and I'm sorry that I don't have it with me -- but it's got a circle around it; it's in Mr. Nakase's screen. We

saw it on the screen the other day. And it's in that backup to these numbers that it all falls apart. It's nonsensical. Even I think you said you couldn't explain it. None of us can explain it. None of us can interpret it and it's mumbo-jumbo is the best way I can describe it.

I don't know how you translate that. *(Addressing the reporter).*

But it's -- it's -- it's nonsense. It's – and that's what caused me to conclude that it very likely – the presumption is, again, it could be a plug number; it could be a number designed to obfuscate some other transaction.

RT 834:7-835:12.

Mr. Mosier testified there was a $3.6 million kickback to the Tings in connection with the sale of the company owned shopping mall known as Canyon Point Plaza:

MR. COHAN: And finally, could you summarize for the court the basis for your conclusion that the Tings should repay the partnership 2 million dollars based on the reduction in purchase price from the real estate contract that was signed by the purchaser for 31.1 million that was not honored, and instead, the partnership asset was sold for only 27.5 million dollars, which was the basis for the 3-plus million-dollar claim that plaintiff made?

MR. MOSIER: Yes. This is the single largest allegation item, quantitatively, at 3.1 million; it is also the most troubling, and it's the one that I devoted the most thought to. It kept me awake at 3:00 a.m. on at least two different occasions, as I tried to work through this and trying to make sense of it. I will concede that my conclusion for the two million is speculative, rather than based on hard numbers, but it's -- there's enough speculation and enough issues -- that I'll recite in a moment -- that I thought it should be bumped upstairs; that is, it should come to Judge Hunt to make

the final decision. And then it would be remiss of me not to call it to the court's attention as a potential actionable item.

The issues that I learned in the testimony – some of which I already knew -- were that there had been, of course, a 3.1 or 3.6 million-dollar reduction in -- in the price. The difference between 3.1 and 3.6 is the commission that was due to the brokers which was unpaid. Of course, it was originally started out, we learned, as an all-cash deal. But after a condo purchase by Mr. Zhang, it -- then there was some discussion about having to get a note for it. That precipitated an appraisal by Citibank, and that appraisal turned out to be 27.1 million, making it a nice package up to that point. And then, for reasons unexplained, Mr. Zhang took it upon himself to identify a number of line items that justified the reduction from the 31 million down to the 27 million that had nothing to do with anything, I believe, based on the testimony. And then we know that the sale of the real estate was changed and changed to the sale of the partnership. And probably the most troubling of the testimony that I listened to was that of the brokers who disclosed that **Mr. Ting was looking for a 2 million-dollar rebate in this transaction, 2 million dollars back to him**. And then remarkably, on the day -- or a couple of days just after -- the final payment is made, he -- Mr. Ting -- gives 2 million dollars to his daughter Patricia, who -- in turns -- gives the 2 million dollars back to Mr. Zhang in exchange for 3 condos and 1 house. And based on my experience in dealing with Taiwanese and Taiwanese businessmen, this has almost a perfect pattern of a typical Taiwanese transaction. It's -- it doesn't surprise me of anything I'm looking at here. By the way, there's nothing dishonorable in this transaction in the Taiwanese culture, in my experience; it's the way business is done. But relative to this document and relative to this limited partnership agreement,

I believe that it -- it is important that I call this 2 million dollars to the court's attention as a potential recommendation for repayment by Mr. Ting.

MR. COHAN: And when you say a "potential recommendation," do you mean it is an actual recommendation by you to the court?

THE WITNESS: It's an actual recommendation for a potential adjustment, yes.

RT 794:23 – 797:10. (emphasis added) (herein “Mr. Mosier’s Canyon Point Testimony”.)

MR. COHAN: Is there any indication that Mr. Zhang wasn't in a position to have that appraisal before he agreed to pay 31.1 million dollars?

MR. MOSIER: No.

MR. COHAN: So he was already aware of the existing you know, correct?

MR. MOSIER: Yes. I don't think I know that, but --

MR. COHAN: Well, you also know that Mr. Zhang was an experienced real estate investor from the testimony of the agent who was representing Mr. Zhang, correct?

MR. MOSIER: Very, yes; we got the impression he was quite sophisticated.

MR. COHAN: Well, and he did happen to have 13 or 14 million dollars that he actually paid for this transaction, didn't he?

MR. MOSIER: Yes.

MR. COHAN: So we have all these indicia of a fraudulent reduction in the price, and we have three witnesses who have testified to Mr. Ting requesting 2 million dollars being paid -- we'll just say outside of escrow and outside of the real estate contract --

MR. MOSIER: Yes.

MR. COHAN: -- right? And so it stands to reason, without any other explanation, that some sort of kickback must have been paid, because

there's no other explanation for the reduction in the price by 4 and a half million dollars, correct?

MR. MOSIER: That's certainly a conclusion.

MR. COHAN: Right. And irrespective of whether Patricia Ting actually paid fair market value for the property she purchased, there could well have been – and more -- it seems probable that the 2 million dollars was paid, in some form or fashion -- whether it was part of a real estate transaction involving Patricia Ting, or it was done offshore, in cash, or some other form or fashion between Mr. Zhang and Mr. Ting -- we have no way of knowing about. Isn't that the conclusion you actually reached?

MR. MOSIER: My conclusion was I thought there was enough concern here over this transaction -- and all of the variables you've been citing, some that I cited -- that it was certainly worth calling to the judge's attention that I have a great concern about the transaction, and therefore, it warrants careful scrutiny. It does lack firm evidence, as Mr. Burns pointed out, that any cash changed hands incorrectly.

MR. COHAN: Are you familiar with the distinction between direct evidence and circumstantial evidence?

MR. MOSIER: Generally.

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MR. COHAN: Are you able to come up with any explanation for the reduction in the purchase price by 4 and a half million dollars that is more probable than the explanation that the 2 million-dollar kickback was actually paid in some form or fashion by Mr. Zhang to Mr. Ting – or someone acting for Mr. Ting -- as consideration for reducing the payment to the partnership by 4 and a half million dollars? Excuse me, by 3.6 million dollars.

MR. MOSIER: No, I'm not aware of any other reasons, other than the -- the appraisal reference by Mr. Burns.

MR. COHAN: So is it fair to say that it appears far more probable than not that the reason for the reduction in that purchase price from 31.1 million to 27.5 million was because of a kickback by Mr. Zhang to Mr. Ting?

MR. MOSIER: That is my concern. That's the reason I moved it into this category in the fourth revision of the Exhibit C.

RT 846:21 – 849:20. (herein "Mosier Canyon Point testimony".)

In the court's statement of decision, the factual findings were:

Facts.

There was a variety of unusual features to the case, among which the most prominent were the following:

- All of the partners (both the limited and the managing general partners) are members of the same family.
- Many family members (and hence many of the witnesses) do not speak English as a first language and are more comfortable in either Mandarin Chinese or Japanese.
- Until his death in 2009, the unofficial head of the family ("the Chairman") was Chin-Chih Hsieh, a resident of Taiwan. He died intestate in Japan.
- The Chairman never had or claimed an ownership interest in the limited partnership.
- The limited partnership, however, was 100% capitalized by the Chairman in proportions which he allocated to the various family members whom he made partners; no capital contributions or buy-ins were ever made by any partner.

- In addition to those interests he did have in the United States, the Chairman also had major investments for his family and himself in Taiwan and Japan.
- The California limited partnership agreement is written in English and is dated January 1994, but was not signed until 1996 at the earliest.
- Defendants have explicitly stated through counsel that they do not contest the validity of the partnership agreement.
- At the creation of the limited partnership, the Chairman appointed his daughter Kuei-Mei Ting and her husband Darwin Ting, both defendants, as the co-managing partners.
- There was no separate management agreement covering the partnership and no other provision for salary, management fees, bonus, or other consideration to the managing partners.
- The partnership has periodically made income distributions to each of its partners.

Although the general partnership's assets fluctuated in value over the years, they were always in the multi-million dollar range and predominantly invested in Southern California shopping centers, often held in the name of subsidiaries denominated UNT Atia. The partnership also once had title to a residential property on Liane Lane in Santa Ana which at the time of trial had been transferred to the Tings.

The nominal plaintiff in the case, Meri Nishiuchi, is one of the Chairman's daughters. She is also sister and sister-in-law to the Ting defendants. In essence her derivative complaint charges that the Tings have periodically -- and in some cases routinely - mismanaged and looted the partnership for their own aggrandizement and also that they may have favored some

limited partners to the disadvantage of others in respects not authorized by the partnership agreement.

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Fiduciary Breaches.

By far more than a preponderance, the trial testimony given by the expert, Mr. Mosier and his accountant, Mr. Collins, was not complimentary of the Tings in respect to their management of the partnership as reflected in its books and records, which they described as inadequately maintained.

The court's notes show Mosier's and Collins's repeated usage of the words such as "phony invoices," "smell," "unacceptable," "selective," "under the table," "troubling," "overpaid," "mumbo jumbo," "poor job," "pretextual," "kickback," etc. That view was also fortified by the testimony of at least three other witnesses, Ray Cai, Kathleen Lek, and Bruce Wong who were witnesses to the Ting negotiations in respect to the foregoing sale (and sale price) of the Canyon Plaza property in 2011, just a year before this suit was filed. The evidence from Mr. Mosier also demonstrated -- without any contravening evidence or argument from the defendants - that Mr. Ting's practices as general partner departed from specific requirements of the limited partnership agreement in the following particulars:

(a) The partnership books (to the extent that they remain intact) do not comply with GAAP.

(b) There was never any annual audit.

(c) Management failed to pay taxes of some subsidiary entities,

(d) There were instances of unbalanced cash distributions as compared to ownership shares.

11 AA 2569 – 2571.

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V. ARGUMENT

A. STANDARD OF REVIEW

On appeal, questions of fact are reviewed under the substantial evidence standard by giving deference to the trial court's decision, and questions of law are reviewed independently. *Crocker Nat'l Bank v. City & County of San Francisco* (1989) 49 Cal. 3d 881, 888. When an appeal presents a mixed question of law and fact, if the application of the law to the facts depends on an inquiry that is "essentially factual," the rule of deferential review applies; if not, the rule of independent review applies. *Ghirardo v. Antonioli* (1994) 8 Cal. App. 4th 791, 800–801.

The determination of the statute of limitations applicable to a cause of action is a question of law and reviewed independently. *McLeod v. Vista Unified School Dist.* (2008) 158 Cal.App.4th 1156, 1164. However, the question of when plaintiffs' cause of action accrued is a mixed question of law and fact. *Avner v. Longridge Estates* (1969) 272 Cal. App.2d 607, 617; *Oakes v. McCarthy Co.* (1968) 267 Cal. App.2d 231, 255. To resolve this question, the trial court must undertake an inquiry that is essentially factual, thus the court's determination is reviewed under a deferential standard. *See Oakes*, supra, 267 Cal. App. 2d at p. 256; s*ee also Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, 810 ("[r]esolution of the statute of limitations issue is normally a question of fact."); *Bastian v. County of San Luis Obispo* (1988) 199 Cal.App.3d 520, 527 ("once properly pleaded, belated discovery is a question of fact.").

Accordingly, the trial court's ruling regarding the appropriate statute of limitations is reviewed de novo. However, accrual of Atia Co.'s breach of fiduciary duty claim is reviewed with deference to the trial court's decision. The trial court's ruling with respect to the $3.6 million kickback involves purely factual issues, and is likewise subject to the deferential substantial evidence review. *Winograd v. American Broadcasting Co.* (1998) 68 Cal. App. 4th 624, 632 ("[t]he trial court's resolution of disputed factual issues must be affirmed so long as supported by substantial evidence"). At the conclusion of the damages phase of trial, the trial court entered a money judgment against the Tings for

$6,620,179, plus prejudgment interest, for a total of $9,020,033. 2 AA 2901-2903. The trial court's statement of decision illustrates that the standard of review is based on questions of fact and law because many of the Tings' discrete wrongdoings were in 2007, 2010, 2011 and 2012:

> Plaintiff's trial case was composed of deceptions in respect to numerous discrete items. Hence, even if Ms Nishiuchi had reason to know that the partnership deeded the Liane Lane house to the Tings in 2001, it is not intuitive that 10 years later she would have also suspected (a) Mr. Ting's surreptitious treatment in 2011 of the sale price for the Canyon Plaza shopping center to a third party or (b) his equally undisclosed decision in 2007 to distribute himself a $1.5 million "bonus."

11 AA 2573.

B. THE LIANE HOUSE TRANSFER WAS LEGAL BECAUSE THE TINGS OBTAINED WRITTEN CONSENT FROM 60% OF THE LIMITED PARTNERS FOR THE LIANE HOUSE

Neither Atia Co. nor Nishiuchi had a valid claim against the Tings with respect to the Liane House because the Tings obtained written consent from 60% of the limited partners. 10 AA 2209-2210. The Partner Third Amended Complaint alleged a Quiet Title cause of action with respect to the Liane House which the Tings transferred to themselves in 2001 for no consideration. 2 AA 280.

The limited partnership agreement states: "Majority in interest of the Limited Partners" means fifty-one percent (51%) or more of the interests of the Limited Partners; "Vote" includes written consent. 10 AA 2195-2196. The Tings are also limited partners with a combined interest of 15%. 10 AA 2197.

In 2003, the Tings obtained written consent from 60 percent of the limited partners that the Tings may transfer the Liane House to themselves. 10 AA 2209-2210; RT 382:21 – 383:387:17. Darwin Ting obtained this consent because he did not want

Meri Nishiuchi to sue him. *Id*. Furthermore, the document referencing written consent by a majority of the limited partners was produced by the Tings during discovery, demonstrating their knowledge of their duties to legally obtain partnership property.

The Tings moved for summary adjudication on the quiet title cause of action on the basis that the transfer of the Liane House was outside the maximum 7 year statute of limitations. 2 AA 307-509. The trial court granted the motion:

> Moving defendants have met their burden of showing that they have a complete defense to plaintiff's cause of action for quiet title in that they have brought forth a prima facie case that the statute of limitations for such suit expired before the filing of this suit (Civ. Code § 3439.09(c)) and also because as a matter of law, an action to quiet tile is not available against a legal owner by a plaintiff holding only a potential claim for equitable title. *Tuffree v. Polhemus* (1895) 108 Cal. 670, 676.

4 AA 902-903.

C. DERIVATIVE ACTION WAS FILED JULY 3, 2012

An action is "commenced" for the purposes of determining its satisfaction of the applicable statute of limitations on the date the complaint is filed. CCP §§ 350, 411.10.

This case is a California limited partnership derivative action under Corp. Code §15910.02, originally filed on February 2, 2012 as an individual action. 1 AA 1-25. On July 3, 2012, the individual claim was abandoned and the action was amended to a derivative action. 1 AA 26-80. The operative derivative complaint before trial was called the "Partner Derivative Third Amended Complaint" – filed on October 11, 2012. 2 AA 237-299.

The trial court's Phase 1 Minute Order states:

> The case was originally filed on February 2, 2012 and amended several times thereafter. Phase 1 of the trial (June 2013) was held on the "Partner Derivative Third Amended Complaint" filed on October 11, 2012. The

> cause was bifurcated by the court such that the first phase of the trial was confined to the question of liability, meaning whether or not there was sufficient proof that defendants Darwin Ting and Kuei-Mei Ting - the general and managing partners of the California limited partnership known as Atia Co., LP. - did both individually and as trustees of various Ting Family Trusts, breach their fiduciary duty to the partnership.

11 AA 2569-2575 at 2569.

D. IN A DERIVATIVE ACTION ATIA CO. IS THE REAL PARTY PLAINTIFF

This case against the Tings is a California limited partnership derivative action under Corp. Code §15910.02. "[A] any proceeds or other benefits of a derivative action, whether by judgment, compromise, or settlement, belong to the limited partnership and not to the derivative plaintiff; if the derivative plaintiff receives any of those proceeds, the derivative plaintiff shall immediately remit them to the limited partnership." Corp. Code §15910.05 subdivision 1 and 2. "The particular stockholder who brings the derivative suit is merely a nominal party plaintiff. It is the corporation that is the ultimate beneficiary of such a derivative suit. Thus, the corporation is the real party plaintiff in the action." *Favila v. Katten Muchin Rosenman LLP* (2010), 188 Cal. App. 4th 189, 301.

Here, Phase 1 of the trial (June 2013) was held on the Partner Third Amended Complaint filed on October 11, 2012. 2 AA 237-299. The purpose of the derivative action was to enforce a claim which Atia Co., a limited partnership, possessed against its general partners, i.e. the Tings. The cause of action was for breach of fiduciary duty; this claim and the proceeds therefrom belong to the limited partnership Atia Co., not the limited partner Nishiuchi. Corp. Code §15910.05.

E. IN A DERIVATIVE ACTION THE CLAIM BELONGS TO ATIA CO. AND NOTICE TO LIMITED PARTNER NISHIUCHI IS NOT NOTICE TO ATIA CO. LP, A LIMITED PARTNERSHIP

In a limited partnership derivative action, the "claim" belongs to Atia Co.: "The purpose of a limited partner's derivative action is to enforce *a claim which the limited partnership possesses* against others (in this case, the general partners) but which the partnership refuses to enforce. Like a shareholder's derivative action, a limited partner's derivative suit is filed in the name of a limited partner, and the partnership is named as a defendant. Although a limited partner is named as the plaintiff, it is the limited partnership which derives the benefits of the action." *Wallner v. Parry Professional Bldg., Ltd*., (1994) 22 Cal. App. 4th 1446, 1449-1450, emphasis added.

Under the California Uniform Partnership Act of 2008: "A limited partner's knowledge, notice, or receipt of a notification of a fact relating to the limited partnership is not effective as knowledge of, notice to, or receipt of a notification by the limited partnership." Corp. Code §15901.03. It is fundamental that "A limited partnership is an entity distinct from its partners." Corp. Code §15901.04. The authority to manage the business and affairs of the limited partnership is vested in the general partner(s), not the limited partner. Corp. Code §15904.01 – 15904.09. A limited partner has no power to bind the limited partnership, nor participate in the control of the business. Corp. Code §15903.01 – 15903.07.

Here, Atia Co. is a limited partnership formed under the laws of California. 10 AA 2194-2206. Nishiuchi was originally a 5% limited partner of Atia Co. (Mei-Li Nishiuchi 5%) who later received an additional 2.5% interest. 10 AA 2197; RT 512: 3-25. Nishiuchi's knowledge and notice of a fact relating to Atia Co. is not effective as knowledge of or notice to Atia Co. Therefore, any "notice" Nishiuchi may have had about Atia Co.'s claim for breach of fiduciary duty against the Tings is not effective as notice to Atia Co.

The Tings present no jurisprudence reported after the California Uniform Partnership Act of 2008 that notice to a limited partner is notice to the limited partnership.

F. THERE WAS SUBSTANTIAL EVIDENCE TO PROVE A $3.6 MILLION KICKBACK TO THE TINGS IN CONNECTION WITH THE CANYON POINT SHOPPING CENTER SALE

As framed, the Tings' second issue is: Did the lower court err in finding that Appellants had received a $3.6 million kickback on a certain sale when there was no evidence whatsoever presented of such a kickback, and the court's own designated expert testified that any such claim was purely "speculative"?

There are two aspects to a review of the legal sufficiency of evidence. First, the appellate court must resolve all explicit conflicts in the evidence in favor of the respondent and presume in favor of the judgment all reasonable inferences. *Kuhn v. Department of General Services* (1994) 22 Cal. App.4th 1627, 1633, quoting *Estate of Bristol* (1943) 23 Cal.2d 221, 223. Second, the appellate court must determine whether on the entire record there is substantial evidence, contradicted or uncontradicted, which will support the determination. *Bowers v. Bernards* (1984) 150 Cal. App.3d 870, 873–874. "[E]ven 'slight evidence' in support of the fact to be inferred has been held to be sufficient." *Fashion 21 v. Coalition for Humane Immigrant Rights of Los Angeles* (2004) 117 Cal. App. 4th 1138, 1150. When there is substantial evidence in support of the trial court's decision, the reviewing court has no power to substitute its deductions. *Bowers v. Bernards*, *supra*, 150 Cal. App. 3d at 874. Furthermore, if the entire record demonstrates substantial evidence in support of the appealed judgment or order, the appellate court must affirm notwithstanding that the record also reveals "substantial" contrary evidence. *Id.*

Expert opinion testimony constitutes substantial evidence only if based on conclusions or assumptions supported by evidence in the record. Opinion testimony

which is conjectural or speculative "cannot rise to the dignity of substantial evidence." *Pacific Gas & Electric Co. v. Zuckerman* (1987) 189 Cal. App.3d 1113, 1135. An expert opinion is speculative when there is no legally admissible evidence upon which the expert could base his opinion. *Hyatt v. Sierra Boat Co.* (1978) 79 Cal. App. 3d 335, 337.

California State Board of Equalization (2014) Rule 2. Value Concept: "In addition to the meaning ascribed to them in the Revenue and Taxation Code, the words 'full value,' 'full cash value,' 'cash value,' 'actual value,' and '**fair market value**' mean the price at which a property, if exposed for sale in the open market with a reasonable time for the seller to find a purchaser, would transfer for cash or its equivalent under prevailing market conditions between parties who have knowledge of the uses to which the property may be put, both seeking to maximize their gains and neither being in a position to take advantage of the exigencies of the other." (emphasis added.)

Here, in Mr. Mosier's Canyon Point Testimony, he discussed at length the Canyon Point shopping mall transaction. RT 794:23 – 797:10. RT 846:21 – 849:20. The buyer was Andy Zhang. The brokers testified that Mr. Ting asked for money "under the table"; Mr. Ting and Mr. Zhang met without the brokers. RT 657:20-658:1; RT 659:10-661:1; 670:15-14; RT 628:3-26. In summary, the evidence was:

- Mr. Zhang was the principal of Chang Chih Int'l Investment, LLC. RT 407:20 – 26; 1121:11-15.
- In February 2011, the buyer Andy Zhang signed a contract for the sale of Canyon Point Plaza for $31.1 million, "all cash"– the fair market value. 10 AA 2240-2241; RT 401:18 – 404:8. Mr. Zhang represents in the contract that he had the cash to buy Canyon Point Plaza. RT 637:15-23.
- Mr. Zhang's agent, Ray Cai, confirmed that Mr. Zhang's bank statements showed that he had sufficient cash to pay $31.1 million. RT 647:15-649:5.
- Ray Cai, Kathleen Lek, and Bruce Wong, who were witnesses to Ting's negotiations in respect to the foregoing sale (and sale price) of the Canyon Plaza property, testified that Mr. Ting asked the brokers for a couple of

million dollars cash, i.e. “money under the table” and “off the record”, from the sale to be wired to Taiwan. RT 657:20-658:1; RT 659:10-661:1, 670:15-671:14.

- Zhang and Mr. Ting met in secret without the brokers. RT 628:3-26.
- Mr. Ting admits that the $3.6 million of remediation expenses were made up and fabricated to justify reducing the sale price from $31.1 to $27.5 million. RT 347:5-23. RT 349:12-350:4. RT 594:3-14.
- The Tings’ daughter is Patricia Ting. RT 165:19-22. Patricia Ting has no experience investing in real estate. RT 433:17-23.
- Mr. Ting gave Patricia Ting $2 million as a “gift” so that Patricia could buy real estate from Mr. Zhang. RT 431:23- 434:1. RT 597:19-598:1.
- On March 2, 2012, Patricia Ting took title to 27 condominium units located at 70 N. Catalina Ave., Pasadena, California. 10 AA 2385-2388.
- Patricia Ting bought the condominiums from Andy Zhang. RT 597:19-598:1; RT 710:4-10.
- Mr. Ting also wire-transferred money to Mr. Zhang on behalf of Patricia Ting. RT 698:9-18.
- Patricia Ting claims, “The mistake was they put my name under all the units in Catalina.” RT 712:3-5.
- Mr. Ting stole Atia Co.’s $200,000 earnest deposit from Zhang. RT 407:20-408:18.

Additionally, Mr. Mosier’s reports show that nothing Mr. Ting says can be trusted:

> New Insight into Mr. Ting: In the latest round of data presentation by the Parties, the Expert focused on the credibility and character of Mr. Ting in his role as GP of ALP. **The Expert observes that in many instances, Mr. Ting has testimony under oath that states one thing, and then when confronted with clear evidence to the contrary, Mr. Ting "reconsiders" his position and then amends it with a variety of**

> **excuses**. The number of examples presented by the Plaintiff is noteworthy. In at least one transaction, **there is evidence that Mr. Ting invented explanations and numbers that I later proved to be misleading and/or erroneous**.

9 AA 2180-2185 at 2181:10-18. (emphasis added).

"[I]f you decide that a witness has deliberately testified untruthfully about something important, you may choose not to believe anything that witness said." CACI 107; See Evidence Code 780. Like Mr. Mosier reported to the trial court: "[T]here is evidence that Mr. Ting invented explanations and numbers that I later proved to be misleading and/or erroneous." 9 AA 2181:17-18. Except by the Tings' argument in their brief and mistaken citations, there was no testimony from any witness that Mr. Ting or Mr. Zhang were concerned with the defeasance penalty or due on sale clause. Additionally, the Tings' Opening Brief misquotes, mischaracterizes or takes the evidence out of context. Mr. Mosier actually testified:

> "And based on my experience in dealing with Taiwanese and Taiwanese businessmen, this has almost a perfect pattern of a typical Taiwanese transaction. It's -- it doesn't surprise me of anything I'm looking at here. By the way, there's nothing dishonorable in this transaction in the Taiwanese culture, in my experience; it's the way business is done." RT 796:20-26.

The Tings correctly point out that the correct measure of damages in a derivative suit is the injury to the company. *Sole Energy Co. v. Petrominerals Corp.* (2005) 128 Cal. App. 4th 212, 229. Here, it is undisputed that the Tings, acting on behalf of Atia Co., and Mr. Zhang entered into a written all cash agreement for the sale of Canyon Point Plaza for $31.1 million. Nor is it disputed that the sale eventually closed for $27.5 million. Accordingly, as a result of this kickback transaction, Atia Co. was damaged in the differential amounting to $3.6 million between the original agreed upon sale price and the actual closing price.

Inferences may constitute substantial evidence, but they must be the product of logic and reason. Speculation or conjecture alone is not substantial evidence. *Louis & Diederich, Inc. v. Cambridge European Imports, Inc.* (1987) 189 Cal. App.3d 1574, 1584-1585. The inferences to be drawn from circumstantial evidence are for the [trial court's] determination and if conflicting inferences may reasonably be drawn from the evidence, which inference is to be drawn lies in the [trial court's] discretion. It is equally true that a reasonable inference drawn from circumstantial evidence may be believed as against direct evidence to the contrary. *Halstead v. Paul* (1954) 129 Cal. App.2d 339, 341. As a matter of law, an inference is dispelled when the contrary evidence is "clear, positive, uncontradicted, and of such a nature that it cannot rationally be disbelieved." *Blank v. Coffin* (1942) 20 Cal. 2d 457, 461.

The court drew an inference – which was never rebutted with clear and convincing evidence by the Tings – that there was a kickback of $3.6 million to the Tings by Zhang:

> 2. Canyon Point Kickback.
>
> (a) Liability. In February 2011 Mr. Zhang, the buyer of this project, had originally offered $31.1 million (Trial Exhibit 48), but the sale eventually closed for $27.5 million in August 2011. In phase 1, the court found by weight and strong probability of logical inference that this price change is explained by defendant Darwin Ting having taken a kickback.
>
> *****
>
> The same evidence which was relied on by the referee was also evaluated by the court at trial. This evidence included (i) persuasive testimony by three brokers who testified to statements made by Mr. Ting betraying his openness to getting a kickback in respect to this specific transaction, (ii) the brokers' observations about Mr. Ting's curious to odd negotiating technique with the eventual buyer, (iii) Mr. Ting's acquiescence to undocumented reasons put forth by Mr. Zhang for radical price reductions after the property had been put on the market (court footnote 5 states: Viz. an $1.8 million remediation credit

respecting a tenant dry cleaner, $1 million for parking refurbishment, a $200K credit respecting a vacant unit, etc. for all of which Mr. Zhang was said to have been the witness. Mr. Ting did not come forth with any corroborative evidence and acknowledged that he personally does not know the source for Mr. Zhang's figures. He also testified that early in his dealings with Mr. Zhang, $200K had been advanced in earnest money which, though later deposited into the UNT II account, Mr. Ting then put it in a personal account to repay himself for an alleged loan to UNT II from 2003 or 2004 for which he has no record), and (iv) an apparent sweetheart relationship developed between Mr. Ting's family and the buyer concerning both a Ting family owned bakery in the center and the simultaneous purchase by Mr. Ting's daughter of some Pasadena property owned by Mr. Zhang.

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As a matter of law, an inference is dispelled when the contrary evidence is “clear, positive, uncontradicted, and of such a nature that it cannot rationally be disbelieved." *Blank v. Coffin* (1942) 20 Cal. 2d 457, 461. That does not apply to the situation in the instant case.

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(b) *Disgorgement*. This does not end the Canyon Point debate. True, the court has been convinced that Mr. Ting took a kickback and that the partnership (and its members) were obviously damaged to the extent that he did. But kickbacks are almost by definition surreptitious and so how to measure the loss is a separate problem.

The only concrete figures available were the February $31.1 million offer price and the September $27.5 million closing price, producing a $3.6 million delta. Against this, in phase 2 the referee/expert estimated a $1.1 million mitigation in Mr. Ting's favor based on more or less undefined advantages which he

> achieved for the limited partnership over the years. But he also testified that the alleged $3+ million discount for future parking lot upgrades, environmental remediation, etc. was unsubstantiated.
>
> Such being the case, the court determines that it can only rely on the two hard figures above and therefore orders the defendants to disgorge the entire differential - i.e. $3.6 million -- to the Atia partnership for redistribution under the partnership agreement.

12 AA 2871 – 2873.

Mr. Mosier used the words "speculate" and "inference" interchangeably. In its statement of decision, the trial court recognized Mr. Mosier's confusion with the words:

> On both direct and cross-examination Mr. Mosier acknowledged that he could not directly demonstrate the kickback by any paperwork. At one point he described his conclusion as being based on "speculation" but elsewhere he said he was more comfortable calling [this] an "inference" based on both the indirect evidence he had seen and his prior experience in similar situations. Mr. Mosier is not an attorney and the court does not feel bound by his interchangeable use of the "speculation/inference" nomenclature.

12 AA 2872.

Thus, based on the above, the trial court's disgorgement award is supported by substantial evidence.

G. THERE WAS NO EVIDENCE THAT ATIA CO. WAS ON NOTICE FOR ANY OF THE FIVE PROVEN BREACHES FROM 2005-2012 UPON WHICH THE $6,620,179 VERDICT WAS BASED

The Tings contend that Nishiuchi was *forever* barred from bringing a claim against the Tings for their subsequent theft of millions of dollars from Atia Co. when in 2006 Nishiuchi discovered that the Tings transferred the Liane House. In Mr. Ting's Response

to Special Interrogatories 47, Mr. Ting admits he took a bonus, salary, and interest free loans from 2005 to 2012 (9 AA 1997:11-1998:13) without notice to or approval by any limited partner and all in violation of Corporations Code §15904.06(h): A general partner is not entitled to remuneration for services performed for the partnership.

Nowhere in the Tings' Opening Brief do they cite any evidence – nor is there any – that Atia Co. or Nishiuchi was on notice more than four years before any of the Five Proven Breaches. Atia Co. timely filed suit for the Tings' wrongful conduct of which Atia Co. did not have notice. Atia Co. may sue for the Tings' breaches of duty committed from 2007 to 2012 within four years after notice, i.e. this derivative action was timely filed on July 3, 2012.

The verdict and judgment were based on the following wrongful conduct of the Tings from 2005 through 2012. 12 AA 2871-2881. The supporting evidence for the verdict is also as follows:

- In 2007, the Tings breached their [fiduciary] duty by paying themselves an unauthorized bonus of $1,510,000. RT 148:3-149:2; RT 249:13-23. The $1,510,000 "bonus" was categorized as an "Unexplained Receivable" on Atia Co.'s accounting book. RT 269:10-270:11.
- From July 2010 to July 2011, the Tings spent Atia Co.'s money for tenant equipment and improvements, and gave free rent, for their family bakery business. RT 783:6 – 785:19.
- In 2011, the Tings breached their fiduciary duty to Atia Co. in the form of a $3.6 million kickback to themselves during the sale of a shopping mall, owned by Atia Co., known as the Canyon Point Marketplace.
  RT 794:23 – 797:10; RT 846:21 – 849:20; RT 401:18 - 606:20.
- In 2012, the Tings admit loaning themselves $3,384,383 from Atia Co.'s bank account. The trial court found the total amount of the unpaid loans was $1,390,000. (Darwin Ting's Response to Special Interrogatories 47, Exhibit B.) 9 AA 2070-2071; RT 1051: 11-14; 12 AA 2873-2874.

The trial court's Phase 1 statement of decision includes the following regarding Nishiuchi's notice which is adopted herein and argued as a part of this brief:

> (b) *Notice.* Defendants' second, and broader, position is that there was hardly a time when the representative derivative plaintiff, Ms. Nichiuchi, did *not* know what was going on under the Ting management. As defendants' counsel put it during his closing argument, this is analogous to the "cockroach in the soup," meaning presumably that you don't need more than one such cockroach to know that there is something seriously wrong in the kitchen. He pointed to several incidents to engage this metaphor and he completed his point by saying that since Ms. Nishiuchi is a derivative plaintiff, everything which she knew or should have known must be *imputed* to all *other* limited partners. Fortifying this point was the family relationship of all of the parties, their apparent deference to the prior practices of the Chairman not only before the creation of the limited partnership but also in his supervision of his various other unrelated family enterprises in Japan and Taiwan, several family meetings conducted by the Chairman attended by many if not all of them, and the overall success of the limited partnership, at least in terms of its making profit distributions to its members over the years. Putting the argument another way, by defendants' lights, once Ms. Nishiuchi knew about the cockroach, the matter of delay was forever after settled.
>
> But this is contrary to Corp. Code § 15901.03(h):
>
> "A limited partner's knowledge, notice, or receipt of a notification of a fact relating to the limited partnership is not effective as knowledge of, notice to, or receipt of a notification by the limited partnership."

> The "cockroach" argument is also both extrapolative and inferential. Plaintiff's trial case was composed of deceptions in respect to numerous discrete items. Hence, even if Ms. Nishiuchi had reason to know that the partnership deeded the Liane Lane house to the Tings in 2001 (fn 25) , it is not intuitive that 10 years later she would have also suspected (a) Mr. Ting's surreptitious treatment in 2011 of the sale price for the Canyon Plaza shopping center to a third party or (b) his equally undisclosed decision in 2007 to distribute himself a $1.5 million "bonus." A defendant asserting an affirmative defense by and large has the burden of proof on that defense and this court determines that the "notice" argument implied by the "cockroach" image was inadequate to the task.

11 AA 2573.

H. TOLLING OF STATUTE OF LIMITATIONS FOR BENEFICIARY OF FIDUCIARY RELATIONSHIP

"A general partner's knowledge, notice, or receipt of a notification of a fact relating to the limited partnership is effective immediately as knowledge of, notice to, or receipt of a notification by the limited partnership, except in the case of a fraud on the limited partnership committed by or with the consent of the general partner." Corp. Code §15901.03 (h) (emphasis added).

Although causes of action against a fiduciary are subject to the same statutes of limitation as apply to the same causes of action when asserted against strangers or nonfiduciaries, the California cases recognize that facts that would ordinarily require investigation may not excite suspicion in a fiduciary relationship and that the same degree of diligence and self-protection is not required of one relying on the fiduciary character of the relation. *Hobart v. Hobart Estate Co.*, (1945) 26 Cal.2d 412, 440. The beneficiary of a fiduciary relationship is entitled in law to rely on the assumption that the fiduciary is acting in furtherance of the relationship and in fulfillment of fiduciary

obligations. *Hobbs v. Bateman Eichler, Hill Richards, Inc*., (1985) 164 Cal.App.3d 174, 201-03; Civil Code § 3529 ("That which ought to have been done is to be regarded as done, in favor of him to whom, and against him from whom, performance is due."); *Neel v. Magana et. al*.,(1971) 6 Cal.3d 176, 188-189 (Neel) (The duty of a fiduciary embraces the obligation to render a full and fair disclosure to the beneficiary of all facts which materially affect his rights and interests. "Where there is a duty to disclose, the disclosure must be full and complete, and any material concealment or misrepresentation will amount to fraud. . . .")

As a result, when "a fiduciary obligation is involved, the courts have recognized a postponement of the accrual until the beneficiary has knowledge or notice of the act constituting a breach of fidelity." *United States Liability Ins. Co. v. Haidinger-Hayes, Inc*., (1970) 1 Ca1.3d 586, 596 (US Liability Ins.). This postponement finds its justification in the special nature of the fiduciary relationship. *Neel, supra*, 6 Cal.3d at 187-188 .

Not only is the accrual of the cause of action postponed to the time of discovery, but the California courts recognize that "the usual duty of diligence to discover facts does not exist." *United States Liability Ins., supra*, 1 Ca1.3d at p. 598. As a result, the fact that information giving notice of the fiduciary's wrongdoing appears as a matter of public record is not sufficient notice to the beneficiary even if it might have been sufficient notice in the absence of the fiduciary relationship to commence the running of the statute. *Bennett v. Hibernia Bank*, (1956) 47 Ca1.2d 540, 562 (Bennett). As an essential part of the relationship, the fiduciary "has a duty to make a full and fair disclosure of all facts which materially affect the rights and interests of the parties." *Bennett, supra*, 47 Ca1.2d at pp. 559-560. The tolling rule applicable to fiduciaries based on their duty to make a full disclosure has been applied outside the context of fiduciary law when the defendant was under a statutory duty to make a full disclosure of information to the plaintiff. *Seelenfreund v. Terminix of Northern California, Inc*., (1978) 84 Cal.App.3d 133, 138-39.

The tolling of the statute of limitations on causes of action against a fiduciary pending the plaintiff's discovery of relevant facts “vindicates the fiduciary duty of full disclosure" because "it prevents the fiduciary from obtaining immunity for an initial breach of duty by a subsequent breach of the obligation of disclosure." *Neel, supra*, 6 Cal.3d at p.189.

The Tings’ argument regarding: (a) limited partner Nishiuchi’s knowledge of a possible breach of fiduciary duty in the Tings’ transfer of the Liane House; (b) Nishiuchi’s failure to file suit within four years of notice; and, (c) the barring of the instant lawsuit for breaches of fiduciary duty which occurred in 2007 through 2012 (the Five Proven Breaches) cannot be taken seriously. If the law provided such protection for fiduciaries it would invite unscrupulous general partners and others to commit trivial breaches unlikely to induce lawsuits, so that four years later they would have carte blanche to loot limited partnerships and otherwise breach fiduciary duties. No logic or law supports the proposition nor have the Tings offered any reason to adopt it—beyond their transparent self-interest in retaining their ill-gotten gain.

I. CONTINUING VIOLATIONS

The “continuing violations” doctrine aggregates a series of wrongs or injuries for purposes of the statute of limitations, treating the limitations period as accruing for all of them upon commission or sufferance of the last of them. *Richards v. CH2M Hill, Inc.* (2001) 26 Cal.4th 798, 811-818 (Richards); *Komarova v. Nat’l Credit* (2009) 175 Cal. App. 4th 324, 343. The doctrine serves a number of equitable purposes. First, because some injuries are the product of a series of small harms, the doctrine prevents an inequitable result when a party is unable to identify with certainty when harm has occurred or risen to a level sufficient to warrant action. *Aryeh v. Cannon Business Solutions* (2013) 55 Cal. 4th 1185, 1197-98 (Aryeh). Second, it promotes judicial economy by discouraging parties from pursuing court action in response to every slight

out of fear that delay would result in a time barred action. *Id.* at 1198. To that end, courts will only apply the continuing violations doctrine where a defendant's actions have not acquired a degree of permanence so that a party is on notice that further efforts at conciliation would be futile. *Richards, supra*, 26 Cal. 4th at p. 801.

Here, in Mr. Ting's Response to Special Interrogatories No. 47 and its attached Exhibit B, Mr. Ting identified one thousand and forty seven (1,047) transactions from which the Tings benefited – from 2005 to 2012 - totaling $17,232,708.75. 9 AA 1997:11-1998:13; 9 AA 2036-2072. In Mr. Ting's response, he claimed he repaid to Atia Co. $10,337,909.97 of those interest free loans. 9 AA 2036-2072. Atia Co. was paying 7% interest per year to its lender on that same money the Tings took from Atia Co. RT 307:5-13. The trial court's Phase 1 statement of decision includes the following regarding continuing violations which is adopted herein and argued in this brief:

> *Continuing Violations.* To repeat, this is a derivative case in equity and not strictly subject to a rigid statute of limitations. The preponderance of the evidence showed unmistakably that this pattern was sufficiently pervasive to constitute a series of related wrongful acts which can be treated as one for the purposes of calculating damages. *Komarova v. Nat'l Credit* (2009) 175 CA 4th 324, 343.
>
> *****
>
> Nevertheless, it was apparent from the testimony of the referee/expert witness regarding the defendants' "phony invoices," and their "selective" and "unacceptable" accounting practices that for as much as 10 years before this suit was filed the defendants had undertaken a periodic policy of knowingly and surreptitiously taking the limited partnership assets for their own private gain without notice or accountability to the partnership, and ultimately to its disadvantage. They comforted themselves that the Chairman would have wanted it thus.

> Furthermore, although the pattern did manifestly go back for a decade or more, some of the items identified by plaintiff and the referee occurred well within any conventional statute of limitations period, such as the 2011 kickbacks on Canyon Plaza and the rent and partnership expenditures ("tenant improvements") for a family-owned bakery in the same period. Others - e.g. (i) the Tings' salary, management fee, and "bonus" payments in violation of Corp C § 15904.06, (ii) unpaid partnership loans, and (iii) personal charges on the partnership credit cards - seem to have extended over a period of years perhaps going back as far as the inception of the partnership, but continuing periodically - and certainly for accounting purposes - into the present.
>
> The significance, therefore, of the parties' agreed "accounting period" is that in the forthcoming phase 2 of the trial the referee may not go back further in time than 2005. Otherwise, however, the court finds that the evidence adduced sufficiently shows that the defendants engaged in a continuing violation of their fiduciary duty to the limited partnership. The referee/expert is thus authorized to prepare his damage analysis and recommendations on the items specified below for that entire period.

12 AA 2880.

Accordingly, the trial court did not err in applying the continuing violations doctrine in the instant case.

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J. THE DERIVATIVE ACTION DID NOT ACCRUE UNTIL ALL THE ELEMENTS OF THE FIVE PROVEN BREACHES WERE MET

The statute of limitations does not begin to run until the wrongful conduct occurs resulting in damages. The period in which a plaintiff must bring suit or be barred, runs from the moment a claim accrues. *Pooshs v. Philip Morris USA, Inc.* (2001) 51 Cal.4th 788, 797. Under the common law "last element" accrual rule, the statute of limitations runs from "the occurrence of the last element essential to the cause of action." *Neel, supra,* 6 Cal.3d 176, 187. The elements of a cause of action are "wrongdoing" "causation," and "harm." *Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103,1107, 1109, 1110-14.

Under the discovery rule, the plaintiff discovers the cause of action when he at least suspects a factual basis, as opposed to a legal theory, for its elements, even if he lacks knowledge thereof —when, simply put, he at least "suspects ... that someone has done something wrong" to him. *Jolly v. Eli Lilly & Co., supra*, 44 Cal.3d at p. 1110.When damages are an element of a cause of action, the cause of action does not accrue until the damages have been sustained." *City of Vista v. Robert Thomas Securities, Inc.* (2000) 84 Cal. App. 4th 882, 886. The mere possibility, or even probability, that damage will result from a wrongful act does not render the act actionable if no actual harm has yet occurred. *Davies v. Krasna* (1975)14 Cal. 3d 502, 513.

The Tings contend that Atia Co. is forever barred from asserting its breach of fiduciary duty claim, even as to breaches that occurred within the conventional limitations period, because Nishiuchi was aware of the Tings' wrongful conduct in 2001. This position is both unsupported by law and produces an absurd and inequitable result. Atia Co. cannot suspect "a factual basis" for wrongdoing which has not occurred. As the trial court's statement of decision explains:

> Plaintiff's trial case was composed of deceptions in respect to numerous discrete items. Hence, even if Ms Nishiuchi had reason to

> know that the partnership deeded the Liane Lane house to the Tings in 2001, it is not intuitive that 10 years later she would have also suspected (a) Mr. Ting's surreptitious treatment in 2011 of the sale price for the Canyon Plaza shopping center to a third party or (b) his equally undisclosed decision in 2007 to distribute himself a $1.5 million "bonus."

12 AA 2880. (emphasis added.)

Furthermore, even if Nishiuchi was aware of the Tings' wrongful conduct in 2001, Atia Co. was not damaged as a result of the Tings' involvement in the Canyon Point transaction until 2011. The Tings' position is untenable when taken to its inevitable conclusion. For example, if Atia Co. brought a breach of fiduciary duty claim against the Tings in 2005 for transferring company-owned real estate to themselves for no consideration, Atia Co. would not be barred from bringing a subsequent claim for breach of fiduciary duty with respect to the Canyon Point transaction. The Tings provide no authority supporting their argument that plaintiff should be forever barred from bringing an otherwise timely claim simply because it did not assert an earlier claim based on the same legal theory, but entirely different facts. Furthermore, the Tings do not claim nor offer any evidence that they were prejudiced by delay.

K. STATUTE OF LIMITATIONS BASED ON CONTINUOUS ACCRUAL

Atia Co.'s claims are valid based on continuous accrual principles. The theory of continuous accrual is a response to the inequities that would arise if the expiration of the limitations period following a first breach of duty or instance of misconduct were treated as sufficient to bar suit for any subsequent breach or misconduct; parties engaged in long-standing misfeasance would thereby obtain immunity in perpetuity from suit even for recent and ongoing misfeasance. *Aryeh v. Canon Business Solutions, Inc.* (2013) 55 Cal.

4th 1185, 1198 (Aryeh). Under the theory of continuous accrual, a series of wrongs or injuries may be viewed as each triggering its own limitations period, such that a suit for relief may be partially time-barred as to older events [as was the claim concerning the Liane House] but timely as to those within the applicable limitations period. *Howard Jarvis Taxpayers Assn. v. City of La Habra*, (2001) 25 Cal.4th 809, 818-822. Continuous accrual applies whenever there is a continuing or recurring obligation. *Aryeh*, *supra*, 55 Cal. 4th at p. 1199. Because each new breach of such an obligation provides all the elements of a claim—wrongdoing, harm, and causation—each may be treated as an independently actionable wrong with its own time limit for recovery. *Id*. The theory of continuous accrual supports recovery only for damages arising from those breaches falling within the limitations period. *Id.*

Here, under the continuous accrual doctrine, Atia Co.'s claim is within the statute of limitations. First, the Tings, as general partners of Atia Co., had a continuous fiduciary obligation to Atia Co. and the limited partners. Second, each of the Tings' various fiduciary breaches individually provided the wrongdoing, harm and causation elements of a claim.

There are five major components for plaintiff's claim – alleged in the operative complaint which resulted in judgment – relating to fiduciary breaches that occurred from 2005 to 2012, i.e. the Five Proven Breaches (supra under heading I. SUMMARY, pp.2-3). These Five Proven Breaches were unrelated to the Liane House transfer of which Nishiuchi was purportedly on notice in 2006.

The Tings contend that their first breach occurred in 2001 and that the statute of limitations expired in 2005 – or at the latest in 2006 when Nishiuchi discovered that the Tings "stole" the Liane House. The Tings contend that, four years later, Atia Co. was forever barred from filing suit against them for breach of fiduciary duty. The Tings argue, in essence, that they are free to commit subsequent acts of misfeasance in perpetuity without any consequence. This is exactly the type of inequity that the doctrine of continuous accrual precludes.

L. "LAST OVERT ACT" DOCTRINE'S TOLLING OF STATUTE OF LIMITATIONS

In closing argument, Atia Co. argued that under the last overt act doctrine, the statute of limitations does not run until the last overt act in furtherance of the conspiracy has been committed:

> That leads us to the last overt act under a conspiracy. This is not about arson. This case is about the Tings taking money from the limited partnership.
>
> As the seminal case cited [in] the … the memorandum on contested issue number 5, the seminal case is …Wyatt. In the Wyatt case, the defendant continues to collect unlawful loans up to the date of the trial. And because it was a conspiracy, the statute of limitations has not even started.

RT 998:18-26.

The rule is, "Proof of a civil conspiracy triggers the 'last overt act' doctrine. Under that doctrine, the statute of limitations does not begin to run until the final act in furtherance of the conspiracy has been committed." *People ex rel. Kennedy v. Beaumont Investment, Ltd.*, (2003)111 Cal. App. 4th 102, 138. "The last overt act doctrine prevents the statute of limitations from beginning to run in certain cases, even after the fraud is discovered until the commission of the last overt act pursuant to the conspiracy." *Aaroe v. First Am. Title Ins. Co.*, (1990) 222 Cal. App. 3d 124, 128; citing *Agnew v. Parks* (1959) 172 Cal.App.2d 756, 766. "The last overt act doctrine … acts to toll the beginning of the applicable three-year limitations period, in the same way that Cal. Civ. Proc. Code § 338(d) tolls the beginning of the three-year period based upon delayed discovery." Id.

In *Wyatt v. Union Mortgage Co.*, (1979) 24 Cal. 3d 773, defendants were sued for breach of fiduciary duty, constructive fraud, and fraud. *Wyatt* at 781. The California Supreme Court held, "When a civil conspiracy is properly alleged and proved, the statute of limitations does not begin to run on <u>any part</u> of a plaintiff's claims until the 'last overt

act' pursuant to the conspiracy has been completed." *Id* at 786 (emphasis added). "Statutes of limitations have, as their general purpose, to provide repose and to protect persons against the burden of having to defend against stale claims. So long as a person continues to commit wrongful acts in furtherance of a conspiracy to harm another, he can neither claim unfair prejudice at the filing of a claim against him nor disturbance of any justifiable repose built upon the passage of time." *Id* at 787. "[T]he 'last overt act' was appellants' collection a few weeks before trial of the final payment on the 1970 loan. This was the culminating act in the conspiracy to defraud respondents which began with the first tortious act in 1966. Therefore, the trial judge correctly refused to instruct the jury on the statute of limitations." *Id.* The Court held "[defendants] stood accused of continuing their tortious conduct in furtherance of the conspiracy up until -- and even after -- the filing of the complaint. It was their own conduct that kept the cause of action against them alive. Therefore, no considerations of justice or equity require us to overrule the consistent line of cases that have applied the 'last overt act' doctrine to civil conspiracies." *Wyatt* at 787 (citations omitted).

The Tings were sued for breach of fiduciary duty. In the operative Partner Third Amended Complaint before trial, a conspiracy between the Tings was alleged:

> By reason of their positions as general partners and/or fiduciaries of Atia Co. LP and because of their ability to control and conduct the business and financial affairs of Atia Co., defendants Darwin Ting and Kuei-Mei Ting (hereafter collectively "The Tings") owed Atia Co. and its partners the duty to exercise due care, loyalty and diligence in the management and administration of the affairs of Atia Co. and its property and assets, including creation and maintenance of all required records, financial statements and accounting data, to put the interests of the Company above their own financial interests, and the duty of candor, including full and candid disclosure to Atia Co.'s partners of all material facts related to performing their duties and creating and maintaining required records.

2 AA 248:4-12.

*****

> In a hub-and-spoke conspiracy, many parties conspire directly with one "hub" or main party, and do not conspire with each other. As the Court of Appeals for the First Circuit explained: "In a "hub-and-spoke conspiracy," a central mastermind, or "hub," controls numerous "spokes," or secondary co-conspirators. These co-conspirators participate in independent transactions with the individual or group of individuals at the "hub" that collectively further a single, illegal enterprise." *United States v. Newton*, 326 F.3d 253,255 n.2 (1st Cir. 2003). The "hubs" are Darwin Ting and Kuei-Mei Ting who, at all times relevant, were the general partners of Atia Co. and the managers/members, of UNT Atia Co. II, Atia Investor, Inc., Atia Colima, LLC, and Sunshine Communications, LLC. Additionally, The Tings were the trustees of the Ting Family Trust, The First Restatement of The Ting Family Trust, and The Ting Children 1979 Trust. The Tings were the principal directors of all Atia Co.'s and its operating entities' transactions, e.g., property sales, encumbrances, property transfers, fraudulent money transfers, and unauthorized expenditures for The Tings' personal benefit.

2 AA 272:26 – 273:11. (emphasis added.)

The above allegations were proven at trial. The Tings were continuously the only general partners of Atia Co. since its inception. RT 376:4-14. As Atia Co.'s general partners, the Tings repeatedly misappropriated money from the partnership between 2005 and 2012.

In Mr. Ting's Response to Special Interrogatories No. 47, and its attached Exhibit B, Mr. Ting identified one thousand and forty seven financial transactions by date from 2005 to 2012 from which the Tings benefited i.e. a bonus, salary, credit card for personal use, management fee, and interest free loans. 9 AA 1997:11-1998:13; 9 AA 2036-2073.

These items were included in the disgorgements identified by the trial court's statement of decision.12 AA 2873-2874.

In *Wyatt*, "[T]he 'last overt act' was appellants' collection a few weeks before trial of the final payment on the 1970 loan. This was the culminating act in the conspiracy to defraud respondents which began with the first tortious act in 1966. Therefore, the trial judge correctly refused to instruct the jury on the statute of limitations." *Wyatt at 787.* Here, the last overt act was the Tings' taking interest free loans in 2012 from Atia Co. 9 AA 2036-2073. Therefore, the statute of limitations for the Tings' continual breaches did not begin to run until their last overt act was completed in 2012.

VI. CONCLUSION

Atia Co. cannot be on notice in 2006 for the Tings' wrongdoings from 2007 through 2012. The Tings obtained written consent from 60% of the limited partners for the Liane House. That Atia Co. did not sue the Tings for transferring the Liane House cannot bar Atia Co. from suing the Tings for their wrongdoings from 2007 through 2012.

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There is substantial evidence supporting the conclusion that the Tings received a kickback which caused damages to Atia Co. of $3.6 million from the Canyon Point shopping mall sale. For all the foregoing reasons, the judgment should be affirmed.

Respectfully submitted,

Dated: December 22, 2014

NAKASE LAW CORPORATION

By: _____
Brad Nakase, Esq.

Dated: December 22, 2014

WILLIAM A. COHAN,
PROFESSIONAL CORPORATION

By: _____
William A. Cohan, Esq.

Attorneys for Respondent
MERI NISHIUCHI, in the right of
and for the benefit of ATIA CO., LP

CERTIFICATE OF COMPLIANCE

Pursuant to rule 8.204(c)(1) of the California Rules of Court, I hereby certify that this brief contains 13,852 words, including footnotes. In making this certification, I have relied on the word count of the Microsoft Word program used to prepare this brief.

Dated: December 22, 2014

NAKASE LAW CORPORATION

By: _____

Brad Nakase, Esq.

Attorney for Respondent
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COURT OF APPEALS FOURTH APPELLATE COURT
DIVISION THREE JUDICIAL DISTRICT

PLAINTIFF : NOT RECEIVED
DEFENDANT :

Case No.:
PROOF OF SERVICE

1. At the time of service I was at least 18 years of age and not a party to this action.

2. I served copies of the RESPONDENTS BRIEF; A COPY OF THE BRIEF WILL BE E-SUBMITTED TO THE APPELLATE COURT AND AN AUTOMATIC COPY IS GENERATED TO THE SUPREME COURT;

3. a. Party served : HON DEREK W HUNT
b. Person served : By leaving courtesy copies in Judges chambers

4. Address where the party was served: 700 civic center Dr.
Santa Ana CA. 92701

5. I served the party
a. **by personal service.** I personally delivered the documents listed in item 2 to the party or person authorized to receive service of process for the party (1) on: 12/24/2014 at:

7. **Person who served papers**
a. KNOX ATTY. SERVICE
b. KNOX SERVICES
18301 VON KARMAN AVENUE SUITE 120
IRVINE, CA 92612
c. 714-479-1650

d. Fee for service: $
e. I am:
(3) a registered California process server
(i) an independent contractor
(ii) Registration No.: 2687
(iii) County: ORANGE, CA

8. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Signature: Miguel Ruiz
Miguel Ruiz

NAKASE LAW CORPORATION (ACCT#2133)
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COURT OF APPEALS FOURTH APPELLATE COURT
DIVISION THREE JUDICIAL DISTRICT

PLAINTIFF : NOT RECEIVED
DEFENDANT :

Case No.:
PROOF OF SERVICE

1. At the time of service I was at least 18 years of age and not a party to this action.

2. I served copies of the RESPONDENTS BRIEF; A COPY OF THE BRIEF WILL BE E-SUBMITTED TO THE APPELLATE COURT AND AN AUTOMATIC COPY IS GENERATED TO THE SUPREME COURT;

3. a. Party served : GEORGE S BURNS, ESQ.
BURNS & MOSS
b. Person served : George Burns | Attorney

4. Address where the party was served: 620 Newport Center Dr. Ste 600
Newport Beach CA 92660

5. I served the party
a. **by personal service.** I personally delivered the documents listed in item 2 to the party or person authorized to receive service of process for the party (1) on: 12/23/2014 at: 1:45 PM

7. **Person who served papers**
a. KNOX ATTY. SERVICE
b. KNOX SERVICES
18301 VON KARMAN AVENUE SUITE 120
IRVINE, CA 92612
c. 714-479-1650
d. Fee for service: $
e. I am:
(3) a registered California process server
(i) an independent contractor
(ii) Registration No.: 2612
(iii) County: ORANGE, CA

8. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Signature: Erik Luna

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COURT OF APPEALS FOURTH APPELLATE COURT
DIVISION THREE JUDICIAL DISTRICT

PLAINTIFF : NOT RECEIVED
DEFENDANT :

Case No.:
PROOF OF SERVICE

1. At the time of service I was at least 18 years of age and not a party to this action.

2. I served copies of the RESPONDENTS BRIEF; A COPY OF THE BRIEF WILL BE E-SUBMITTED TO THE APPELLATE COURT AND AN AUTOMATIC COPY IS GENERATED TO THE SUPREME COURT;

3. a. Party served : LAWRENCE D ESTEN, ESQ
MANNING & KASS, ELLROD, RAMIREZ, TRESTER LLP

b. Person served : Patricia De La Cruz / Secretary

4. Address where the party was served: 19800 MacArthur Blvd ste 900
Irvine CA. 92660

5. I served the party
a. **by personal service.** I personally delivered the documents listed in item 2 to the party or person authorized to receive service of process for the party (1) on: 12/23/2014 at: 1:20PM

7. **Person who served papers**
a. KNOX ATTY. SERVICE
b. KNOX SERVICES
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IRVINE, CA 92612
c. 714-479-1650
d. Fee for service: $
e. I am:
(3) a registered California process server
(i) an independent contractor
(ii) Registration No.: 2612
(iii) County: ORANGE, CA

8. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Signature: Erik Luna