In the

Court of Appeal

of the

State of California

FOURTH APPELLATE DISTRICT
DIVISION ONE

D075028

SALAM RAZUKI,
Plaintiff-Respondent,

v.

NINUS MALAN, SAN DIEGO UNITED HOLDINGS GROUP, LLC, FLIP MANAGEMENT, LLC, BALBOA AVE COOPERATIVE, CALIFORNIA CANNABIS GROUP, DEVILISH DELIGHTS, INC., CHRIS HAKIM, MIRA ESTE PROPERTIES, LLC and ROSELLE PROPERTIES, LLC,
Defendants-Appellants.

APPEAL FROM THE SUPERIOR COURT OF SAN DIEGO COUNTY
HONORABLE EDDIE C. STURGEON · CASE NO. 37-2018-000034229-CU-BC-CTL

APPELLANTS' REPLY BRIEF

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REPLY

Plaintiff-Respondent Salam Razuki fails to respond to most of the legal arguments raised by Appellants. The validity of those arguments should be deemed conceded. Respondent argues that he does not need to respond to Appellants' arguments because they are "merits" arguments, and this is an appeal from a preliminary injunction appointing a receiver. But to show entitlement to a receiver, Respondent needs to show a likelihood of success on the merits of his claims. If his claims fail as a matter of law, he cannot get a receiver, and the trial court's order must be vacated. Respondent's failure to refute his lack of standing, the invalidity of the contract upon which he sues, or the sufficiency of money damages is a concession that Appellants are correct and the receiver was wrongfully appointed.

Respondent's opposition brief also fails to cite evidence in the record to support most of his factual assertions. "The reviewing court is not required to make an independent, unassisted study of the record in search of error or grounds to support the judgment. It is entitled to the assistance of counsel. Accordingly every brief should contain a legal argument with citation of authorities on the points made. If none is furnished on a particular point, the court may treat it as waived, and pass it without consideration." *Sprague v. Equifax, Inc*. (1985) 166 Cal.App.3d 1012, 1050; accord, *United States v. Dunkel* (7th Cir.1991) 927 F.2d 955, 956 (arguments can be deemed waived when inadequately developed or supported because "[j]udges are not like pigs, hunting for truffles buried in briefs"). This court should ignore Respondent's assertions of fact, since he does not cite evidence supporting them.

The court should be aware that the very few times Respondent actually cites something in the record, he is citing the same few pages of a declaration. In different parts of his brief, he claims those pages (1 AA 248 and 4 AA 1203-1207) say totally different things. He uses them as a panacea every time he needs to paper over a lack of evidence, and the court should not be misled.

There is a reason Respondent fails to cite the record, even after getting an extra six months to work on his brief: There is no evidence that Respondent Salam Razuki owns the companies in receivership. Respondent's own complaint alleges that he owns only a contingent right to the profits and losses of a holding company, RM Property Holdings, LLC . The holding company – not Razuki – was supposed to own some of the companies in receivership at some point in the future.

Respondent Razuki, therefore, is three degrees of separation away from ownership of the LLC. He claims a contingent right to the profits and losses of an LLC which was *supposed* to own the companies, but does not own them today. Razuki's complaint shows he's eventually entitled to dividends from RM Property Holdings, LLC – not ownership of anything. As for the holding company's theoretical ownership interest, it is based on a contract that was void at the moment it was signed, so even the holding company has no real ownership interest. All of this is undisputed, making the trial court's order reviewable de novo.

Respondent Razuki argues that his loans to Appellant Ninus Malan, or to the Appellants in receivership, are evidence that Razuki owns those companies. That is not how loans work. Loaning money to a company does not give the lender an ownership interest in that company. Respondent's brief also fails to cite evidence that those loans even exist.

ARGUMENT

1.0. *Bibby v. Dieter* has been affirmed, has never been overruled, and holds that when an initial order appointing a receiver is void, all subsequent orders based on it are also void.

In our opening brief, Appellants explained that the order appointing the receiver was void ab initio for procedural and substantive reasons. When an order is void, all orders derived from that order are also void. Here, the trial court lacked jurisdiction, it failed to set a bond, it appointed the receiver ex parte without a showing of need, the complaint was never served on the Defendants, and the receiver had a prior arrangement with Plaintiff-Respondent Razuki about whom the receiver would hire to run Defendants. Specifically, Razuki convinced the receiver to promise to hire another Plaintiff, SoCal Building Ventures, LLC, to operate the Defendants. All of this makes the initial appointment order void under *Bibby v. Dieter* and its progeny. *Bibby v. Dieter* (1910) 15 Cal.App. 45.

Respondent Razuki, however, argues that a void order can be cured by subsequent events. In so arguing, he disparages controlling law (*Bibby v. Dieter*) as the "sole authority" in Malan's brief, a case "decided nearly 110 years ago." ROB at p.34. He says any "infirmities" in the original order appointing the receiver were rectified by the trial judge holding near-weekly hearings throughout the first three months of the receivership.

A void order cannot be made less void by subsequent orders, especially not when those subsequent orders are also void. And *Bibby v. Dieter* remains good law, having been affirmed several times over the years and never overruled.

Respondent never actually says it is bad law, but he implies it when calling it the "sole authority" used by Appellants. We only need one case proving a point of law, but if Respondent wants a string cite, Appellants can oblige him. See, e.g., *Nichols v. Superior Court* (1934) 1 Cal.2d 589

(affirming *Bibby v. Dieter*); *Wiencke v. Bibby* (1910) 15 Cal.App. 50, 53 (affirming *Bibby v. Dieter*); *Guay v Superior Court* (1957) 147 Cal.App.2d 764 (affirming *Nichols v. Superior Court*); *Rondos v. Superior Court* (1957), 151 Cal. App. 2d 190 (citing *Bibby v. Dieter*).

In *Nichols v. Superior Court*, the court affirmed *Bibby v. Dieter*'s holding that all orders based on a void act are themselves void. "A void judgment is, in legal effect, no judgment. By it no rights were divested. From it no rights can be obtained. Being worthless in itself, all proceedings founded upon it are equally worthless. It neither binds nor bars any one. All acts performed under it, and all claims flowing out of it, are void. The parties attempting to enforce it may be responsible as trespassers." *Nichols*, supra, 1 Cal.2d 589 (citing Black, Judgm. § 355 and 1 Freem. Judgm. § 117). Because the receiver statute is jurisdictional, any "noncompliance with the statute would render the appointment void." *Davila v. Heath* (1910) 13 Cal.App. 370, 372. This has been the law for 110 years, and it is still the law today. Respondent cites no authority to the contrary.

Plaintiff-Respondent Razuki argues that Judge Sturgeon appointed the receiver when "hearings were set by Judge Sturgeon on noticed motions scheduled by the parties and the court, and not on any emergency or true ex parte basis." *Respondent's opening brief* ("ROB") at p. 37. That is not true. These were not noticed motions. Judge Medel appointed the receiver on an ex parte application, and Judge Sturgeon appointed the receiver again at a hearing he called sua sponte less than a week after his last sua sponte hearing. This was explained in detail in Appellants' opening brief:

> "Acting sua sponte with no request from any party and no noticed motion filed, Judge Sturgeon set a hearing on August 14, 2018. At that hearing, he made no rulings, but set a hearing for August 20th to determine whether to re-appoint a receiver. 3 R.T. 318-321. No ex parte application had been filed. No motion had been filed. The hearing was set entirely on the court's own motion.

> On August 20, 2018, the parties appeared for Judge Sturgeon's sua sponte hearing. The court appointed the receiver, Michael Essary, again. Over objections, the court signed a written order appointing the receiver on August 28, 2018. 8 AA 2499. The court deemed the receiver's $10,000 bond sufficient, and did not require Plaintiff Razuki to post a bond. 8 AA 2500:11-12. The court set a hearing for September 7, 2018 on whether to issue a preliminary injunction keeping the receiver in place. Id. The court held a hearing on September 7, 2018 and issued a preliminary injunction appointing the receiver. …The court told the receiver to operate under the previous temporary restraining order until the court signed a new one. 5 R.T. 601:11 ("You're still a receiver").
>
> In the written preliminary injunction order, which the court did not sign until September 26, 2018, the court ordered these companies into receivership without the Plaintiff first posting a bond. 13 AA 4399-4406. The order gave Plaintiff until September 21, 2018 to post a $350,000 injunction bond; it did not require Plaintiff to post the bond before getting the receiver. 13 AA 4400:15-16. The order was signed September 26, 2018. 13 AA 4399-4406."

AOB at pp. 13-14.

This timeline shows why each order is independently defective and void for basic procedural reasons. Judge Medel's July 2018 order was issued without notice, without serving the defendants with the complaint, and without requiring a bond posted before it would take effect – a point that Respondent implicitly concedes. See *Respondent's Brief* at pp. 34-35 (failing to dispute that Judge Medel's order was void). Judge Sturgeon's August 20th temporary restraining order is void because it derives from

Medel's order, it was issued sua sponte and without serving[1] the defendants with the complaint, and without requiring a bond posted before it would take effect. The court's September 7th temporary restraining order is void because it was based on the August 20th order and because it allowed the receiver to continue serving without Respondent posting an additional bond. It is also void because it exceeds the allowable duration of a temporary restraining order. On August 28th, the court signed a written order appointing the receiver, once again failing to require a bond and again exceeding the allowable duration of a temporary restraining order. *Davila v. Heath* (1910) 13 Cal.App. 370, 372 (holding "noncompliance with the [bond requirement] statute would render the appointment void."). The court's September 7th order is void because it appointed the receiver without requiring a bond to be posted before it would take effect, and because it was based on the earlier void orders. The September 26th order, too, is void for the same reasons.

The receiver served for several weeks pursuant to Judge Sturgeon's orders without Plaintiff-Respondent Razuki posting a bond. Razuki argues that he "posted that bond in the amount of $350,000 on September 20, 2018, as directed by the trial court," but he fails to mention that the receiver had been controlling the Defendants since August 20th. *ROB* at p. 38. The court appointed the receiver and issued a preliminary injunction without

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[1] "[S]o harsh a measure as the appointment of a receiver to take property out of one's possession without trial will not be indulged in by a court without previous notice to the defendant. It would be unjustifiable, except where it clearly appeared that irreparable injury would be done during the few days necessary for a hearing on notice; and even in such an extreme case, a temporary injunction would usually be sufficient. A motion to appoint a receiver will not be entertained unless notice has been given to the defendant, if practicable, and the appointment will not be made without notice, save in case of irreparable pending injury." *Fischer v. Superior Court of San Francisco* (1895) 110 Cal. 129, 138.

requiring a bond, and the receiver served for nearly a month without a bond in place. Although the court eventually required a bond and Razuki *eventually* posted it, by then it was too late. The receivership statute is jurisdictional – the court has no jurisdiction to appoint a receiver without requiring a bond *first.* The trial court did it backwards: Judge Sturgeon appointed the receiver and *then* required a bond a month later, which exceeds the court's jurisdiction. The orders appointing the receiver are void because they were issued without jurisdiction.

The orders are void not just because of procedural "infirmities," but also legal defects in the complaint and a paucity of facts bringing Respondent's lawsuit within the receiver statute's jurisdictional requirements. A receiver cannot be appointed unless the complaint pleads facts showing entitlement to a receiver, and the complaint does not plead any such facts. The court's orders (1) are based on a void contract that gives Plaintiff-Respondent Razuki a contingent right to a **dissolved** holding company's profits and losses – not ownership of the companies *inside* the holding company, (2) appoint a receiver who had promised Razuki he would hire another *plaintiff* to manage *defendants*, and (3) ignore lesser remedies available to protect Rauzki's imaginary interests, like money damages or an injunction against sale.

Plaintiff-Respondent's reliance on Judge Sturgeon's sua sponte hearings ignores the threshold problem: Respondent pleaded no facts that would give the trial court jurisdiction to appoint the receiver in the first place. "Where a complaint fails by its allegations to show that the conditions required by law have been complied with an order for the appointment of a receiver is void for all purposes." *Rondos v. Superior Court* (1957), 151 Cal. App. 2d 190 (citing *McCutcheon v. Superior Court* (1933) 134 Cal.App.5; *Bibby v. Dieter* (1910) 15 Cal.App. 45 (holding that such appointment may be attacked collaterally), and others). All of

Plaintiff's claims are compensable in money damages. Injunctive relief is unnecessary because Plaintiff-Respondent's complaint – as opposed to Respondent's Brief on appeal – does not claim he owns anything unique. He does not claim to own real property. He does not claim to own the companies in receivership. He does not even claim to own the holding company. He claims only a contingent right to future profits *and losses* from RM Property Holdings, LLC. If he feels like he's being deprived of those profits, he can try to prove damages at trial. But he does not need injunctive relief to preserve his right to damages.

Plaintiff-Respondent's claims are compensable at law, so the receiver is not necessary. The Transfer Agreement says Plaintiff is eventually entitled to 75 percent of the profits and losses of RM Property Holdings. Profits and losses are ***money***. They are not shares – they are not businesses, or conditional use permits, or marijuana dispensaries, or real property, or any other irreplaceable things. They are *money*. The complaint says Plaintiff is entitled to *money* – that's it. And he is allegedly entitled to money from the holding company or Malan – not from the Appellants-Defendants in receivership. The Defendants in receivership are not Respondent's property. If he proves his claims, the best he can hope for is damages against Appellant Malan, not ownership of the corporate Appellants in receivership. Putting these other Appellants-Defendants in receivership is not necessary to preserve Respondent's ability to get a damage award against Appellant Malan, so the court had no jurisdiction to appoint the receiver.

2.0. Respondent fails to respond to Appellants' argument that the receiver was appointed based on a void contract, so the point is conceded, and the court should vacate the order appointing the receiver.

Respondent does not respond to Appellants' argument that the contract, on its face, is void for violating public policy at the time it was signed. AOB at pp. 44-47. The point should be deemed conceded.

"In determining whether the subject of a given contract violates public policy, courts must rely on the state of the law as it existed at the time the contract was made." *Bovard v. American Horse Enterprises, Inc.* (1988) 201 Cal.App.3d 832, 840 fn.3 (holding contract for profits of marijuana paraphernalia is void for violating federal Controlled Substances Act).

Here, the contract was made in November 2017, a time when the "state of the law" in California was that courts would refuse to enforce contracts for profits or ownership of businesses selling goods banned under federal law, like marijuana. "A violation of federal law is a violation of law for purposes of determining whether or not a contract is unenforceable as contrary to the public policy of California." *Kashani v. Tsann Kuen China Enterprise Co.* (2004) 118 Cal.App.4th 531, 543. When "the evidence establishe[s] both parties entered into the business purchase agreement with the knowledge that the business was substantially involved in the sale of [illegal] goods, and buyer specifically intended to continue selling such merchandise after taking over the business," courts will not enforce the contract. *Yoo*, supra, at 1255.

The Transfer Agreement upon which Razuki sues provides for the distribution of profits from the sales of marijuana, a Schedule I narcotic prohibited by the Controlled Substances Act. It is common knowledge that "Marijuana remains illegal under federal law, even in those states in which medical marijuana has been legalized." *United States v. Canori* (2d Cir. 2013) 737 F.3d 181, 184 (citing 21 U.S.C. § 903 (providing for preemption

where "there is a positive conflict between [a provision of the Controlled Substances Act] and that State law such that the two cannot consistently stand together"). At the time the parties entered the Transfer Agreement, such contracts were void. *Bovard v. American Horse Enterprises, Inc.* (1988) 201 Cal.App.3d 832, 840. Razuki does not dispute this, though he says it is "complicated." It is not. See, e.g. *Bovard v. American Horse Enterprises, Inc*. (1988) 201 Cal.App.3d 832, 840 fn.3 (holding contract for profits of marijuana paraphernalia is void for violating federal Controlled Substances Act). Since Razuki had to show a probability of success on the merits of his claims, all of which are based on the void Transfer Agreement, the trial court erred as a matter of law when appointing the receiver. The order appointing the receiver is void because it exceeds the trial court's jurisdiction.

3.0. Respondent fails to respond to Appellants' argument that Respondent lacks standing to enforce the rights of a cancelled and dissolved holding company.

Appellants argued that Respondent Razuki lacks standing because he sues as an individual to enforce the rights of a third party LLC that has since dissolved. AOB at pp. 47, 58, 67; 18 AA 5915-5916 (certificates of cancellation and dissolution). Razuki does not mention that the LLC has been wound up, dissolved, and cancelled, and he fails to explain how anyone can transfer ownership of businesses to a company that no longer exists. Appellants' argument on this point is unopposed and should be deemed conceded.

4.0. Respondent fails to respond to Appellants' argument that the receivership statute's "catch-all" provision is unavailable, so the point should be conceded and the order vacated.

In Appellants' opening brief, we explained that the catch-all provision of Section 564(b)(9) cannot be invoked where the complaint alleges facts placing it within one of the more specific subsections of the

receivership statute, Code Civ. Proc. §564. *Dabney Oil Co. v. Providence Oil Co*. (1913) 22 Cal. App. 233, 237. The first amended complaint says the basis for the receiver is Code Civ. Proc. §564(b)(1), a more specific provision. 1 AA 140:¶127. Under this subdivision, the court may appoint a receiver only "in an action…between partners," when 'the property or fund is in danger of being lost, removed, or materially injured." *Id*. To get a receiver, Razuki was supposed to prove jointly owned property was at risk of loss; he did not prove that, so the receiver should not have been appointed under the only clause available, Section 564(b)(1).

Respondent did not respond to this argument, so it should be deemed conceded.

5.0. Respondent offers no evidence that "he is a proper owner" of the businesses in receivership, and whether he is their "financier" is irrelevant to ownership.

Plaintiff-Respondent argues that he "presented the trial court with substantial documentary and testimonial evidence which adequately demonstrated that he is a proper owner and the primary financier of the Marijuana Operations." The first point is false. The second point is false *and* irrelevant.

Nothing in Respondent Razuki's complaint or evidence shows that he owns the businesses in receivership. His lawsuit is based on a Transfer Agreement that says Appellant *Malan* owns the businesses and should transfer them to RM Property Holdings, LLC. Razuki does not claim to own the businesses, he claims to own a contingent interest in the profits or losses of RM Property Holdings, LLC.

In Respondent's brief, Razuki pivots away from the Transfer Agreement itself, and argues that the recitals section of the Transfer Agreement "strongly supports…the existence of the parties' oral partnership agreements on which [his] ownership claim is based." ROB at

p. 43-44. Razuki now claims that "it is the underlying nature of those oral partnership agreements which governs the current ownership of those entities. Accordingly, Razuki also has standing to protect those interests, not RM Holdings." *Id*. (citing 4 AA 1210-1212)[2].

First of all, the recitals of the Transfer Agreement are inadmissible hearsay. No one has adopted them under penalty of perjury. There is no evidence that Appellant Malan wrote the recitals, that he understood them, or that he attested to their truth, let alone the other corporate Appellants or cross-appellant Chris Hakim. Even if they were admissible, they do not say that Razuki owns the marijuana businesses – they say the parties have bought various businesses throughout the years and wish to transfer some of them to a holding company. They do not say that California Cannabis Group (a non-profit) or Devilish Delights (another non-profit), to name just two companies in receivership, belong to Razuki. In fact, they imply that Appellant *Malan* owns those companies, since he is the one who was supposed to transfer the businesses to the holding company. The recitals are not admissible evidence, and they are not evidence of ownership even if admissible.

Second, the written Transfer Agreement says "any prior discussions and negotiations, if any, are superseded by this Agreement." 1 AA 90:14-19, 96 (third cause of action), 269:§4.1 ("Integration" clause of Transfer Agreement). Plaintiff-Respondent Razuki alleges in his complaint that "Unfortunately, this oral agreement was untenable." 1 AA 127:¶26. They entered the written Transfer Agreement to "resolve any ambiguities" in the "untenable" oral agreement. Id. 1 AA 128:¶31. So these "oral partnership

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[2] The pages of the record which Razuki cites to prove the terms of the "oral agreement" do not mention the oral agreement. The portion of the record at 4 AA 1210-1212 is the written transfer agreement, not evidence of an oral agreement.

agreements," whatever their terms might have been, are superseded. Respondent cannot rely on oral agreements on the one hand, and simultaneously rely on a Transfer Agreement that *supersedes those oral agreements* on the other hand.

Third, an oral agreement to distribute profits from the illegal sale of Schedule I narcotics is just as void as a written agreement to do the same.

Fourth, according to Razuki's complaint, the Transfer Agreement and the oral agreements were *exactly the same.* They entered the written agreement to "**memorialize** their prior oral agreements and to describe additional duties and obligations for each of them." 1 AA 122:12-13.

The Transfer Agreement says Appellant Malan will transfer his ownership to RM Property Holdings – not Plaintiff-Respondent Razuki – and only after Razuki performs an accounting of his assets, which he has not done. Since the agreement presupposes that Malan has the ability to transfer ownership, that means that right now *Malan* has ownership. If Malan obeys the transfer agreement, at some point in the future *RM Property Holdings, LLC* might have ownership. But nothing in the transfer agreement says that Razuki will ever own the companies. The only party that even theoretically owns anything is RM Property Holdings, LLC, a company that was dissolved, canceled, and wound up, and did not ask for this receiver. The Transfer Agreement, which supersedes all oral agreements by its very terms, gives Razuki the right to one thing: Future profits or losses of RM Property Holdings, LLC.

Although Plaintiff-Respondent Razuki says he loaned $5 million to Appellants' businesses, this is neither supported by the evidence nor relevant. Respondent cites **no evidence** showing he invested any money in Appellants except for a $70,000 contribution to escrow to help Mira Este Properties, LLC buy land. See ROB at p. 44 (citing only 1 AA 248 and 4 AA 1203-1207). Respondent's statement of facts does not mention funding

or cite any evidence showing Respondent contributed anything of value to Appellants. ROB at pp.13-21. This argument is totally unsupported by citations to the record and should be disregarded. Respondent's loaning money to Appellants is irrelevant, too, because loaning money to a company does not mean one owns the company. When a property owner borrows money, "and the lender seeks a resulting trust on account of the loan and the use of the proceeds of the loan to pay for the land, the courts universally deny the lender the benefit of a resulting trust." *Haskell v. Wood* (1967) 256 Cal. App. 2d 799, 805.

The pages of the record cited by Respondent do not support his assertions. As evidence of ownership, Razuki cites 1 AA 248 and 4 AA 1203-1207. Page 248 is part of Razuki's declaration, in which he says he loaned money to various borrowers, but does not say he owns any of the businesses in receivership. He does not say that he and Malan agreed that Razuki would share in the ownership of the businesses. In fact, he says that "Regardless of any paperwork, Malan and I maintained an oral agreement to split the profits" – not the ownership, but the ***profits*** – "for all Partnership Assets 25%/75% respectively." 1 AA 248:¶6. He offers no evidence that he owns the Appellants.

Pages 1203-1207 of the record are part of another declaration from Plaintiff-Respondent Razuki, in which Razuki describes how Appellants' businesses were acquired by Malan. In recounting the Appellants' funding history, Razuki admits that he does not own the businesses. Razuki declares that Appellant "Malan owns (in his name only)" every one of the companies in receivership. 1 AA 247-248, ¶5. Razuki claims to have provided start-up financing for those companies, but he is very clear that Malan owns the companies in receivership, and Razuki owns two other companies that are not in receivership. 1 AA 248:¶5(b). He distinguishes

between ownership and financing, and emphasizes that one does not equate with the other.

For example, Plaintiff-Respondent Razuki declares that a man named Joe Banos loaned money to NM Investments, Inc., which then transferred money to San Diego United Holdings Group, LLC, which then bought the real property where the Balboa marijuana business used to operate. 4 AA 1204:¶¶46-47. In other words, a third party loaned money to two companies owned by Appellant Malan – NM Investments, Inc. and San Diego United Holdings Group, LLC – one of which leased property to Balboa Ave Cooperative to run a dispensary. Razuki's status as an alleged co-signer on San Diego United's loan (along with Appellant Malan) does not make him an owner of San Diego United, or its loan proceeds, or anything bought with the loan proceeds, and Razuki does not even claim that it does, at least not in his declaration[3]. In his declaration, he declares that Malan owns those properties "in his name only", and that Malan had promised to transfer the properties to RM Property Holdings, LLC – not Razuki.

[3] On appeal, Respondent argues that he "demonstrated his integral participation" in the marijuana businesses because "that it was only by virtue of his credit history and business relationships that lenders were willing to finance the Marijuana Operations." ROB at p. 44. He cites no evidence supporting that, however. Even if true, the use of his "credit history" and "relationships" to convince banks to lend money to Appellants does not mean Respondent owns Appellants. Just as a parent co-signing a child's lease or car loan does not give the parent the right to possess the car or occupy the child's apartment, Respondent allegedly co-signing loans to Appellants does not make Respondent an owner of everything the Appellants might have bought with that money.

In the same part of his declaration, Plaintiff-Respondent Razuki explains how he gave up his rights as a buyer of one of the real properties, declaring that he "assigned" his rights as a buyer of the Roselle facility to Appellant Roselle Properties, LLC, an LLC owned by Malan. 4 AA 1207:¶72. He affirmatively admits that he does not own Roselle Properties, LLC.

Attached to that same declaration are escrow instructions showing the "buyer" of the Mira Este marijuana facility is Mira Este Properties, LLC – not Razuki. 5 AA 1333. And while Razuki is shown to have contributed some money to the down payment for Mira Este's land, that does not give him ownership of the land or Mira Este Properties, LLC, it just makes him a lender. Incidentally, Razuki is one of four such lenders – the smallest, in fact. Razuki contributed $70,000 while the Loan Company paid $1.9 million. 5 AA 1333.

In the same declaration, Razuki declares that "Hakim and Malan are each 50% shareholders in and to Monarch [Management Consulting]." 1 AA 250:¶12(a). Over and over again, Razuki declares that the companies in receivership are owned by Malan or Hakim, not Razuki.

There is a reason Razuki wanted to confine his role to that of lender: He is legally forbidden from owning or operating marijuana dispensaries on any property in San Diego, according to a stipulated judgment reached with the City of San Diego after he got caught red-handed running an illegal dispensary. 3 AA 693:¶10(a). Appellants explained this in their opening brief, and Respondent does not deny it.

None of the evidence cited by Respondent shows that he owns any of the businesses in receivership.

6.0. Respondent cannot insulate the trial court's order from appellate review by downplaying it as a mere "provisional remedy"; he must show facts invoking jurisdiction under the receivership statute, and he does not do that.

Plaintiff-Respondent asks this court to ignore the serious defects in his case, including his lack of standing, the voidness of the contract upon which he sues, his failure to sue the right parties, and his lack of ownership interests in the companies condemned to receivership. He argues that since this is "an appeal concerning provisional relief, not a trial," the court should ignore his lawsuit's many defects and leave those silly questions about merits for "summary judgment or trial." ROB at 49-50.

In effect, he argues provisional remedies are immune from appellate review simply because they are provisional. This is not the law.

It was Respondent's burden to show a probability of success on the merits to get a preliminary injunction. To get the drastic remedy of a receiver, he had an even higher burden since the court lacks jurisdiction to appoint a receiver unless Respondent proves each statutory element. Both the trial court and this court have to look at the merits – the law requires it. It requires Razuki to make a showing of probable success, and he didn't make it.

Respondent argues that the whole purpose of a preliminary injunction is to preserve the status quo, and that is mostly true. However, the trial court cannot preserve the status quo if Respondent has no right to the status quo. The trial court certainly cannot *change* the status quo by appointing a receiver if Respondent's claims fail as a matter of law.

Respondent asks for deference to the trial court, arguing its order should be reviewed for abuse of discretion. ROB at p. 25-27, 42. That is not the standard of review for most of the questions in this appeal, as explained in our opening brief.

Whether the trial court lacked jurisdiction to appoint a receiver, or perform any other act, is a legal question reviewed de novo when the jurisdictional facts are not in dispute. *Dabney Oil Co. v. Providence Oil Co.*, 22 Cal. App. 233, 237; *Robbins v. Foothill Nissan* (1994) 22 Cal.App.4th 1769, 1774. These jurisdictional facts are undisputed:

- The Transfer Agreement says Malan and Razuki will transfer ownership of companies to RM Property Holdings, LLC, not to anyone else.
- The Transfer Agreement says Malan and Razuki will transfer ownership of companies only after they perform an accounting. They have not performed an accounting.
- RM Property Holdings, LLC has been dissolved, canceled, and wound up.
- The Transfer Agreement does not say Malan will transfer ownership of anything to Respondent Razuki.
- Razuki does not currently have ownership of any of the companies in receivership.
- Razuki's complaint asks for money damages, not ownership of the companies in receivership.
- The receiver had an arrangement with Razuki about who he would hire and fire. He promised to hire a plaintiff, SoCal Building Ventures, LLC, to manage three defendants. Once appointed, he did that.
- Razuki hired a hit man to murder Malan for the express reason that Malan defending himself in this litigation was costing him too much money.

Respondent offers no evidence contesting these facts, so they are undisputed. ROB at pp. 13-24.

"Abuse of discretion" is not the sole standard of review, but if it were, this trial court certainly abused its discretion. "An abuse of discretion is demonstrated if the court's decision was not supported by substantial evidence or the court applied an improper legal standard or otherwise based its determination on an error of law." *City of Crescent City v. Reddy* (2017) 9 Cal.App.5th 458, 466.

And when the record does not show the trial court made findings of fact, this court, when applying the substantial evidence test, will not presume the correctness of the trial court's decision. "Where a respondent argues for affirmance based on substantial evidence, the record must show the court *actually performed* the factfinding function. Where the record demonstrates the trial judge did not weigh the evidence, the presumption of correctness is overcome. The substantial evidence rule thus operates only where it can be presumed that the court has performed its function of weighing the evidence. If analysis of the record suggests the contrary, the rule should not be invoked." *Affan v. Portofino Cove Homeowners Assn.* (2010) 189 Cal.App.4th 930, 944–945.

The trial court here did not weigh the evidence, make findings of fact, or explain the basis of any of its rulings. It did not find, for example, that a less drastic remedy was inadequate. It did not weigh whether the receivership would hurt the businesses more than it would help them. The court did not find Plaintiff-Respondent Razuki had a probable property interest in any of the businesses in receivership – an impossibility, since Razuki himself claims only the right to derive dividends from the profits of the holding company, not an ownership interest in the businesses owned by the holding company. The court did not find that the property was at risk of irreparable harm without a receiver, except to say "the amount of money that allegedly have been put into this case" shows irreparable harm; and, legally, it does not. 4 R.T. 422:20-24. Money is *reparable* harm

compensable with money damages. Because the trial court did not make findings of fact, its decision is not afforded any deference.

Regardless of the standard of review, Appellants showed the trial court's order is void for lack of jurisdiction under the receivership statute. Respondent has not responded with citations to the record or authority, waiving those arguments and conceding the merits of this appeal.

7.0. After-the-fact hearings to allow people to "weigh in" on the receiver's actions do not legitimize the order appointing him or show that the trial court properly balanced the harms.

Plaintiff-Respondent Razuki argues that the trial court allowed Appellant Malan and Cross-Appellant Hakim to "weigh in on any proposed significant actions to be taken by the Receiver" at several ex parte hearings held after the appointment. ROB at p.47 (citing 1 RA 4-47). Razuki argues the post-appointment hearings showed that the court "properly balanced the relative harms" to Appellants before appointing the receiver.

Respondent's conclusion does not follow from his premise. That the court held an ex parte hearing after appointing the receiver does not mean the court properly balanced the harms between Appellants and Respondents *before* appointing the receiver.

Plaintiff-Respondent Razuki also argues that there is no conceivable harm to Appellants that could result from appointing a receiver because the receiver's job is the preserve the assets in receivership. This argument, if accepted, would render the "balancing of harms" requirement a nullity. If a receiver is *always* in the parties' best interest based on his job description alone, the equities would *always* favor his appointment. This is not the law, of course, as shown by Respondent's failure to cite any law (or facts) in that section of his brief. ROB at pp. 45-47.

In reality, the court failed to balance the harms, and the evidence – like Razuki's declaration and the Transfer Agreement, both of which show Razuki is entitled to money damages *at most* – shows that the harm befalling Appellants greatly outweighs any potential harm to Razuki. Appellants have suffered a great harm: The deprivation of their property rights. The non-profit organizations have been stuck in limbo, unable to operate for the benefit of the members of their cooperatives. 2 AA 479:¶¶3-7, 482, 498. For more than a year now, they have been unable to operate or expand. The presence of the receiver has deterred vendors from entering contracts with Appellants, as explained in the reply brief of Cross-Appellants Chris Hakim and Mira Este Properties, LLC. The receiver himself has spent hundreds of thousands of dollars on him, his attorney, and on accountants, as shown in the receiver's reports filed with the court. See *Cross-Appellants' Reply Brief* at pp.8-10. A receiver is an enormous expense, and with a business as fragile as a cannabis dispensary, his presence is a death knell. While it might be his job to preserve the assets, that is not what receivers end up doing, and it's not what this one has done.

Holding hearings does not mitigate the problems with appointing the receiver in the first place. The receivership statute is jurisdictional; the court lacked jurisdiction to appoint the receiver. Whether the court allowed the parties to "weigh in" is irrelevant. Appellants have a right to operate their own businesses and property without having to "weigh in" with the court.

Respondent Razuki also argues ownership in the marijuana operations is a unique asset that cannot be replicated or replaced by money damages. The marijuana businesses have a conditional use permit, he says, and it is hard to get another one. But Razuki is not *asking* for ownership in his complaint, and he does not allege he owns the businesses in any of declarations he filed. He alleges a right to the profits or losses of RM

Property Holdings, LLC. **Profits and losses – by their very definition – are compensable at law as money damages.**

Also, in Respondent's brief, Razuki argues that the receiver has done a great job by *selling the assets* – in other words, converting them to money damages. ROB at p. 33 (lauding the receiver's sale of Balboa Ave Cooperative – a business whose sale he was hired to prevent). Respondent cannot praise the receiver selling off the businesses while simultaneously arguing that the businesses should never, ever be sold and that the receiver is the only person who can stop those sales.

The trial court did not find that there was a likelihood of irreparable injury to Respondent, at least not as the term "irreparable" is used in California law. The trial judge expressly said he was appointing the receiver and finding "imminent harm, irreparable harm…based on the amount of money that allegedly have been put into this case." 4 RT 422. Money damages are not irreparable harm, though, so the judge – in reality – made no finding about irreparable harm whatsoever. The trial court expressly erred as a matter of law when it appointed the receiver when finding the irreparable harm consisted of *reparable* money damages.

The likely harm to Appellants consisted of losing vendors and bearing a crushing burden of receiver/attorney fees that would result in their insolvency. The likely harm to Respondent Razuki of failing to appoint the receiver was nothing, since there was no evidence he was suffering any harm. But at most, Respondent's harm was money damages, since the Transfer Agreement upon which he sues does not say he is entitled to own the businesses. The agreement says he is eventually entitled to profits from a holding company, which is compensable at law. No number of ex parte hearings can fix those problems with the receiver appointment.

8.0. Respondent Razuki fails to respond to Appellant's argument that the receiver had an illegal arrangement about who he would hire.

Appellant Malan explained in his opening brief that Razuki and the receiver declared, under penalty of perjury, that they had agreed that the receiver would hire plaintiff-in-intervention SoCal to run the marijuana operations. AOB at pp.49-50 (citing 1 AA 240-241). Such arrangements are illegal. Rule 3.1179(b) (party seeking a receiver "may not, directly or indirectly" enter any "arrangement or understanding" concerning the receiver's role in "who the receiver will hire, or seek approval to hire, to perform services."). In Respondent's brief, Razuki does not deny that this arrangement exists. He does not deny that the receiver had promised to hire a *plaintiff* to manage three *defendants.* He does not deny that the law forbids this or that it violates the receiver's fiduciary oath. His only defense is, "The trial court twice concluded those accusations lack substantive merit" – though he cites no evidence showing the trial court actually came to such a conclusion. ROB at p. 48.

In other words, Razuki fails to respond to the argument. This court should deem it waived, and deem Appellants' argument unopposed. The undisputed evidence shows that the receiver had promised Razuki he would fire the current managers and re-hire a plaintiff to manage three defendants. The receiver in fact did do that, hiring Plaintiff SoCal immediately after he was appointed. This is illegal. For this reason alone, the receiver should be removed. The evidence on this issue was undisputed, so this court reviews it de novo, as a question of law: May a trial court lawfully appoint a receiver who has promised a plaintiff that he will fire certain managers and re-hire another plaintiff to operate three defendants?

9.0. Respondent must maintain clean hands throughout the litigation, and his attempt to murder Appellant Malan to frustrate this appeal justifies removing the receiver.

Respondent argues that his attempt to murder Malan to frustrate this appeal and interfere with his defense in this lawsuit was "never a consideration for the trial court at the time it exercised its discretion in issuing either of its August 28, 2018 and September 26, 2018 Orders." ROB at pp.50-51. Razuki argues that this court should focus only on the circumstances as they existed in August and September 2018, and ignore subsequent events. *Id.* Respondent cites no law in this section of his brief, however, and cites to no facts either, so the court should deem Appellant's argument unopposed. *Id.*

Respondent's argument is not so much an argument as a tautological statement about the linearity of time. Obviously the trial court did not consider the November 2018 murder attempt when ruling in September 2018 – because it had not happened yet. But developments *since* the receiver was appointed are relevant to whether the receiver should stay in place. "The [unclean hands] doctrine demands that a plaintiff act fairly in the matter for which he seeks a remedy. He must come into court with clean hands, **and keep them clean**, or he will be denied relief, regardless of the merits of his claim." *Kendall-Jackson Winery, Ltd. v. Superior Court* (1999) 76 Cal.App.4th 970, 978.

The basis for this application of the unclean hands doctrine was explained in *Hall v. Wright* (S.D.Cal. 1954) 125 F. Supp. 269, 273-274: "It is the age-old policy of courts of equity to require that he who sues seeking equity must not only come into court with 'clean hands' as respects the controversy, but must continue to keep 'clean hands' as to the controversy **throughout the pendency of the litigation**…."

Respondent knows this is the law. While Respondent argues "this Court should examine the facts and circumstances as they were presented to the trial court at the time it issued those Orders," he also spends a good three pages talking about how the receiver has performed since then. ROB at pp.31-33. Respondent Razuki is arguing out of both sides of his mouth: He wants this court to ignore recent developments when they would hurt his case, but not when he thinks they might help him. *Compare* ROB at pp.31-33 (discussing receiver's activities since September 2018) *with* ROB at pp.50-51 (imploring this court to ignore Razuki's activities since September 2018). He cannot have it both ways. The court is obliged to look at how the parties have acted since the receiver was appointed, since one who seeks equitable relief must do equity, and must maintain clean hands throughout the litigation.

Respondent Razuki argues that his attempt to murder Malan is "unproven." Not so. In fact, the evidence that he tried to kill Malan because this litigation was costing him too much money is undisputed. Nowhere does Razuki offer any evidence disputing he tried to murder Malan to prevent Malan from exercising control over the marijuana businesses and defending himself in litigation. Respondent Razuki does not deny it in any declaration, or even in his brief. There is no evidence disputing his attempt to murder Malan.

10.0. There is no such thing as a "presumption of clean hands" in a civil dispute, and the undisputed evidence shows Respondent has unclean hands.

Although Razuki argues he is entitled to a "presumption of innocence," this is true only in criminal court – Malan is not asking this court to imprison Razuki. This is a civil dispute. In a civil dispute, on a motion to appoint a receiver, the court must decide whether each element is met by a preponderance of the evidence. The burden rests with the moving

party to show that he has met each element of the receivership statute. Here, that means it was Razuki's burden to show, by a preponderance of evidence, that he has clean hands. He has not shown that. He offers no evidence to dispute declarations from the FBI agent and Malan himself that Razuki tried to murder him to interfere with this litigation. (This court should note that Respondent cites no evidence or law in the section of the brief discussing the murder attempt. See ROB at pp. 49-51.) Razuki's undisputed inequitable conduct prevents him from receiving equitable relief as a matter of law.

11.0. Respondent fails to respond to Appellants' argument that lesser remedies, like an injunction against sale of the businesses, would have been sufficient.

Appellants' opening brief explains that to get a receiver, Plaintiff-Respondent Razuki needs to prove lesser remedies are insufficient, and he did not do that. "Because the remedy of receivership is so drastic in character, ordinarily, if there is any other remedy, less severe in its results, which will adequately protect the rights of the parties, a court should not take property out of the hands of its owners." *Alhambra-Shumway Mines, Inc. v. Alhambra Gold Mine Corp.* (1953) 116 Cal.App.2d 869, 873. Since an injunction against sale would have sufficed to protect Respondent's supposed ownership interests, the trial court should not have appointed the receiver.

Respondent fails to respond to this with arguments or evidence. The only part of Respondent's brief that comes even close to addressing the adequacy of lesser remedies is the comment – unsupported by evidence – that "the only viable mechanism for ensuring that those businesses continue to be run…was to have a neutral third party (the Receiver) take over the operations." ROB at p. 46. Respondent argues "Malan and Hakim have demonstrated a predilection toward 'self-help,'" whatever that means. Id. (citing 1 AA 250-251). Somehow their general "predilection" for "helping"

themselves justifies the specific remedy of appointing a receiver to take control of a half dozen businesses.

The implication that Appellants Malan or Hakim acted badly in the past – with *different businesses* – is inadmissible character evidence. There was literally zero evidence showing that Malan or Hakim intended to sell Appellants to anyone or do anything else to harm the businesses. Respondent cites to no such evidence in his brief.

More importantly, the pages of the record he cites, 1 AA 250-251, say nothing about Appellants' "predilections" for "self-help." Those consist of two pages from Respondent's declaration, in which he says that Appellants hired a certain company to manage the marijuana businesses. Respondent declares that Appellants hired that manager without Respondent's permission, and then refused to transfer the corporate Appellants to the holding company. That's all it says on pages 250-251. There is no evidence to support Respondent's vague assertion that Appellants "have demonstrated a predilection toward self-help" that would show irreparable harm that would result without a receiver.

CONCLUSION

The trial court had no jurisdiction to appoint a receiver, and certainly not this receiver, who had promised one plaintiff to re-hire another plaintiff to manage three defendants. The court should remand with instructions to vacate the receivership, return the property in receivership to the people and companies from which it was seized, and order the receivership bond paid to Appellants.

Dated: February 14, 2020 Respectfully submitted,

/s/ Daniel T. Watts
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CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 8.204(c)(1) or 8.504(d)(1) of the California Rules of Court, the enclosed Appellants' Reply Brief is produced using 13-point or greater Roman type, including footnotes, and contains 8,228 words, which is less than the total words permitted by the rules of court. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: February 14, 2020 Respectfully submitted,

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