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IN THE SUPREME COURT
OF THE
STATE OF CALIFORNIA

JJD-ELK GROVE, LLC

Plaintiff and Appellant,

v.

JO-ANN STORES, LLC

Defendant and Respondent.

On Review From The Court Of Appeal For the Third Appellate District,
Division One, 3rd Civil No. C094190

After An Appeal From the Superior Court For The State of California,
County of Sacramento, Case Number 34-201900248163, Hon. Shama H. Mesiwala

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PETITION FOR REVIEW

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TABLE OF CONTENTS

Page

I. ISSUE PRESENTED FOR REVIEW 5

II. WHY REVIEW SHOULD BE GRANTED 5

III. FACTS & PROCEEDINGS 7

IV. ARGUMENT 12

A. Review should be granted to resolve the growing split in the Courts of Appeal. 13

B. This case presents an ideal vehicle for deciding the issue, *viz.*, whether to grant commercial parties a virtually categorical exemption from Civil Code § 3275. 15

1. The Court of Appeal's evisceration of Civil Code § 3275 in the commercial context is a mistake—and a worrying one. 16

C. Civil Code § 3275 applies to commercial contracts generally and should therefore apply to co-tenancy provisions in particular. 17

D. The Court of Appeal's approach threatens whole areas of California business law. 23

V. CONCLUSION 25

TABLE OF AUTHORITIES

Page

CASES

Ahdout v. Hekmatjah (2013) 213 Cal.App.4th 21, 37-40 25

Alliance Mortgage Co. v. Rothwell (1995) 10 Cal.4th 1226, 1236 23

Broadmoor San Clemente Homeowners Assn. v. Nelson (1994) 25 Cal.App.4th 1, 4 24

Constellation-F, LLC v. World Trading 23, Inc. (2020) 45 Cal.App.5th 22 ..... passim

Garrett v. Coast & Southern Fed. Sav. & Loan Assn. (1973) 9 Cal.3d 731, 739 ..... 18, 20

Grand Prospect v. Ross Dress for Less, Inc. (2015) 232 Cal.App.4th 1332 ..... passim

Hardwick v. Wilcox (2017) 11 Cal.App.5th 975, 977 24

Kyne v. Kyne (1940) 16 Cal.2d 436, 438 24

MKB Mgmt., Inc. v. Melikian (2010) 184 Cal.App.4th 796, 798 24

Perdue v. Crocker Nat'l Bank (1985) 38 Cal.3d 913, 931 17

Ridgley v. Topa Thrift & Loan Ass'n (1998) 17 Cal.4th 970, 976 ..... 17, 18

STATUTES

California Civil Code § 1671 ..... 11, 18

Civil Code § 1668 24

Civil Code § 3275 ..... passim

OTHER AUTHORITIES

Agreements Not To Compete, *Overview*, Cal. Civ. Prac. Business Litigation § 62:1 24

TABLE OF AUTHORITIES

(Continued)

Page

Retail Leasing: Drafting and Negotiating the Lease (Cont. Ed. Bar 2021 supp.) Cotenancy Requirements, § 7.1 8

RULES

Cal. Rules of Court, rule 8.500(b)(1).....6

California Rules of Court Rule 8.504(d)(1) 27

I.

ISSUE PRESENTED FOR REVIEW

Which of the two conflicting analytic frameworks—the Fifth District's in *Grand Prospect v. Ross Dress for Less, Inc.* (2015) 232 Cal.App.4th 1332, or the Third District's in the opinion below—should govern the enforceability of co-tenancy provisions in retail lease agreements?

II.

WHY REVIEW SHOULD BE GRANTED

By its published opinion "declin[ing] to follow the rule announced in *Grand Prospect*," the Third District has created an explicit and acknowledged split of authority in the Courts of Appeal as to whether commercial parties retain Civil Code § 3275's protection against contractual penalties and forfeitures. In this case, the clause at issue is a co-tenancy provision in a commercial lease. (Op. at pg. 2.) Under *Grand Prospect*, the Fifth District requires a co-tenancy provision's penalty to bear a reasonable relationship to the harm anticipated from the provision's breach and holds the sophistication of the parties is irrelevant to whether an agreed upon provision constitutes a forfeiture. (Op. at pg. 12.) The opinion below holds the opposite; it will enforce any penalty

term negotiated by commercial parties. (*Ibid.*) And in a third case involving a commercial lease's holdover-rent provision, the majority opinion in *Constellation-F, LLC v. World Trading 23, Inc.* (2020) 45 Cal.App.5th 22, held that an onerous provision was nonetheless enforceable because "[t]ransactors in a competitive market are 'free from obligation to each other' when they enter their lease contract." (*Id.* at 26.) Over the past seven years, nine Courts of Appeal justices have addressed in four published opinions whether protections against penalties and forfeitures apply to commercially sophisticated parties. Five have held that they do not, and four have ruled that they do. This Court's review is therefore "necessary to secure uniformity of decision." (Cal. Rules of Court, rule 8.500(b)(1).)

Given the importance of this question to the economic wellbeing of commercial landlords and the need to provide parties with predictability in the interpretation of negotiated provisions in retail leases, review is also necessary "to settle an important question of law." (*Ibid.*) The sweep of the opinion below threatens more general, settled principles of California law concerning forfeitures and penalties in commercial contracts, as well as calling into question the applicability of *all* public

policy-based rules that override illegal or otherwise unenforceable terms in commercial contracts. This Court's review is necessary to prevent destabilization of these fundamental principles governing large swaths of the State's economy—surely an important issue. (*Ibid.*)

III.

FACTS & PROCEEDINGS

As the Court of Appeal noted, "the facts are largely undisputed." (Op. at p. 2.) JJD-HOV Elk Grove, LLC ("JJD") is a family-owned commercial landlord that operates a shopping center in Elk Grove, California. (*Id.* at p. 3; AA 447.[1]) For all relevant purposes, JJD leased approximately 35,000 square feet of space to Jo-Ann Stores, LLC ("Jo-Ann"), a national retailer of fabric, sewing supplies, and related items, in 2003. (*Id.* at p. 3; AA 426.) The parties' lease contains a co-tenancy provision.

"Cotenancy requirements are generally found only in retail leases," and "condition[] a retail tenant's opening for business, or continuing operation of its business at the designated premises, on the opening for

1 References to the Court of Appeal opinion attached as an appendix appear as "Op. at p. __." References to the record in the Court of Appeal are given by "AA __," which refers to the Appellant's Appendix.

business or continued operation by other tenants in the shopping center." (Op. at pp. 6-7 [quoting *Retail Leasing: Drafting and Negotiating the Lease* (Cont. Ed. Bar 2021 supp.) Cotenancy Requirements, § 7.1].) Co-tenancy provisions allow tenants to reduce their rent if a certain number of tenants at the retail space leave or are unopen for business.

The co-tenancy provision in the lease between JJD and Jo-Ann provides: "To induce Tenant to enter into this Lease . . . Landlord represents that it has entered into or shall enter into binding leases . . . for the use and occupancy of either: (x) [three so-called 'anchor tenants' or comparable substitutes] . . . or (y) sixty percent (60%) or more of the gross leasable area of the Shopping Center (excluding the Premises)." (Op. at p. 3 [added emphasis removed].) When the co-tenancy provision is not satisfied, the contract provides that Jo-Ann may pay "Substitute Rent" in lieu of the otherwise-applicable "Fixed Minimum Rent." (*Ibid.*) "Fixed Minimum Rent" at the time the complaint was filed was, and currently is, "$42,292 per month." (*Ibid.*) "Substitute Rent" is defined as "the greater of 3.5 percent of Jo-Ann's gross sales (except pattern sales), or $12,000 per month." (*Ibid.*)

The amount of Substitute Rent was negotiated by the parties, with the initial draft lease setting it at $2,000 a month. It was subsequently negotiated to the operable provision, *i.e.*, 3.5% or $12,000 a month. There is no evidence indicating why Substitute Rent was increased by 600% from the proposed term as compared to the final agreement; both the proposed term, and what was ultimately agreed to, appear to have been selected at random. Also, Jo-Ann has never, across the nearly twenty years of operation at this location, had gross sales sufficient to trigger the percentage-based definition. Rent payments on the lease commenced September 17, 2004, and six days later, on September 23, 2004, Jo-Ann invoked the co-tenancy provision to pay Substitute Rent. (AA 951.)

There is no dispute that, during the relevant time period, the co-tenancy provision was unsatisfied. There is a dispute as to whether it was within JJD's power to satisfy the condition. Occupancy dropped below the co-tenancy provision's threshold because in 2017 an anchor tenant sought bankruptcy protection, and the bankruptcy court assumed control over the lease and premises. (AA 458-459.) After the bankruptcy court permitted the sale of the lease, there is no dispute that the co-tenancy provision was again satisfied. (Op. at p. 5.)

During the period the bankruptcy court precluded JJD from replacing the anchor tenant, Jo-Ann maintained it had the right to pay Substitute Rent of $12,000 instead of the Fixed Minimum Rent of $42,292. (Op. at p. 3.) If the co-tenancy provision is enforceable, Jo-Ann is correct. If the provision is not enforceable, Jo-Ann owes JJD $638,293 in back-rent.

The present case arises out of JJD's action for declaratory relief and breach of contract, which asserts that the parties' particular co-tenancy provision constitutes an unenforceable penalty. (Op. at p. 5.) JJD maintains that, inasmuch as Jo-Ann declined to produce evidence of *any* financial loss from the temporary failure of the co-tenancy provision, a 72% reduction in rent works a forfeiture under *Grand Prospect* and the cases applying California Civil Code § 3275. (JJD Opening Brief at p. 8.) That is, the value of the property the co-tenancy provision forces JJD to forfeit (more than $30,000 per month) bears no reasonable relationship to any harm to Jo-Ann ($0 per month). (*Id.* at p. 21.)

The trial court declined to conduct a *Grand Prospect* analysis, however, and instead relied on the non-unanimous decision in *Constellation-F, LLC v. World Trading 23, Inc.* (2020) 45 Cal.App.5th 22,

a Second District cases concerning holdover-rent provisions. (AA 1032.) Foreshadowing the Court of Appeal's reasoning, the trial court held that the co-tenancy provision is enforceable because it was the result of negotiation between sophisticated parties. (*Ibid.*)

JJD timely appealed, asserting without dispute that while *Grand Prospect* considered and rejected the landlord's *unconscionability* argument because of the sophisticated negotiation between the parties, the court did not consider such negotiations dispositive of the landlord's *forfeiture* claim under Section 3275. (Op. at pp. 8-10.) In a published opinion, the Third District Court of Appeal expressly rejected the *Grand Prospect* framework and held: "[T]he parties' contractual intent when reduced to writing should be controlling and enforced, particularly as applied to the commercial leasing market in arms-length negotiations and transactions." (Op. at p. 14.) The Court of Appeal did purport to hold open the possibility that a co-tenancy provision if phrased in terms of liquidated damages might run afoul of California Civil Code § 1671. (Op. at p. 13 & n.6.)

This timely petition for review follows.

IV.

ARGUMENT

This petition presents the classic, and most compelling, reason for an expenditure of the Court's limited resources: a split of authority in the Courts of Appeal, here between the Third and Fifth (and, accepting the trial court's analysis, the Second) Districts. The split is published, express, and acknowledged. This case presents the issue cleanly; there are no vehicle concerns. The issue is important, affecting as it does an industry valued at $16 *trillion*, given California's importance in the nationwide commercial real estate market.

Review is also necessary because the opinion below is wrong. California law is not the law of Nevada or Tennessee, cited by the Court of Appeal. (Op. at p. 8 n.3.) Since its adoption in 1872, California's Civil Code § 3275 forbidding contractual forfeitures has been a stalwart in the armament of the sensible, often unique, protections that have allowed California businesses to thrive. More than that, however, the Court of Appeal's willingness to allow commercial parties to flout California law's well-established substantive protections. Commercial parties are not above the law, and the Court of Appeal's movement in the opposite direction requires reversal.

A. <u>Review should be granted to resolve the growing split in the Courts of Appeal.</u>

The Court of Appeal below held: "We decline to follow the rule announced in *Grand Prospect* that a co-tenancy provision reducing rent if a specified condition occurs (e.g., if an anchor tenant is not open or if occupancy drops below a certain level) is an unenforceable penalty unless the reduction has a reasonable relationship to the harm the parties anticipated would be caused thereby." (Op. at p. 12.) In place of the *Grand Prospect* rule, the Court of Appeal substituted an absolute deference to the contract's terms so long as the term was negotiated by sophisticated parties. (Op. at pp. 13 n.6, 14-18.).

Whichever approach is correct, the two cannot be reconciled with one another. This Court's intervention is therefore necessary. The Third and the Fifth Districts adjoin one another. Whether a family-owned mall must forfeit nearly $650,000 despite no harm to a national retail tenant now turns on which side of the street the mall falls. This is neither efficient nor fair.

At least on the view of the trial court, and to a lesser extent the Court of Appeal, the Second District is also in conflict. In place of *Grand Prospect*, the trial court relied on the Second District's non-unanimous

opinion in *Constellation-F, LLC v. World Trading 23, Inc.* (2020) 45 Cal.App.5th 22, despite its different subject matter—and the forceful dissent of Presiding Justice Stratton. The Court of Appeal, while acknowledging it dealt with holdover rent rather than co-tenancy agreements, considered *Constellation-F* to be persuasive support for its approach, albeit without any discussion of the dissent. (Op. at pp. 15-16.)

Grand Prospect was handed down in 2015. *Constellation-F* came down in 2020. This case was decided in 2022. The Courts of Appeal are splintering on the question whether California's prohibition on penalties and forfeitures applies to commercial parties. Given the considerable import of this question, it is worth the Court's time to address it. The Court now has before it several opinions on the issue, providing an informed basis for decision. *Grand Prospect*'s extensive, thoughtful analysis has been cited nearly 200 times in trial and appellate court briefs, and it has garnered 68 case citations. If commercial parties are going to receive an exemption from complying with Civil Code § 3275, as the Second and Third District Court of Appeals opinions provide, it would be better for everyone involved to

know of this rule sooner rather than later. Now is the time for this Court's intervention.

B. <u>This case presents an ideal vehicle for deciding the issue, *viz.*, whether to grant commercial parties a virtually categorical exemption from Civil Code § 3275.</u>

This is not a case in which the parties disagree about the facts. This is not a case in which the courts below disagreed with the sufficiency of JJD's evidence or found fault with its statement of the rule from the most closely analogous case. This is a case in which the courts below selected a different rule to govern the same question of fact and expressly and explicitly refused, with reasons, to apply the rule from the published precedent JJD identified.

This is also not a case in which there can be much if any question on the ultimate issue—the reasonableness of the penalty JJD suffers compared to the harm to Jo-Ann—if JJD is correct that the rule of *Grand Prospect* applies. A $30,000 *per month* windfall to Jo-Ann with no evidence of harm is very nearly, if not in fact, *per se* unreasonable. Additionally, while evidence as to the details of the parties' negotiation concerning the provision at issue is scant, the evidence there was a back-and-forth on the clause suffices to establish that it was the product of

negotiation. Particularly because JJD elected not to bring a claim of unconscionability, the record is more than sufficient to address the issue as presented: whether the mere existence of negotiation by commercial parties about a contractual term insulates that term from penalty and forfeiture review under Civil Code § 3275.

It is hard to imagine a case that would provide a cleaner vehicle for deciding the issues involved.

1. The Court of Appeal's evisceration of Civil Code § 3275 in the commercial context is a mistake—and a worrying one.

California is the world's fifth largest economy, and the only entity smaller than a nation-state to break the top ten, in part because its legal system and regulatory regime are world leaders. One of the best features of these systems is their insistence on a robust role for public policy in the market. California commercial parties cannot contract to engage in discriminatory conduct. California commercial parties, subject to statutory exceptions, cannot contract to engage in usury. Agreements not to compete, clauses constituting unfair competition, unreasonable liquidated damages provisions, contracts in violation of licensing or other regulatory standards—all of these are unenforceable, whether the product of sophisticated negotiations or not.

California's rule against contractual forfeitures and penalties is no different. Even standing alone, it is bad policy to exempt co-tenancy agreements from penalty and forfeiture analysis for reasons discussed below. But combined with the erosion such an approach would work in other areas of California business law, judicial re-writing of Civil Code 3275 would yield untoward results.

C. Civil Code § 3275 applies to commercial contracts generally and should therefore apply to co-tenancy provisions in particular.

California has a simple rule when it comes to contractual forfeitures:

> Whenever, by the terms of an obligation, a party thereto incurs a forfeiture, or a loss in the nature of a forfeiture, by reason of his failure to comply with its provisions, he may be relieved therefrom, upon making full compensation to the other party, except in case of a grossly negligent, willful, or fraudulent breach of duty.

Cal. Civil Code § 3275. As this Court noted in *Ridgley v. Topa Thrift & Loan Ass'n* (1998) 17 Cal.4th 970, 976, the rule remains, "unchanged since 1872," and means that "[a] contractual provision imposing a 'penalty' is ineffective, and the wronged party can collect only the actual damages sustained." (*Perdue v. Crocker Nat'l Bank* (1985) 38 Cal.3d 913, 931.) "The characteristic feature of a penalty is its lack of proportional relation

to the damages which may actually flow from failure to perform under a contract." (*Ridgley*, *supra*, 17 Cal. 4th at 977 [quoting *Garrett v. Coast & Southern Fed. Sav. & Loan Assn.* (1973) 9 Cal.3d 731, 739].)

This rule has been enforced as between commercial parties. In *Ridgley*, the Court invalidated a "prepayment" charge, negotiated between sophisticated parties, because it could not "be defended as a reasonable attempt to anticipate damage from default." (*Ridgley, supra*, 17 Cal.4th at 981.) The *Ridgley* opinion expressly rejects the foundation upon which the Third District's decision rests, noting that the fact "plaintiffs are small business owners rather than consumers . . . does not deprive them of section 1671's protection against unreasonable penalties or of the right to relief from contractual forfeiture under section 3275." (*Id*. at 985.) *Ridgley*'s holding, that commercial parties are protected under Civil Code § 3275, finds support in the text of the statute; it contains no exception for commercial parties or negotiated provisions. The entirety of the Court of Appeal's analysis of this longstanding, still viable substantive provision of California law was to ignore *Ridgley* altogether and instead state: "It thus appears the *Grand Prospect* court equated an unenforceable penalty with a forfeiture within the meaning of Civil Code

section 3275. Based on the record before us, we decline to do the same." (Op. at p. 14.) That represents a tautology rather than reasoning.

Consider, for a moment, the outcome of *Grand Prospect* under the Third District's reasoning. In *Grand Prospect*, the commercially sophisticated parties extensively negotiated a lease where the co-tenancy provision allowed for rent in the amount of $0 if it was not satisfied. (*Grand Prospect*, *supra*, 232 Cal.App.4th at 1361.) If the Third District decided that case, apparently, because the provision was negotiated by commercial parties, there can be no penalty and § 3275 has no application. That is, the tenant in *Grand Prospect* could enjoy the fruits of a forfeiture because it induced a landlord to execute an abusively one-sided contract term. *Grand Prospect* recognized the absurdity of this result, and its opinion explains in extensive detail why California law precludes it.

There can be no question that, as understood in this Court's teachings, co-tenancy provisions may constitute penalty or forfeiture clauses. Rather than a liquidated damages provision, which would apply if there had been a contractual *breach*, most co-tenancy clauses, as with this one, assume the contract will continue. The co-tenancy provision exists to incentivize—and in cases where it is too onerous, to compel—a

landlord to undertake an act (re-renting an anchor space "or else") during the life of the agreement. That is exactly how a contractual penalty operates in this Court's description: "A penalty provision operates to compel performance of an act and usually becomes effective only in the event of default upon which a forfeiture is compelled without regard to the damages sustained by the party aggrieved by the breach." (*Garrett, supra,* 9 Cal.3d at 739 [citations omitted].) Here, for JJD, the "or else" is rent the available space for pennies on the dollar to simply satisfy the co-tenancy provision with Jo-Ann, or suffer $30,000 a month in loss, despite the fact that Jo-Ann suffers **none**.

Exempting co-tenancy clauses from penalty and forfeiture analysis does not greatly add to the predictability of their enforcement either. Under either framework—*Grand Prospect* or the Third District's here—the parties are required to reconstruct the negotiation that led to the lease's individual terms. The Third District's approach requires focus on questions of procedural unconscionability: are the parties sophisticated, were they represented by counsel, was there equal bargaining power? *Grand Prospect*'s approach seeks to evaluate more than the mere

existence of a negotiation, and focus on whether that negotiation represents a reasonable attempt to approximate damage.

It is also worth briefly mentioning that *Constellation-F*, a case on which the Court of Appeal relied, was a non-unanimous decision relating to holdover rent, an altogether different kind of contractual provision—as evidenced by JJD and Jo-Ann's lease having a separate holdover-rent clause. Holdover rent provides for an increased rent if the tenant stays beyond the lease term. This is categorically incomparable to a co-tenancy clause, in that the party suffering from the penalty when there is a holdover-rent increase (the tenant) can avoid the penalty by simply vacating the premises. JJD, the party suffering the penalty here, has no such choice and cannot control whether a tenant decides to lease space in its shopping center, particularly not when the space is tied up in bankruptcy court.

Presiding Justice Stratton's dissent in *Constellation-F* was also better reasoned than the majority. It argued the holdover-rent provision was an unenforceable penalty because "the undisputed evidence established that neither [landlord] nor [tenant] made any effort whatsoever to determine, together or separately, an estimate of

anticipated loss if [tenant] overstayed its lease." (*Constellation-F*, *supra*, 45 Cal.App.5th at 34.) And because the rental increase was not "based on what the parties to this particular lease might have estimated to be holdover damages," the increase served as a de facto forfeiture; "our case law mandates that a reasonable effort be made by the parties to a commercial lease to estimate anticipated damages in the event of a breach of contract. None was made here." (*Id.* at 38.)

Finally, retail lease agreements as a subset of commercial contracts more generally are a very poor candidate for allowing egregious forfeitures such as that involved in the present case. The physical retail leasing industry (colloquially, mall owners) is under enormous stress from online retailers, a stress made all the more acute by pandemics that make concentrations of people unwise. While each industry must change with the times and bear the risks of the future, an orderly transition rather than a wholesale collapse of the industry depends on incremental, fair progress. Giving national chain stores huge windfalls at the expense of local commercial landlords will have serious, unfortunate consequences for the California real estate market.

D. <u>The Court of Appeal's approach threatens whole areas of California business law.</u>

Unlike some other states, such as Nevada, Tennessee, and Oregon, each cited by the Court of Appeal, California believes in and has found great success in regulated capitalism rather than laissez-faire anything-goes approaches. (Op. at p. 8 n.3.) The Court of Appeal's willingness to disregard a provision of the Civil Code, applied by this Court to a commercial agreement in the not-too-distant past, with no textual basis or jurisprudential support means that a number of other business regulations are at risk.

Thus one now wonders—and commercial parties, who have the resources and often the dollar incentives to try out questionable legal theories in the hope of big returns—whether California's numerous other legislative and judicial policies are subject to attack. For example, is our "elaborate and interrelated set of foreclosure and anti-deficiency statutes relating to the enforcement of obligations secured by interests in real property" next to fall? (*Alliance Mortgage Co. v. Rothwell* (1995) 10 Cal.4th 1226, 1236.) They "were enacted as the result of 'the Great Depression and the corresponding legislative abhorrence of the all too common foreclosures and forfeitures [which occurred] during that era for

reasons beyond the control of the debtors.'" (*Ibid.*) The same kind of statute, the same kinds of parties. What will become of these rules?

So too can the question be asked of California's "strong public policy against agreements containing covenants not to compete," which are often extensively negotiated in other states. (Agreements Not To Compete, *Overview*, Cal. Civ. Prac. Business Litigation § 62:1.) Usurious loans, contracts resulting in unfair competition, discriminatory contracts—all of the laws governing such matters are now at risk. (*See generally id.* at § 58:8, 60:6, 63:17-18; *Hardwick v. Wilcox* (2017) 11 Cal.App.5th 975, 977.) Under the Third District's reasoning, can commercial parties contract to a discriminatory restrictive covenant in real estate? (*E.g., Broadmoor San Clemente Homeowners Assn. v. Nelson* (1994) 25 Cal.App.4th 1, 4.) What about including an illegal object or term in a real estate agreement? (*E.g.*, *MKB Mgmt., Inc. v. Melikian* (2010) 184 Cal.App.4th 796, 798.) A gambling wager between sophisticated parties is also unenforceable in this state. (*Kyne v. Kyne* (1940) 16 Cal.2d 436, 438.) As are contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for their own fraud or willful injury to person or property. (Civil Code § 1668.) May parties now try (again) to contract around the

disgorgement provisions of the Contractors' State License Law. (*Ahdout v. Hekmatjah* (2013) 213 Cal.App.4th 21, 37-40.) The list goes on. Even if some or all of these other areas survive renewed judicial scrutiny, there will be a period of instability while well-heeled commercial parties test the waters.

Now is not the time for the California courts to take California business law backwards. California law, like the law of all states to a greater or lesser extent, withdraws from private parties the right to make certain choices—whether they be commercial parties or not. It does so in service of the public interest, as determined by the Legislature. Upending fundamental, long-established principles of law duly enacted by the people's representatives based on judicial will rather than text or history, and all in the name of freedom of contract, does not serve the parties, the courts, or the public interest.

V.
CONCLUSION

For the reasons set forth, JJD respectfully requests that the Court grant its petition for review and set this case for full briefing and argument.

DATED: August 4, 2022

WHITNEY, THOMPSON & JEFFCOACH LLP

By: /s/ Jacob S. Sarabian
Marshall C. Whitney
Jacob S. Sarabian
Attorneys for JJD- ELK GROVE, LLC

CERTIFICATE OF COMPLIANCE PURSUANT TO CALIFORNIA RULES OF COURT RULE 8.504(d)(1)

Pursuant to California Rules of Court Rule 8.504(d)(1), I certify that according to Microsoft Word the attached brief is proportionally spaced, has a typeface of 13 points and contains 4,768 words.

DATED: August 4, 2022

WHITNEY, THOMPSON & JEFFCOACH LLP

By: */s/ Jacob S. Sarabian*
Marshall C. Whitney
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Attorneys for JJD- ELK GROVE, LLC

ATTACHMENT 1:

COURT OF APPEAL OPINION

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

JJD-HOV ELK GROVE, LLC, Plaintiff and Appellant, v. JO-ANN STORES, LLC, Defendant and Respondent.	C094190 (Super. Ct. No. 34-2019-00248163-CU-BC-GDS)

APPEAL from a judgment of the Superior Court of Sacramento County, Shama H. Mesiwala, Judge. Affirmed.

Whitney, Thompson & Jeffcoach, Marshall C. Whitney and Jacob S. Sarabian for Plaintiff and Appellant.

DLA Piper, Mark E. McKeen and Eva K. Schueller for Defendant and Respondent.

The issue in this case is whether a co-tenancy provision in a retail lease for space in a shopping center is enforceable.[1] The landlord is appellant JJD-HOV Elk Grove, LLC (JJD) and the tenant is respondent Jo-Ann Stores, LLC (Jo-Ann). The co-tenancy provision in the parties' lease requires the shopping center to have either (1) three anchor tenants or (2) 60 percent of the space leased, and, if it does not, JoAnn is permitted to pay "Substitute Rent."

In 2018, Jo-Ann informed JJD it intended to start paying Substitute Rent effective July 1, 2018, because the co-tenancy provision was not met after two anchor tenants closed. JJD responded that the co-tenancy provision was an unenforceable penalty under the holding in *Grand Prospect Partners, L.P. v. Ross Dress for Less, Inc.* (2015) 232 Cal.App.4th 1332 (*Grand Prospect*). Jo-Ann contended *Grand Prospect* was distinguishable and the co-tenancy provision was enforceable. JJD and Jo-Ann filed competing complaints for declaratory relief and cross-motions for summary judgment. The trial court found the co-tenancy provision was enforceable, and thus granted Jo-Ann's motion, denied JJD's, and entered judgment accordingly. JJD now appeals.

As we will explain in more detail below, we decline to follow the rule announced in *Grand Prospect* here, and instead hold that this case is governed by the general rule that courts enforce contracts as written. We therefore agree with the trial court's conclusion that the co-tenancy provision at issue in this case is enforceable, and will affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

As found by the trial court, the facts are largely undisputed. Indeed, the separate statements filed by the parties in support of their respective motions contain very similar facts.

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[1] The term is frequently spelled "cotenancy." We spell it co-tenancy because that is how the parties spell it.

JJD owns a shopping center in Elk Grove. In June 2003, JJD and Jo-Ann entered into a lease agreement pursuant to which Jo-Ann leased approximately 35,000 square feet of space in the shopping center.[2] The term of the lease was 10 years, commencing in September 2004, with four options to extend the term for five years each. "Fixed Minimum Rent" was initially $36,458 per month, and it increased every five years. At the time of the events giving rise to these lawsuits, Fixed Minimum Rent was $42,292 per month.

As relevant here, the lease contains a co-tenancy provision that provides, "To induce Tenant to enter into this Lease . . . Landlord represents that it has entered into or shall enter into binding leases . . . for the use and occupancy of *either*: (x) [three so-called 'anchor tenants' or comparable substitutes] . . . *or* (y) sixty percent (60%) or more of the gross leasable area of the Shopping Center (excluding the Premises)." (Italics added.) The co-tenancy provision must be met by tenants that are open for business. If the co-tenancy provision is not met, Jo-Ann "shall be obligated to pay only Substitute Rent" until it is met, and if the co-tenancy provision is not met for a period of six months, Jo-Ann has the option either to "continue its tenancy . . . subject to the obligation to pay only Substitute Rent until the satisfaction of the co-tenancy requirement," or to terminate the lease. Substitute Rent is the greater of 3.5 percent of Jo-Ann's gross sales (except pattern sales), or $12,000 per month, and is "in lieu of the Fixed Minimum Rent . . . required to be paid hereunder." The lease thus specifies two different rents: Fixed Minimum Rent and Substitute Rent. If the co-tenancy provision is met, Jo-Ann owes Fixed Minimum Rent, and if it is not met, Jo-Ann owes Substitute Rent.

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[2] The lease was executed by JJD's predecessor in interest (Elk Grove Marketplace, LLC, or EGM) and Jo-Ann's predecessor in interest (FCA of Ohio, Inc.). JJD became the successor in interest to EGM in 2007, and Jo-Ann became the successor in interest to FCA in 2014. Because neither party suggests this is relevant, this decision refers to the parties as JJD and Jo-Ann at all times.

The parties have produced very little evidence about the negotiations that led to the lease. What little evidence they have produced, however, demonstrates the co-tenancy provision was negotiated by the parties. The evidence shows that Jo-Ann initially proposed that Substitute Rent would be either 3 percent of sales or $2,000 per month, but that those amounts were ultimately increased to the amounts stated above (i.e., the greater of 3.5 percent of sales or $12,000 per month). The evidence also shows the parties discussed whether the percent alternative should be 60 percent, 70 percent, or 80 percent of gross leasable area, before ultimately agreeing to 60 percent. The parties also agreed to amend the co-tenancy provision. As originally executed, the anchor tenants were unidentified and would collectively occupy at least 72,000 square feet. Shortly after the lease was executed, the parties amended it to identify two of the three anchor tenants (Sports Chalet and Sacramento Food Cooperative) and to decrease the anchor tenants' square footage to 68,000.

Jo-Ann invoked the co-tenancy provision twice prior to the events giving rise to these lawsuits. For several months in late 2004/early 2005, Jo-Ann paid Substitute Rent until all three anchor tenants were open for business. Then, in 2007, a dispute arose over whether Jo-Ann had a right to pay Substitute Rent after Sacramento Food Cooperative was replaced by Grocery Outlet. The dispute centered around whether Grocery Outlet was a comparable substitute tenant, not whether the co-tenancy provision was enforceable. JJD filed a complaint for declaratory relief against Jo-Ann regarding whether the Substitute Rent provision was triggered. The complaint acknowledged that the lease provides Jo-Ann is entitled to pay Substitute Rent if JJD failed to meet its co-tenancy obligations. The parties ultimately settled their dispute by an agreement that stated neither party waived their respective contentions regarding how the co-tenancy provision was defined or satisfied.

The present dispute arose on July 5, 2018, when Jo-Ann informed JJD it intended to start paying Substitute Rent effective July 1, 2018, because the co-tenancy provision

was not met after two anchor tenants (Sports Chalet and Toys R Us) closed. Sports Chalet closed in mid-2016, and Toys R Us closed June 30, 2018. It appears it was the closure of Toys R Us that brought the shopping center's occupancy to below 60 percent, which, according to Jo-Ann, triggered its right to pay Substitute Rent. JJD has proffered facts and submitted evidence that shows Jo-Ann paid Substitute Rent for approximately 20 months between June 1, 2018, and May 26, 2020. On May 26, 2020, Scandinavian Designs opened in the former Toys R Us space. Jo-Ann returned to paying Fixed Minimum Rent once Scandinavian Designs opened.

JJD contends the co-tenancy provision in the lease is an unenforceable penalty in light of *Grand Prospect, supra*, 232 Cal.App.4th 1332, and it filed a complaint against Jo-Ann for declaratory relief and breach of contract. It requested a judicial declaration that the co-tenancy provision is an unenforceable penalty and Jo-Ann is thus obligated at all times to pay Fixed Minimum Rent, and money damages for unpaid rent. It states that as of January 5, 2021, Jo-Ann owed it $638,293 in rent (assuming the co-tenancy provision is unenforceable and Jo-Ann at all times owed Fixed Minimum Rent), and Jo-Ann does not dispute the amount (although it does dispute whether it owes the amount). Jo-Ann filed a cross-complaint against JJD seeking a judicial declaration that the co-tenancy provision is valid and enforceable.

The parties filed cross-motions for summary judgment, with JJD arguing the co-tenancy provision is an unenforceable penalty and Jo-Ann arguing the opposite. The trial court ruled in Jo-Ann's favor. It held *Grand Prospect* was distinguishable and JJD's reliance on it was misplaced. It also held the co-tenancy provision did not impose damages for breach of contract but instead simply provided for a different rent structure or alternative rent payments in the event certain contingencies (e.g., reduced occupancy of the shopping center) occurred. The trial court thus held the co-tenancy provision in the parties' lease was enforceable. JJD timely appealed.

DISCUSSION

I

Standard of Review

A party is entitled to summary judgment "if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c).) "We review a grant of summary judgment de novo; we must decide independently whether the facts not subject to triable dispute warrant judgment for the moving party as a matter of law." (*Intel Corp. v. Hamidi* (2003) 30 Cal.4th 1342, 1348.) " 'Where a motion for summary judgment has been granted and there is a sufficient ground to support the judgment entered thereon, it will be upheld regardless of the grounds on which the trial court based its decision.' " (*Troche v. Daley* (1990) 217 Cal.App.3d 403, 407; see also *Airlines Reporting Corp. v. Renda* (2009) 177 Cal.App.4th 14, 21 ["we review the judgment, not the rationale, and may affirm if the judgment is correct on any theory"].)

Whether a contractual provision is unenforceable is a question of law that is determined by the trial court. (*Grand Prospect, supra*, 232 Cal.App.4th at p. 1354.) As a question of law, the trial court's determination is subject to de novo review on appeal, "but the factual foundation for appellate review consists of (1) the facts that are not in dispute and (2) the facts that are established by viewing the conflicting evidence in the light most favorable to the trial court's judgment." (*Id*. at p. 1355.) The trial court found the facts in this case are undisputed, and neither party suggests otherwise.

II

Analysis

A. Overview of Co-tenancy Provisions

"A cotenancy clause conditions a retail tenant's opening for business, or continuing operation of its business at the designated premises, on the opening for business or continued operation by other tenants in the shopping center." (Retail

Leasing: Drafting and Negotiating the Lease (Cont.Ed.Bar 2021 supp.) Cotenancy Requirements, § 7.1 (Retail Leasing).) "Cotenancy requirements are generally found only in retail leases." (*Ibid*.) "The need for a cotenancy provision in a retail lease arises because of the effect that anchor tenants have on a shopping center. Anchor tenants attract customers to the shopping center. The financial viability of a shopping center depends on having desirable anchor tenants. Nearly all shopping centers have at least one anchor tenant. Cotenancy provisions may also require a specified level of occupancy by the non-anchor tenants. No retail tenant wants to be stuck in a shopping center filled with vacant stores. A cotenancy provision provides the tenant with rent abatement and perhaps a right to terminate the lease when the cotenancy provision is violated." (5 Thompson on Real Property (3rd Thomas Ed. 2022 supp.) § 44.14(b)(1), fns. omitted.)

"A cotenancy provision is typically entered into after lengthy negotiations between the landlord and the tenant. These are typically sophisticated parties who are well-represented by their attorneys. The facts and circumstances regarding the desirability of the premises and the bargaining strength of the parties plays a major role in the drafting of the provision." (5 Thompson on Real Property, *supra*, § 44.14(b)(2).)

"The major points covered by cotenancy provisions are (1) the specific named cotenants and level of occupancy required, (2) any right the landlord has to cure failures to meet a cotenancy requirement, and (3) the tenant's remedies if a cotenancy failure occurs. (1 Retail Leasing, *supra*, § 7.1, p. 7-2.) These three major points can be resolved by the landlord and tenant in many different ways. Consequently, there is no standard form of cotenancy requirements." (*Grand Prospect, supra*, 232 Cal.App.4th at p. 1343.)

At least prior to *Grand Prospect*, it appears that co-tenancy provisions have generally been assumed by the parties and found by the courts to be valid and enforceable. (See, e.g., Retail Leasing, *supra*, § 7.23 ["Before *Grand Prospect Partners* . . . , a well-recognized remedy for the failure of a cotenancy requirement was for the tenant to abate or reduce the amount of rent it was required to pay"].) According to a

treatise on real property, "[c]ourts generally appear to enforce cotenancy provisions when called upon to do so. There are relatively few reported court decisions addressing the validity of these provisions. Given the large number of retail leases containing these provisions it appears that these provisions function as the parties intend them to." (5 Thompson on Real Property, *supra*, § 44.14(b)(4), fn. omitted.)[3]

B. The Grand Prospect Decision

JJD relies on a rule announced in *Grand Prospect* in arguing that the co-tenancy provision in the parties' lease is an unenforceable penalty because of the lack of a proportional relationship between the forfeiture compelled and the damages or harm that might actually flow from the failure to perform a covenant or satisfy a condition. *Grand Prospect* involved a co-tenancy provision in a retail lease between the owner of a shopping center (the landlord) and Ross Dress for Less (Ross). The lease was for a 10-year term with four 5-year renewal options (like the lease in this case). Rent was approximately $39,500 per month and would increase every five years. (*Grand Prospect, supra*, 232 Cal.App.4th at pp. 1338-1340.) The co-tenancy provision required Mervyn's to be open for business on the date Ross's lease commenced, and if it was not, Ross was

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[3] Cases from other states upholding co-tenancy provisions include *Boca Park Marketplace Syndications Grp., LLC v. Ross Dress for Less, Inc.* (D.Nev. June 20, 2019, 2:16-cv-01197-RFB-PAL) 2019 U.S. Dist. Lexis 103985 (enforcing provision allowing tenant to pay "Substitute Rent" of 2 percent of gross sales in lieu of "Minimum Rent" if co-tenancy requirement not met); *Kleban Holding Co., LLC v. Ann Taylor Retail, Inc.* (D.Conn. Nov. 26, 2013, 3:11-CV-01879 (VLB)) 2013 U.S. Dist. Lexis 168231 (enforcing co-tenancy provision allowing tenant to pay reduced rent of 5 percent of gross sales if either Borders or 50 percent of other retail space in mall were not open); *Hickory Grove, LLC v. Rack Room Shoes, Inc*. (E.D.Tenn. May 21, 2012, 1:10-cv-290) 2012 U.S. Dist. Lexis 70353 (enforcing co-tenancy provision allowing tenant to pay reduced rent of 4 percent of gross sales if various co-tenancy requirements failed); and *Old Navy, LLC v. Ctr. Devs. Oreg, LLC* (D.Or. June 13, 2012, 3:11-472-KI) 2012 U.S. Dist. Lexis 82579 (enforcing co-tenancy provision allowing tenant to pay "Alternate Rent Remedy" equal to lesser of 2 percent of gross sales if co-tenancy requirement not met and finding "the Alternate Rent Remedy is not a liquidated damages provision").

not required to open for business and it owed no rent; the court referred to this as the rent abatement provision. (*Id*. at pp. 1340, 1344-1345.) The co-tenancy provision also gave Ross the option to terminate the lease if the Mervyn's space remained vacant for 12 months; the court referred to this as the termination provision. (*Id*. at p. 1345.) Mervyn's never opened, and its space remained vacant for 12 months. (*Id*. at p. 1341.) Ross opted not to open a store or pay any rent, and it terminated the lease at the end of the 12-month period. (*Ibid*.) The landlord filed a complaint seeking a judicial declaration that the co-tenancy provision was unenforceable and damages for unpaid rent, future rent for the full term of the lease, and expenditures on tenant improvements. The case proceeded to a jury trial. The trial court determined the co-tenancy provision was both unconscionable and an unenforceable penalty and struck those provisions from the lease, and the jury thereafter awarded the landlord over $3.7 million in damages. (*Id*. at p. 1342.) Ross appealed, and the appellate court affirmed in part and reversed in part.

On appeal, the appellate court first held the co-tenancy provision could not be invalidated on unconscionability grounds because there was no oppression or inequality in bargaining power.[4] (*Grand Prospect, supra*, 232 Cal.App.4th at pp. 1347-1348, 1352-1354.) It then turned to whether the co-tenancy provision was an unenforceable penalty.

After canvassing California case law on penalties, the *Grand Prospect* court held: "Under California law, the characteristic feature of a penalty is the lack of a proportional relationship between the forfeiture compelled and the damages or harm that might actually flow from the failure to perform a covenant or satisfy a condition. (*Ridgley v. Topa Thrift & Loan Assn.* (1998) 17 Cal.4th 970, 977.) In other words, an unenforceable penalty 'bears no reasonable relationship to the range of actual damages the parties could have anticipated would flow' from a breach of a covenant or a failure of a condition.

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[4] JJD does not raise an unconscionability argument here.

(*Greentree Financial Group, Inc. v. Execute Sports, Inc.* (2008) 163 Cal.App.4th 495, 497.) [¶] Therefore, the general rule for whether a contractual condition is an unenforceable penalty requires the comparison of (1) the value of the money or property forfeited or transferred to the party protected by the condition to (2) the range of harm or damages anticipated to be caused that party by the failure of the condition. If the forfeiture or transfer bears no reasonable relationship to the range of anticipated harm, the condition will be deemed an unenforceable penalty." (*Grand Prospect, supra*, 232 Cal.App.4th at p. 1358.)

After announcing the general rule, the *Grand Prospect* court proceeded to separately analyze the rent abatement provision and the termination provision. It concluded the termination provision was enforceable and Ross could rely on it to terminate the lease 12 months after it commenced. (*Grand Prospect, supra*, 232 Cal.App.4th at p. 1367.) However, it also concluded the rent abatement provision was an unenforceable penalty. (*Id*. at pp. 1361-1365.)

Applying the general rule it announced, the court found that because Ross was not required to pay any rent, the value of the property forfeited by the landlord was the full monthly rent specified in the lease, which amounted to approximately $39,500 per month. (*Grand Prospect, supra*, 232 Cal.App.4th at pp. 1361-1362.) As for the harm anticipated, the court noted the trial court explicitly found " 'Ross did not anticipate any damage, *i.e.*, lost sales or profits, if or because Mervyn's would not be open on the Commencement Date' " of the lease, and Ross did not challenge this finding. (*Id*. at p. 1362; see *id.* at pp. 1362-1363.) The *Grand Prospect* court agreed with the trial court's determination that there was no reasonable relationship between the value of the property forfeited by Grand Prospect ($39,500 per month) and the anticipated harm to Ross ($0 per month). The *Grand Prospect* court also agreed with the trial court's conclusion that the rent abatement provision was an unenforceable penalty. (*Id*. at p. 1365.)

C. Civil Code Section 1671

When discussing the test for determining whether a co-tenancy provision is an unenforceable penalty, the *Grand Prospect* court cited almost exclusively to cases interpreting Civil Code sections 1670 and 1671,[5] but it did not cite or analyze those statutory sections. (*Grand Prospect, supra*, 232 Cal.App.4th at pp. 1346, 1355-1358.)

Civil Code section 1671 states, "a provision in a contract liquidating the damages for the breach of the contract is valid unless the party seeking to invalidate the provision establishes that the provision was unreasonable under the circumstances existing at the time the contract was made." (Civ. Code, § 1671, subd. (b).) " 'The term "liquidated damages" is used to indicate an amount of compensation to be paid in the event of a breach of contract, the sum of which is fixed and certain by agreement, and which may not ordinarily be modified or altered when damages actually result from nonperformance of the contract.' " (*McGuire, supra*, 220 Cal.App.4th at p. 521.) A liquidated damages provision that is deemed invalid and thus unenforceable pursuant to Civil Code section 1671 is called a "penalty." (*Garrett v. Coast & Southern Fed. Sav. & Loan Assn., supra*, 9 Cal.3d. at p. 736, fn. 4; *Blank v. Borden, supra*, 11 Cal.3d at p. 969, fn. 4.) By its terms, Civil Code section 1671 only applies to "a provision in a contract liquidating the damages for the breach of the contract." (Civ. Code, § 1671, subd. (a).)

There was no suggestion by the *Grand Prospect* court that the failure of Mervyn's to open resulted in a breach of the lease by the landlord. The *Grand Prospect* court found, however, that "a contract provision triggered by one or more *conditions precedent*

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[5] Those cases include, in the order in which they are cited, *Beasley v. Wells Fargo Bank* (1991) 235 Cal.App.3d 1383; *Harbor Island Holdings v. Kim* (2003) 107 Cal.App.4th 790; *Garrett v. Coast & Southern Fed. Sav. & Loan Assn.* (1973) 9 Cal.3d 731; *McGuire v. More-Gas Investments, LLC* (2013) 220 Cal.App.4th 512 *(McGuire*); *Fox Chicago R. Corp. v. Zukor's* (1942) 50 Cal.App.2d 129; *Blank v. Borden* (1974) 11 Cal.3d 963; *Ridgley v. Topa Thrift & Loan Assn., supra*, 17 Cal.4th 970; and *Greentree Financial Group, Inc. v. Execute Sports, Inc., supra*, 163 Cal.App.4th 495.

can be deemed a penalty under California law," and that "it is possible for a *condition precedent* to operate as a penalty." (*Grand Prospect, supra*, 232 Cal.App.4th at p. 1355, italics added.) " '[A] condition precedent is either an act of a party that must be performed or an uncertain event that must happen before the contractual right accrues or the contractual duty arises.' [Citations.]" (*JMR Construction Corp. v. Environmental Assessment & Remediation Management, Inc*. (2015) 243 Cal.App.4th 571, 593.) The *Grand Prospect* court thus appears to have concluded the rent abatement portion of the co-tenancy provision was triggered by a condition precedent, or, to borrow the language of the case just quoted, that the shopping center's occupancy by other tenants was an "uncertain event that must happen before the contractual right [to full rent] accrues." (*Ibid*.)

The *Grand Prospect* court also noted "the Legislature has directed California courts to put substance before form. Civil Code section 3528 states: 'The law respects form less than substance.' " (*Grand Prospect, supra*, 232 Cal.App.4th at p. 1356.) The *Grand Prospect* court thus appears to have concluded that the co-tenancy provision in the parties' lease was *substantively equivalent* to a liquidated damages provision, even if it was not formally a liquidated damages provision, and that it was thus appropriate to determine the provision's enforceability using the rules developed in cases interpreting Civil Code section 1671.

We decline to follow the rule announced in *Grand Prospect* that a co-tenancy provision reducing rent if a specified condition occurs (e.g., if an anchor tenant is not open or if occupancy drops below a certain level) is an unenforceable penalty unless the reduction has a reasonable relationship to the harm the parties anticipated would be caused thereby. We do so because the rule is based on Civil Code section 1671, a statute governing the enforceability of contract provisions liquidating damages for breach of contract, and we find that statute to be inapplicable to the facts of this case because there

is no suggestion that reduced occupancy in the shopping center resulted in JJD's breach of the parties' agreement.[6]

D. Civil Code Section 3275

JJD argues that the co-tenancy provision should be viewed under the general law regarding forfeiture, and it cites Civil Code Section 3275, stating it supplies "the law" and the "general rule" "governing contractual penalty provisions in California." Other than quoting Civil Code section 3275, both in its brief and at oral argument, JJD never discusses that statute or explains its applicability to this case. Moreover, it was not cited in the trial court by the parties, or in the trial court's decision.

The *Grand Prospect* court briefly discussed Civil Code section 3275, which provides, "Whenever, by the terms of an obligation, a party thereto incurs a forfeiture, or a loss in the nature of a forfeiture, by reason of his failure to comply with its provisions, he may be relieved therefrom, upon making full compensation to the other party, except in case of a grossly negligent, willful, or fraudulent breach of duty." The court in *Grand Prospect* held, "if a conditional provision in a contract constitutes an illegal penalty, then the affected party 'incurs a forfeiture' for purposes of Civil Code section 3275 and 'may be relieved therefrom.' (Civ. Code, § 3275.) [¶] Therefore, the trial court did not err when it applied Civil Code section 3275 to the rent abatement provision in the Lease."

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6 We do *not* hold that a co-tenancy provision can never be an unenforceable penalty. If a particular co-tenancy provision is "a provision in a contract liquidating damages for the breach of the contract" within the meaning of Civil Code section 1671, then it may be found to be an unenforceable penalty if "the party seeking to invalidate [it] establishes [it] was unreasonable under the circumstances existing at the time the contract was made." (Civ. Code, § 1671, subd. (b).) Here, we hold only that Civil Code section 1671 does not apply *in this case* because no one suggests this particular co-tenancy provision is a provision liquidating damages for breach of the parties' agreement. Indeed, JJD conceded at oral argument that the failure of the co-tenancy provision was not a breach of the lease and also conceded that Civil Code section 1671 therefore does not apply to the facts of this case.

(*Grand Prospect, supra*, 232 Cal.App.4th at p. 1365.) It thus appears the *Grand Prospect* court equated an unenforceable penalty with a forfeiture within the meaning of Civil Code section 3275. Based on the record before us, we decline to do the same.

E. The Co-tenancy Provision is Valid and Enforceable

Finding the rule announced in *Grand Prospect* to be inapplicable here, we go on to conclude that this case is governed by the rule posited by Jo-Ann: "[T]he parties' contractual intent when reduced to writing should be controlling and enforced, particularly as applied to the commercial leasing market in arms-length negotiations and transactions."[7]

As a general rule, " 'It is not the province of the Court to alter a contract by construction or to make a new contract for the parties; its duty is confined to the interpretation of the one which they have made for themselves, and, in the absence of any ground for denying enforcement, to enforcing or giving effect to the contract as made, that is, to enforce or give effect to the contract as made without regard to its wisdom or folly, to the apparent unreasonableness of its terms, or to the fact that the rights of the parties are not carefully guarded as the court cannot supply material stipulations or read into the contract words which it does not contain so as to change the meaning of the words contained in the contract.' " (*Estate of Bodger* (1955) 130 Cal.App.2d 416, 425.) The general rule applies even if a contract gives one party what might appear to be an unfair windfall: "We shall assume for argument's sake that [one party to a contract] has enjoyed great good luck over against the [other party]. But the pertinent [contracts] provide what they provide. [The parties] were generally free to contract as they pleased.

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[7] JJD acknowledges this is an accurate statement of the law, but it notes the rule that contracts are enforceable as written is subject to exceptions and limitations. Although this is true, the exception that it posits—i.e., the rule in *Grand Prospect*—is one we find inapplicable for the reasons just stated, which means we return to the general rule.

[Citation.] They evidently did so. They thereby established what was 'fair' and 'just' inter se. We may not rewrite what they themselves wrote. [Citation.] We must certainly resist the temptation to do so here simply in order to adjust for chance—for the benefits it has bestowed on one party without merit and for the burdens it has laid on others without desert." (*Aerojet-General Corp. v. Transport Indemnity Co.* (1997) 17 Cal.4th 38, 75; see also *Third Story Music, Inc. v. Waits* (1995) 41 Cal.App.4th 798, 809 [" 'The courts cannot make better agreements for parties than they themselves have been satisfied to enter into or rewrite contracts because they operate harshly or inequitably' "].)

JJD argues this is one of those cases that is not governed by the general rule, and that this court should deny enforcement of the co-tenancy provision in the parties' contract. We disagree.

In this regard, and like the trial court, we find *Constellation-F, LLC v. World Trading 23, Inc.* (2020) 45 Cal.App.5th 22 (*Constellation-F*) is instructive. JJD argues *Constellation-F* is inapplicable because it involved a holdover rent provision rather than a co-tenancy provision. This is true but not dispositive. The challenged provision in *Constellation-F* was in a commercial lease for warehouse space. The lease provided base rent would increase by 150 percent if the tenant remained after the lease expired. Such a provision is known as a holdover rent provision. The tenant did not move out after the lease expired, and the landlord filed a lawsuit seeking damages for past due rent at the holdover rate. (*Id.* at p. 25.) The trial court ruled the holdover rent provision was an unenforceable penalty. The landlord appealed, and the appellate court reversed. (*Id.* at p. 26.) Among other things, the appellate court held that Civil Code section 1671 was inapplicable because it only applied to contractual provisions that attempted to set damages for breach of contract. The holdover rent provision, in contrast, did not set damages for breach of contract. Instead, it provided two different rental rates, or what the court referred to as a " 'graduated rental.' " (*Constellation-F, supra*, 45 Cal.App.5th at p. 26.) One rate applied during the term of the lease (base rent) and the other applied

after the lease expired (base rent increased by 150 percent). According to the court, "Graduated rentals are not damages. A graduated rental is the rate for leasing the property. By its terms, then, Civil Code section 1671 did not apply to the holdover rent provision." (*Constellation-F*, at p. 27.)

The trial court appears to have viewed the co-tenancy provision in this case similarly when it stated, "the Lease's co-tenancy provisions . . . do not reflect 'damages' but instead reflect terms for a different rent structure in the event certain contingencies occur." We agree. Like the lease in *Constellation-F*, the lease in this case establishes two different rents: Fixed Minimum Rent and Substitute Rent. Fixed Minimum Rent is the rate if the co-tenancy provision is satisfied, and Substitute Rent is the rate if it is not. And like the holdover rent provision in *Constellation-F*, the co-tenancy provision in this case does not fix damages for breach of the lease or the failure of a condition, and its enforceability is thus not governed by Civil Code section 1671.

The trial court also cited *McGuire, supra*, 220 Cal.App.4th 512 for a similar proposition. Although it also did not involve a co-tenancy provision, *McGuire* is also instructive. In that case, the plaintiffs contracted to purchase two lots from the defendant for $1.05 million. The purchase agreement provided that three neighboring lots would not be permitted to build any structure within 900 feet of an access road, and that the defendant would take any steps necessary to amend the covenants, conditions, and restrictions (CC&Rs) to ensure the neighboring lots would not be permitted to build such structures. The purchase agreement also provided the defendant would refund the plaintiffs $80,000 from the purchase price if it was unable to amend the CC&Rs within two months of the close of escrow. Escrow closed, and the defendant failed to amend the CC&Rs within two months. The plaintiffs demanded a $80,000 refund, the defendant refused, and the plaintiffs sued to recover that amount. (*Id.* at pp. 514-515, 519.) The defendant moved for summary judgment on the ground that the $80,000 refund provision was an unenforceable penalty rather than a valid liquidated damages provision. The trial

court agreed and granted the motion, the plaintiffs appealed, and the appellate court reversed. After surveying the law of liquidated damages and Civil Code section 1671, the court stated, "It is important to recognize . . . that a provision in a contract that appears at first glance to be either a liquidated damages clause or an unenforceable penalty provision may instead merely be a provision that permissibly calls for alternative performance by the obligor. 'A contractual provision that merely provides an option of alternative performance of an obligation does not impose damages and is not subject to section 1671 limitations.' [Citation.] Thus, notwithstanding the limitations on liquidated damages clauses provided in Civil Code section 1671, the courts 'recognize . . . the validity of provisions varying the acceptable performance under a contract upon the happening of a contingency.' " (*McGuire, supra*, 220 Cal.App.4th at pp. 522-523.) In other words, like *Constellation-F*, *McGuire* supports the conclusion that the co-tenancy provision in this case does not liquidate damages or impose a penalty for breach of contract or the failure of a condition, and that Civil Code section 1671 and the line of cases interpreting it do not apply. Instead, the co-tenancy provision simply varies the rent owed by Jo-Ann based on the shopping center's occupancy. If three anchor tenants are open for business or if 60 percent of the space is occupied, then Fixed Minimum Rent is owed; if not, then Substitute Rent is owed. And according to *McGuire* and *Constellation-F*, a contractual provision that provides for alternative performance or different rents is valid.

Although it is not binding on us, at least one other case has interpreted a co-tenancy provision as a valid and enforceable "dual" or "alternative" rent provision rather than an unenforceable penalty, and we find this analysis persuasive. In *Boca Park Marketplace Syndications Grp., LLC v. Ross Dress for Less, Inc., supra*, 2019 U.S. Dist. Lexis 103985, the co-tenancy clause required that 60 percent of the space in the shopping center would be occupied, and if it was not, the tenant's "base rent" obligation would be replaced by "substitute rent" equal to 2 percent of its gross sales. (*Id.* at p. *8.) As in this

case, the co-tenancy clause was triggered by another tenant's bankruptcy, and the tenant began paying substitute rent. (*Id*. at p. *9.) We are told that substitute rent "is approximately $12,000 per month, though it varies month to month. The payment of 2% monthly gross sales results in a significantly reduced rent payment from what [the tenant] would otherwise pay for rent." (*Id.* at p. *10.) As in this case, the landlord argued the co-tenancy provision imposed liquidated damages and constituted an unenforceable penalty. The court disagreed, for three related reasons. First, the lease did not require other tenants to be open and operating, and the closure of a tenant thus did not constitute a breach of contract. Instead, the lease established "two alternate rent schemes." (*Id*. at pp. *11-12.) Second, "the parties knowingly adopted a substitute rent amount understanding that it would be lower than the rent amount that [the tenant] would pay if the clause was not triggered. The parties reached such an agreement because it was mutually believed and understood that the value of the lease space to [the tenant] would be less if the other specified tenants were not co-tenants . . . in the shopping center." (*Id*. at p. *12.) And third, "the parties negotiated and agreed to a dual rent provision and not a liquidated damages provision." (*Ibid*.) The *Boca Park* court concluded as follows: "The parties negotiated and agreed to the relative value of the property to [the tenant] dependent on various states of tenancy and occupancy in the Shopping Center. Both parties are sophisticated corporations and both parties were represented by counsel in the negotiation and execution of the lease. They understood that they were negotiating and agreed to a contract with different benefits and risks for each party." (*Id*. at p. *13.)

So, too, in this case. The parties negotiated the lease with the help of counsel. They agreed to two different rental rates based on different types and levels of occupancy in the shopping center. They agreed the co-tenancy provision could be satisfied by either three anchor tenants or 60 percent of the shopping center's space leased. They agreed if the co-tenancy provision was not satisfied, Jo-Ann could pay Substitute Rent. They agreed that Substitute Rent would be the greater of $12,000 or 3.5 percent of sales. All of

these terms were actively negotiated and there is no suggestion that either party was unaware of or did not understand any portion of the co-tenancy provision. The parties thus considered the risk of reduced occupancy in the shopping center, and agreed Jo-Ann would pay Substitute Rent if that risk occurred.

"Contracts are, by their very nature, allocations of risk and responsibility as between the parties." (*Southern California School of Theology v. Claremont Graduate University* (2021) 60 Cal.App.5th 1, 10.) In this case, we find that the parties considered and agreed to allocate the risk of reduced occupancy to JJD, and agreed JJD would receive substantially reduced rent if that risk occurred. JJD has received precisely the Substitute Rent it agreed to receive, and we find no basis for relieving JJD from the burden of its agreement.

DISPOSITION

The judgment is affirmed and Jo-Ann shall recover its costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1), (2).)

EARL, J.

We concur:

HOCH, Acting P. J.

KRAUSE, J.

IN THE

Court of Appeal of the State of California

IN AND FOR THE

THIRD APPELLATE DISTRICT

MAILING LIST

Re: JJD-Hov Elk Grove, LLC v. Jo-Ann Stores, LLC
C094190
Sacramento County
No. 34201900248163CUBCGDS

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PROOF OF SERVICE

JJD-HOV ELK GROVE v. JO-ANN STORES, LLC
Case No. 34-2019-00248163

STATE OF CALIFORNIA, COUNTY OF FRESNO

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Fresno, State of California. My business address is 970 W. Alluvial Ave., Fresno, CA 93711.

On August 4, 2022, I served true copies of the following document(s) described as **PETITION FOR REVIEW** on the interested parties in this action as follows:

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

Executed on August 4, 2022, at Fresno, California.

/s/ Rebeccah Leal
Rebeccah Leal