1 of 2 DOCUMENTS

In Re Marriage of: ELENA FELDMAN, Petitioner and Respondent, and AARON FELDMAN, Respondent and Appellant.

Case No. 4<th> Civ. D-047896

COURT OF APPEAL OF CALIFORNIA

2006 CA App. Ct. Briefs 47896; 2007 CA App. Ct. Briefs LEXIS 1306

February 14, 2007

San Diego Superior Court Case No. D-479546. ON APPEAL FROM THE SUPERIOR COURT OF SAN DIEGO COUNTY. HONORABLE RANDA TRAPP, JUDGE.

Reply Brief: Appellant-Petitioner

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Attorney for Appellant, AARON FELDMAN.

TITLE: APPELLANT'S REPLY BRIEF

TEXT: [*1] **INTRODUCTION**

This case turns on the interpretation and reasonable application of the Family Code fiduciary duty and disclosure statutes. The case provides this Court with the opportunity to interpret the fiduciary duty and disclosure statutes, defining the parameters of reasonable disclosure, clarifying the disclosure duties of the spouse who manages the family business, and determining when it is appropriate to impose monetary sanctions or attorney's fees under the statutes.

Appellant submits here and in his Appellant's Opening Brief that the trial court misinterpreted the disclosure and fiduciary duty statutes; that the evidence does not support the factual basis for imposing the sanctions and attorney's fee order, and that imposition of the sanctions and attorney's fees orders was an abuse of discretion.

The decision of this Court will be of interest to bench and bar alike.

[*2] **STATEMENT OF FACTS**

Appellant Aaron Feldman ("Aaron" n1) includes this Statement of Facts to reply to the factual omissions in the Respondent's Brief and to clarify certain of Respondent's factual [**8] statements.

n1 Appellant will continue to use the first names of the parties, consistent with the Appellant's Opening Brief. (See, also, *Marriage of Smith (1990) 225 Cal.App.3d 469, 475, fn. 1.)*

General Comments About the Respondent's Factual Discussion

Aaron is a real estate investor: he invests in land and in real-estate related projects. [Appellant's Appendix, pages 711-712 ("A.A. 711-712"); and see Appellant's Opening Brief, pages 2-4 ("A.O.B.., pages 2-4").] All of his real estate holdings and projects are collectively known as Sunroad Enterprises. [Clerk's Transcript, page 289 ("C.T. 289").] Structurally, each project of Sunroad Enterprises is a separate entity [A.A. 591, 593, 651:18-652:1, 710-712], and the entities are held by a corporation named Sunroad Holding Corporation ("Sunroad Holding" or "Sunroad"). [A.A. 308 (deposition page 99:21-1), 591.] Aaron is the sole owner of Sunroad Holding. [C.T. 111; A.A. 308, 312 (deposition page 114:1-3]

Throughout the Respondent's [**9] Brief, Respondent Elena Feldman ("Elena") confuses Aaron with the corporation, Sunroad Holding, using the [*3] names Aaron and Sunroad interchangeably. Yet there were no allegations or evidence that Sunroad Holding is the alter ego of Aaron or that Sunroad Holding is not a bonafide corporation. Further, the evidence was consistent that Sunroad Holding was a valid, functioning corporation and had been so since 1991. [C. T. 111; A.A. 308, 312, 315, 319.]

In her underlying motion for breach of fiduciary duties, which gave rise to the attorney's fees award which is the subject of this appeal, Elena alleged thirteen different breaches. Amongst those breaches was the allegation that Aaron had not disclosed the existence of certain entities and partnerships held by Sunroad Holding in his personal Statement of Assets and Debts filed on November 24, 2003. [C.T. 19-21; A.A. 5-9.] The trial court based its sanction award on four specific acts, including "... ***the addition of new companies,*** ... ." [Reporter's Transcript, page 80, line 25-page 81, line 5 ("R.T. 80:25-81:5"); C.T. 577.]

In Appellant's Opening Brief, Aaron responded to each of the thirteen alleged breaches separately. [**10] This critical "addition of new companies" allegation was "Alleged Breach 4." [See A.O.B., page 12.] (Aaron devoted two pages to discussing this Alleged Breach 4. [See A.O.B., pages 12-14.]) In contrast, Elena broadly labeled "Breach No. 4" as "Aaron's Failure to Disclose All His Corporate and Partnership Interests" and thereunder discussed a number of allegations involving Sunroad Enterprises but [*4] unrelated to the allegedly undisclosed new companies. [See Respondent's Brief ("R.B."), pages 18-24.] Under Elena's presentation of the breaches, several alleged breaches which were not addressed by the court as eased into Breach 4, which Aaron defines as "Failure to Disclose Sunroad's Formation of Entities" and which the court called "the addition of new companies." [R.T. 80-81; C.T. 577-579.]

To assist this Court in reviewing the alleged breaches, notwithstanding the different numbering by the parties, and to illustrate the significance of the different categories, Aaron presents the following chart:

[*5] **Summary Chart of Each Party's Listing of the Alleged Breaches**

Aaron's Discussion of Alleged Breaches		Elena's No. Assigned to the Breach	Comments	See A.O.B. Chart, page no.
No.	Alleged Breach			
1	Israel Bond/Bank loan	1	Same	23
2	401(k) account	2	Same	23
3	Calumet House	3	Same	23
4	Failure to Disclose the Formation of Sunroad Entities	4 (R.B. 18)	Elena joins all of the following breaches as one unit	

Aaron's Discussion of Alleged Breaches		Elena's No. Assigned to the Breach	Comments	See A.O.B. Chart, page no.
No.	Alleged Breach			
			entitled, "Aaron's Failure to Disclose All His Corporate and Partnership Interests."	
		4F (R.B. 23)	Failure to Disclose Sunroad's Formation of Entities	
5	Sunroad Financial Plaza Partners, LP	4A (R.B. 18-20)		23
6	Chula Vista Property	4C (R.B. 21-22)	"Borst" property	23
7	Investment in Mexico City	4B (R.B. 20-21)	Had not been listed in the moving papers as an omitted entity.	23
8	Centrum Property listing for sale	4D (R.B. 22)	Not related to "adding new entities."	23
9	Potential merger/acquisition of automotive dealership	4E (R.B. 22-23)	Not related to "adding new entities."	23
10	Sunroad Marina Partners, LP	4F (R.B. 23)	Disclosed in September 2003 organizational charts. [See A.A. 591-593; 712.]	23

Aaron's Discussion of Alleged Breaches		Elena's No. Assigned to the Breach	Comments	See A.O.B. Chart, page no.
No.	Alleged Breach			
11	Distinguishing Sunroad Eastgate Mall Partners, LP and LLC	4F (R.B. 24)	Not related to "adding new entities."	23
[**11] [*6]				
12	Failure to Provide Appraisal Report	5 (R.B. 24-25)		24
13	Change of Corporate status from C- to S-Corporation	6 (R.B. 26)	Underscores Sunroad Holding's status as a corporation.	24

In all of her discussions of the alleged breaches, Elena failed to show how any one of the breaches was material. This is especially critical given that most of the alleged breaches center around Sunroad Holding, which was disclosed in Aaron's first Statement of Assets and Debts. [A.A. 7.] She also fails to how she was harmed by the so-called breaches.

Specific Comments on Alleged Breaches

. Alleged Breach 1: The Failure to Disclose the Purchase of the Israel Bond and its Corresponding Loan

It is uncontroverted that Aaron agreed to acquire the Israel Bond and arranged for its financing with Bank Leumi in July 2003 [A.A. 205, 207] and that the Bond and loan are both dated October 8, 2003. [A.A. 717-718, 720-721.] It is uncontroverted that Aaron did not list the Israel Bond and its corresponding loan in his first Statement of Assets and Debts, filed on November 24, 2003 [A.A. 5-9], and neglected to mention [**12] his obligation to Bank Leumi in his first deposition on January 28, 2004. [C.T. 122-123.] But it is also uncontroverted that he corrected his mistake on February 27, 2004, [*7] with a correction to his deposition transcript. [C.T. 123; A.A. 202-203.] (This was also early in the discovery process. Depositions of Aaron and his business associates were on-going to late July 2004. [See A.A. 631-632.])

In her Respondent's Brief, Elena argues that Aaron objected to producing a copy of the Bond and note, but fails to cite to the record to support this allegation. [R.B., page 11.] Similarly, she asserts that Aaron "never did produce the documents," again failing to cite to the record. [R.B., page 12.] Contrary to Elena's assertions, Aaron did produce a copy of the Bond and note on March 1, 2004. [C.T. 99; A.A. 716-721.]

Elena asserts that Aaron "parse[d] words about buying an Israeli [sic] Bond," citing to Aaron's comment that he did not know which Bond Elena's counsel was referencing in his July 23, 2004 deposition. [R.B., page 10, note 14.] Yet a careful reading of the deposition transcript reveals the confusion: Elena's counsel had been speaking about Aaron's purchase [**13] of an Israel Bond on behalf of his ***father.*** [See A.A. 220-221 (deposition pages 581:6-583:11).] The questioning began with counsel asking Aaron what monies he draws from a Scenic West account on behalf of his father. [A.A. 220 (deposition page 581:6-21).] Aaron then explained that sometimes his father "wants me to buy bonds from Israel." [A.A. 220 (deposition 582:20-24).] Several questions later, counsel asked Aaron, "Do you recall the source of the funds used to purchase the bond, the Israeli bond, in 2003?" [A.A. 221 [*8] (deposition 583:24-25).]

It was to ***that*** question that Aaron responded, "I don't know what bond you're talking about." [A.A. 221 (deposition 584:1-2).] Counsel then clarified, asking whether Aaron had purchased a bond through Bank of Leumi, to which he said "yes;" and then counsel asked whether he had used any of the monies from Scenic West to purchase his own Israel Bond in 2003, to which Aaron responded "no." [A.A. 221 (deposition 584:3-11).] The entire line of questions shows nothing sinister, nothing evasive, nothing "parsing."

What is particularly troubling about this example is that it is precisely the example which Elena [**14] presented to the trial court, equally out of context, as an example of Aaron's lack of cooperation. [C.T. 11:9-16.] Though Aaron responded, putting the question in context [C.T. 99:11-17], this question and answer continue to be used in an apparent effort to prejudice the courts against Aaron. It worked well in the trial court: Aaron was sanctioned for failing to list the Bond and corresponding note on his Schedule of Assets and Debts and for failing to recall it at his deposition, notwithstanding his correction of the deposition transcript.

In her discussion of the facts surrounding the Bond and note, Elena did not show how she was prejudiced by Aaron's memory-lapse regarding this asset and its corresponding obligation in the same amount.

[*9] **. Alleged Breach 2: Failure to Disclose the 401(k) Pension**

Elena appears to have misunderstood the deposition testimony of both Frederick Tronboll and Richard Vann, both employees of Sunroad Holding. In her Respondent's Brief, Elena asserts that both Frederick Tronboll and Richard Vann stated that Aaron had an interest in the Sunroad 401(k) plan, citing to their deposition transcripts. [R.B., page 13.] Yet, at the [**15] pages cited by Elena, A.A. 308 (deposition page 97), Mr. Tronboll testified that ***he,*** Mr. Tronboll, had a 401(k) plan with Sunroad Asset Management, Inc. [See A.A. 308 (deposition page 97:17-18].) Similarly, at Elena's record citations for Mr. Vann (A.A. 514 (deposition pages 84-86)), Mr. Vann actually said that ***he,*** Mr. Vann, participated in the 401(k) plan. [See A.A. 514 (deposition page 84:1-8).]

As to Aaron, at his deposition on July 23, 2004, he said that he likely did participate, but might not; that the amount was likely insignificant, and that he would "look into this and provide the records of whatever" there was. [A.A. 273 (deposition page 791:6-14).] Thereafter, on September 9, 2004, less than 60 days after his deposition, he corrected his deposition to include the amount of his interest in the company 401(k) plan [A.A. 724]; and several weeks later, he produced the plan-statement verifying that his interest was $ 8,679.20. [A.A. 728.]

[*10] Elena does not cite to any evidence establishing how she was injured by Aaron's forgetfulness regarding this account. Further, use of this lapse in memory appears to be a trap for Aaron rather than [**16] a serious discovery problem for Elena: Elena knew about Aaron's small interest in the 401(k) plan because she had a copy of his statements ***and had provided it to him in discovery!*** [C.T. 120 P12, 305 P13; A.A.741-742, 876 (bearing Elena's bate-stamp number).]

. Alleged Breach 3: Failure to Disclose Sunroad's Acquisition of the Calumet Avenue Residential Property

Elena continues to insist that Aaron acquired a $ 6 million home which he "disguises as a $ 15,000 monthly rental." [R.B., pages 14-15.] Here is where Elena begins to substitute Aaron for Sunroad -- as if they are one-and-the-same -- to create the appearances of wrong-doing. Yet Elena cites to nothing in the evidence which supports the allegation that Aaron owns the Calumet Avenue property.

The uncontroverted evidence established that Sunroad, not Aaron acquired the Calumet Avenue property. First, title controls: All of the documents surrounding the acquisition of the Calumet Avenue home are in the name of the corporations. [See A.A. 480, 684-685, 687-688, 690-691.] The escrow instructions, reflect that the offer was from "Sunroad Asset [*11] Management or Assignee." [A.A. 480.] Amended [**17] escrow instructions were signed by Frederick Tronboll, Sr. as Vice President of Calumet Real Estate Holdings, LLC. [A.A. 684-685.] Second amended escrow instructions were signed by Mr. Tronboll [A.A. 687-688], and the grant deed was in favor of Calumet Real

Estate Holdings, LLC. [A.A. 690-691.]

Second, the property is owned by Calumet Real Estate Holdings, LLC, which in turn is owned by Sunroad Holding Corporation. [A.A. 788.]

Third, in lengthy and instructional testimony, Mr. Tronboll, also Senior Vice President of Sunroad Holding [A.A. 287 (deposition page 15:17)], led Elena's counsel through the intra-corporate transfer of funds to acquire the Calumet Avenue property. [See A.A. 371-372 (deposition pages 312-317).] Consistent with the corporate structure, the monies moved from Sunroad Auto Holding Corporation to Sunroad Holding Corporation to Calumet Real Estate Holdings, LLC. [A.A. 371 (deposition pages 312:8-314:22).] None of these transactions included Aaron's personal monies. ***Nothing in the evidence justifies Elena's claim that Aaron "fail[ed] to disclose any available fund of $ 6,000,000."*** [R.B., page 15.]

Fourth, Sunroad (through Calumet Real [**18] Estate Holdings, LLC) acquired the Calumet Avenue property on March 12, 2004. [A.A. 690-691 (Grant deed).] On April 1, 2004, Aaron's attorney advised Elena that Aaron was leasing a new home for $ 15,000 per month. [A.A. 280.] On April 2, [*12] 2004, Mr. Tronboll stated at his deposition Sunroad Asset Management had just undertaken the management of a newly-acquired property owned by Calumet Real Estate Holdings, LLC, a house on Calumet Avenue. [A.A. 317 (deposition pages 135:12- 136:12).] As Elena knew about the acquisition within days, there is nothing in the evidence to justify her claim that Aaron had failed to disclose the property to Elena. [R.B., page 17.]

Fifth, Elena cites to no evidence to support her statement that Aaron had created "***an elaborate scheme*** involving several companies to shield his control over $ 6,000,000 and his ability to direct the purchase for cash of a residence for himself." [R.B., page 16; emphasis added.] Historically, Sunroad had owned several residences occupied by Aaron and Elena, as acknowledged by Elena. [C.T. 153:26-154:1.] Further, far from the purchase being part of "an elaborate scheme" of concealment, the purchase [**19] and its financing was done in Sunroad's usual course of business. [A.A. 374-375 (deposition pages 325:12- 330:1).] And, as discussed above, it was disclosed to Elena within 21 days of purchase. [A.A. 317 (deposition pages 135-137), 690.]

(Elena laces her Statement of Facts regarding Alleged Breach 3 with legal arguments. Her legal arguments are address in the Argument section, *infra*.)

[*13] **. Alleged Breach 4: Failure to Disclose Sunroad's Formation of Entities**

In her motion for breach of fiduciary duties and again in her Respondent's Brief, Elena asserted that Aaron had failed to disclose nine new entities and that a tenth entity was identified by Mr. Tronboll during his April 4, 2004 deposition. [C.T. 19-21(citing to A.A. 319 (deposition page 141:24-25); R.B., page 23.] As explained by the Sunroad Enterprises organizational charts, the "nine new entities" were not new; they were existing subsidiaries of Sunroad Holding. [A.A. 591. 593, 788.] ***Sunroad Holding had been listed in Aaron's first Schedule of Assets and Debts, served in November 2003.*** [A.A. 7.]

As to the "tenth entity" identified by Mr. Tronboll, what Elena describes as "yet [**20] another omitted corporation" in her Respondent's Brief [R.B., page 23], the entity was Sunroad Corporate Centre, Inc. (SCC Inc.). [See A.A. 712.] The entity, SCC Inc., had been listed on the chart ***in the box for its parent-company,*** Sunroad Corporate Centre Parent, LLC ("Parent"). [See A.A. 712 n2.] Mr. Tronboll explained the structure and the relationship between Sunroad Corporate Centre, Inc. (SCC, Inc.) and its parent Sunroad Corporate Centre Parent, LLC at his April 2, 2004 deposition. [A.A. 319 [*14] (deposition pages 141:10 - 142:9).] He said that there should have been a separate block for Sunroad Corporate Centre, Inc., and Elena's counsel asked him to draw it onto the chart. [A.A. 319 (deposition page 142:7- 143:2); A.A. 712.]

n2 In Appellant's Opening Brief, Aaron had incorrectly cited the organization chart as being found at A.A.

750-751, instead of A.A. 712. Aaron apologizes for any inconvenience this error caused the Court.

Everyone at that deposition -- including Elena's [**21] counsel -- appeared to understand that Mr. Tronboll was drawing a box to create consistency on the organizational chart and to illustrate the relationship between Sunroad Corporate Centre, ***Inc.*** and Sunroad Corporate Centre ***Parent.*** [See A.A. 319 (deposition pages 142-143).] He was not revealing a new entity.

More importantly, all of the entities on the organizational charts were entities of Sunroad Holding. Aaron did not have a direct ownership in any of the entities listed on the organizational charts other than the ones identified on his Schedule of Assets and Debts. [See A.A. 8.]

Elena may quarrel with Aaron's view that he was not obligated to name the subsidiaries and holdings of Sunroad Holding, having identified his ownership interest in Sunroad Holding in his Schedule of Assets and Debts. [A.A. 7.] But she neither argues nor cites to anything in the record to show how she was injured by Aaron's naming of the corporation in his Schedule of Assets and the identification of its various corporate subsidiaries during discovery. She cites to no cogent argument as to why Aaron's respect for the distinction between his individual holdings and the corporate [**22] holdings should [*15] have given rise to sanctions for breach of fiduciary duty.

. Alleged Breach 5: Failure to Disclose Sunroad Financial Plaza Partners, LP

Elena's discussion of Aaron's alleged failure to disclose the creation of Sunroad Financial Plaza Partners, LP reflects her frustration at simply not understanding the operation of Aaron's business. [See R.B., pages 18-20.] Sunroad Plaza Financial, LP was formed on June 7, 2004 ***and was disclosed on June 14, 2004.*** [C.T. 90, 105 P7; A. A. 702.] The asset of this entity was an office building in Rancho Bernardo. [C.T. 105; A.A. 317 (deposition page 135:3-5).] The underlying asset -- the building on Rancho Bernardo Boulevard at the Interstate-15 -- had been identified to Elena a number of times. [A.A. 179 (deposition page 239:5-17], 315 (deposition page 127:12-17), 317 (deposition page 135:1-5).]

Elena's complaints about not understanding the purpose of the entities and her accusations that Aaron is "playing with words" are largely unintelligible. [R.B., pages 19-20.] Aaron and his agents identified the assets, repeatedly presented organizational charts, and repeatedly explained the role [**23] of the various entities. Elena's failure to understand the corporate structure is not Aaron's breach of his fiduciary duties. He is required to present the information, as he did; he is not the guarantor that Elena will [*16] understand it.

. Alleged Breach 6: Failure to Disclose Chula Vista Property

Mr. Tronboll testified that Sunroad was in *litigation* regarding a property in Chula Vista. [A.A. 325 (deposition page 168:6-18).] This was not the "Borst property." [A.A. 516 (deposition page 92:21-23).] The "Borst property" was, as Richard Vann testified, in escrow to be purchased by Sunroad. [A.A. 516 (deposition page 93:1-19).]

Elena has not explained how she was injured by not learning that Sunroad was acquiring this property before its acquisition. This transaction, along with others, crystallizes the question of whether an on-going business must reveal each and every transaction it is undertaking in the regular course of its business. n3

n3 The statement of this issue presumes a community business. The discussion in this brief and in the Appellant's Opening Brief is not a concession that the business is community property or has any community interest. That issues remains to be resolved in the trial court.

[**24]

. Alleged Breach 7: Failure to Disclose Investment in Mexico

Elena presents the facts regarding the investment in Inmobiliaria Camino del Sol, S. de R.L. de C.V. ("Inmobiliaria") as if there was something devious or untoward about Aaron's investing in Mexico. "Funds (being) sent [*17] out of the country" connotes something inappropriate. [See R.B., page 21.] On the contrary, investing in Mexico was part of Sunroad's regular sphere of activity: it had at least four entities in Mexico. [See C.T. 243, 264, 313; A.A. 786, 807, 887-888.] Further, the financing of Inmobiliaria was part of Sunroad's regular business practices. [C.T. 122; A.A. 535, 887.]

It is not unusual for Aaron to have invested in Mexico given that he has strong ties there. He was born, educated, and married there. [A.A. 539-540 (deposition pages 10:22-15:18).] He also worked there for a number of years, and his father's family had an established business there. [A.A. 541-542 (deposition pages 17:13-22:15).]

. Alleged Breach 8: Failure to Disclose the Listing of Centrum Property for Sale

The offer to buy a portion of the Centrum property was ***not made to Aaron,*** as [**25] Elena asserts in her Respondent's Brief. [R.B., page 22.] It was made to Sunroad Holding. [A.A. 518 (deposition pages 102:23 - 103:17.] The offer was within the normal course of Sunroad's business. [A.A. 519 (deposition pages 104:14-105:6).] (It was also made after the listing of the property for sale had expired. [A.A. 518 (deposition page 103:15-16.] Thus, it was of no consequence to the business.)

[*18] Elena does not suggest that she was damaged in any way by Aaron not disclosing the offer on an expired listing. This alleged breach also crystallizes two substantive issues at bar: 1) whether a business must disclose each and every transaction undertaken within the usual course of business, and 2) whether the fiduciary duty statutes are strictly construed such that any breach, whether or not it causes damages, gives rise to sanctions.

This alleged breach involving the Centrum property is not related to "... the addition of new companies," and was not addressed by the Court as a grounds for sanctions. [R.T. 81:2-5; C.T. 577.]

. Alleged Breach 9: Failure to Disclose Potential Merger or Acquisition of a Car Dealership

This potential transaction never [**26] moved beyond the "due diligence" stage. [C.T. 122 P5.] The confidentiality agreement was critical to the investigation of the investment. [C.T. 122 P5.] Elena did not state how she was injured by not knowing about this potential transaction of the business.

This alleged breach is also not related to "... the addition of new companies" and was not addressed by the Court. [R.T. 81:2-5; C.T. 577.]

[*19] **. Alleged Breach 10: Failure to Disclose Sunroad Marina Partners, L.P.**

As stated in Aaron's Appellant's Opening Brief, Sunroad Marina Partners, L.P. is not owned by Aaron. [A.O.B., pages 18-19.] It is owned by both Sunroad Marina Management Corporation ("SMM") and Sunroad Asset Management, Inc. ("SAM"). [A.A. 308 (deposition page 98:13-15), 320 (deposition page 146:20-26, 712 (January 2004 chart).] Both are subsidiaries of Sunroad Holding.

Elena neglects to say that she had known about the Sunroad Marina Partners, L.P. asset since at least December 23, 2003, when Aaron produced the September 30, 2003 Sunroad Enterprises Organizational Charts to her. [R.B., page 23; and see C.T. 111 P3.c.] Further, Aaron named Sunroad Marina as a subsidiary of Sunroad [**27] Holding in his deposition on December 11, 2003. n4 [A.A. 559-560 (deposition pages 89:22-92:6.] Indeed, during the April 2, 2004 deposition of Mr. Tronboll, Elena questioned him about the September 30, 2003 organizational chart. [A.A. 308 (deposition pages 98:19-100:1), 591, 592.]

n4 Aaron did not state the name of Sunroad Marina Partners, L.P correctly in his deposition; he stated that he could not remember all of the subsidiaries without referring to an organizational chart. [A.A. 559 (deposition page 90:1-12).] He promised to provide Elena with a copy of his organizational chart [A.A. 559 (deposition page 90:15-24)] ***and did so within 12 days.*** [C.T. 111.]

[*20] The value of Sunroad Marina Partners, L.P., which owns Sunroad Resort Marina [A.A. 593], will be included in the valuation of Sunroad Holding. (The parties have retained a joint appraiser. [C.T. 304.]) Thus, the statement regarding its value is of little consequence here other than to create the misleading inference that [**28] Aaron had failed to disclose a valuable asset. Also, the value cited by Elena does not include the debts. [See A.A. 180 (deposition pages 245:22-246:13.]

. Alleged Breach 11: Failure to Distinguish Between Two Sunroad Eastgate Mall Partnerships

Elena repeats the same allegation she made to the trial court below: that Aaron failed to distinguish between the two entities, Sunroad Eastgate Mall Partners, LP and LLC. [R.B., page 24.] Aaron addressed this allegation in his Appellant's Opening Brief, at page 19.

Elena fails to appreciate that Sunroad Eastgate Mall Partners, LLC ***ceased to exist as of September 30, 2003.*** [C.T. 105 P10.] Yet this should not be news to her as she was presented with an organization chart on December 23, 2003 that included Sunroad Eastgate Mall Partners, LLC with the notation "in liquidation." [C.T. 111 P3.c.; A.A. 593.] Elena's lack of understanding of the facts is not Aaron's breach of his fiduciary duty.

[*21] **. Alleged Breach 12: Failure to Provide the Appraisal Report**

In her discussion of Aaron's alleged failure to provide her with the appraisal report drafted by Houlihan Lokey Howard & Zukin at the [**29] behest of Sunroad Holding's corporate counsel, Elena includes several allegations which are not supported by citations to the record. [See R.B., page 24.] Aaron will not address them and assumes that the Court will disregard them.

Elena speaks of the appraisal as being "performed ***as of*** December of 2003," as if there was a completed appraisal on that date rather than December 2003 being the valuation date for the report. [R.B. 24; emphasis added.] Indeed, Elena referred to document-production demands from September 2003 and January 2004 and complained that Aaron refused to produce the report in response to these demands. [R.B. 25.] However, Elena omits ***the uncontroverted fact that the report did not exist -- even in its draft form -- until late 2004.*** [C.T. 314 P9.] Thus, Elena's innuendos that Aaron resisted providing her with the report for two years are factually unsupported. [R.B. 25.]

Elena also neglects to state the uncontroverted fact that the appraisal report was a draft and that it had not been adopted by the appraisers themselves (Houlihan), Sunroad's counsel, or Sunroad. [C.T. 314-315 P9.]

While acknowledging Sunroad's counsel's defenses [**30] of work product and confidentiality, Elena rejects these defenses as "not supported by the [*22] facts." [R.B. 25.] She presents no citation to the record to support her contention.

Elena also completely omits any discussion of the requests for protective orders submitted to her by Sunroad's counsel. [C.T. 309 P29, 390-391 P12.k, *l*, and fn. 2.] As discussed more fully in the Appellant's Opening Brief, Elena initially rejected any protective order until after Sunroad's counsel had filed a motion for a protective order. [C.T. 309 P9.] Only then did she agree to a protective order. [C.T. 391 P*l* and fn. 2.]

Elena ended her discussion of the appraisal report with September 29, 2005. [R.B. 25.] But, as reflected in the record, on October 31, 2005, Aaron's counsel signed the protective order ***which incorporated the changes requested by Elena and returned it to Sunroad's counsel and to Elena's counsel.*** [C.T. 391, fn. 2.] The record is silent as to when

Elena received the protective order and whether she ultimately signed it.

Elena suffered no injury from Aaron's assertion of his right to protect attorney work-product and from his (ultimately successful) [**31] efforts to secure a protective order for the limited use of the draft-appraisal.

[*23] **. Alleged Breach 13: Failure to Disclose the Change in Corporate Tax Status from a C-Corporation to an S-Corporation**

Elena asserts that Aaron had been advised to seek her consent before changing the corporate tax status from a C-corporation to an S-corporation. [R.B. 26.] However, she relies solely on a list of agenda discussion-points for a meeting between Aaron and his tax professionals. [See C.T. 268.] She cites to nothing in the record which supports her contention that Aaron had been advised to seek her consent.

It is uncontroverted that Aaron and his advisors decided to change the tax status because it would be advantageous tax-wise, saving the corporation money. [C.T. 314 P8.] It is further uncontroverted that Elena acknowledged that the change in the tax status saved the corporation money. [C.T. 300; A.A. 830.]

[*24] **ARGUMENT**

I. INTERPRETING THE STATUTES

1. The Abuse of Discretion Standard Invites Guidelines for Review of Trial Court Rulings.

Aaron does not quarrel with the general rule that the imposition of sanctions on [**32] established facts are reviewed under an abuse of discretion standard. n5 (*Burkle v. Burkle (2006) 144 Cal.App.4th 387, 399, 50 Cal.Rptr.3d 436, 445.)* But, as this Court has recognized, the abuse of discretion standard "is so amorphous as to mean everything and nothing at the same time and be virtually useless as an analytic tool." (*Hurtado v. Statewide Home Loan Company (1985) 167 Cal.App.3d 1019, 1022, 213 Cal.Rptr. 712, 714,* disapproved on other grounds in *Shamblin v. Brattain* [*25] *(1988) 44 Cal.3d 474.)*

n5 As discussed, *infra,* the imposition of sanctions involves three distinct steps, each with a different standard of review:

1) Interpretation of the statute -- de novo review. (*Marriage of Hokanson (1998) 68 Cal.App.4th 987; Marriage of Petropoulos (2001) 91 Cal.App.4th 161, 177.)*

2) Findings of facts giving rise to potential sanctions -- sufficiency of the evidence. (*Marriage of Hokanson, supra, 68 Cal.App.4th 987, 994; Marriage of Rossi (2001) 90 Cal.App.4th 34, 40.)*

3) Imposing sanctions on established facts -- abuse of discretion (*Burkle v. Burkle (2006) 144 Cal.App.4th 387, 399.)*

For a brief mention of these three steps, see *Marriage of Petropoulos, supra, 91 Cal.App.4th at 177-178.*

[**33]

This Court instructed that "[a]ppellate decisions should furnish firm, clearly defined, objective guidelines for trial court application." (*Hurtado, supra, 167 Cal.App.3d at 1022.)* This is especially true here where the trial court has threatened to sanction Aaron again for like, but ill-defined, conduct. [C.T. 580; R.T. 82:3-5.] It is also especially true for similarly-situated business-owner-spouses who must know their fiduciary obligations for disclosure of business assets in the management of their community businesses.

This Court taught that "discretion" in the context of the abuse of discretion standard refers "to the relationship between the trial and appellate decision-making processes and, more particularly, to the amount of deference which appellate courts should accord to trial court determinations." (*Hurtado, supra, 167 Cal.App.3d at 1022.)* Succinctly, "trial court discretion is not a sacrosanct concept." (*Ibid.*)

There are times when the appellate court should defer to the trial court's decision. Those instances usually involve determinations of disputed facts. "Where a factual determination is based on live testimony or review [**34] of physical evidence, there is every reason to believe a trial court's resolution will be more accurate than that of an appellate court which received no first-hand exposure to the evidence." (*Hurtado, supra, 167 Cal.App.3d at 1024.)* [*26] However, where the trial court's position does not necessarily make it the better decision maker, "appellate court deference is inappropriate." (*Id., at 1025.)* In the case at bar, the deference to the fact-finder is not paramount because the facts are undisputed. The question revolves around the imposition of the sanction to the undisputed facts. n6

n6 It is interesting to note that in her Respondent's Brief, Elena relies largely on her declaration in support of her motion for breach of fiduciary duty to support her factual statements. For the most-part, she neither responds to nor contradicts Aaron's recitation of the facts.

Thus, this is a case in which the trial court's position does not make it a better decision maker and where appellate [**35] deference would be inappropriate. This is a case where this Court should create clearly defined, objective guidelines for the imposition of sanctions.

To that end, Aaron had suggested that the guidelines established for punitive damages, which have similar purposes to sanctions, are useful for evaluating sanctions. [See A.O.B., pages 55-60.] Elena rejected the guidelines as not applicable and did not discuss them. Aaron again invites this Court to consider the guidelines set forth by the United States Supreme Court in *State Farm Mutual Automobile Ins. Co. v. Campbell (2003) 538 U.S. 408, 418, 123 S. Ct. 1513),* as discussed in the Appellant's Opening Brief.

[*27] **2. The Imposition of Sanctions in this Case Turns First on Statute Interpretation.**

The exercise of discretion must be based on reasoned judgment and must comply with the legal principles and policies appropriate to the particular matter at issue. (See *Marriage of Economou (1990) 224 Cal.App.3d 1466, 1476, 274 Cal.Rptr. 473, 479; Horsford v. Board of Trustees of California State University (2005) 132 Cal.App.4th 359, 393-394, 33 Cal.Rptr.3d 644, 670-671.)* [**36]

In *Marriage of Hokanson (1998) 68 Cal.App.4th 987, 80 Cal.Rptr.2d 699,* the appellate court examined Family Code section 1101, subdivision (g), for the purposes of imposing attorney's fees. (The court looked at a different issue regarding section n7 1101, subdivision (g) than we are examining at bar.) The court pointed out that the key issue was whether the trial court had correctly interpreted section 1101, subdivision (g) to give it discretion to deny attorney's fees. *(68 Cal.App.4th at 992.)* Because the case turned on statutory interpretation, the court reviewed the issue *de novo. (Ibid.)*

n7 All further statutory references will be to the Family Code unless otherwise noted.

The case at bar also turns on statutory interpretation. For the purposes of imposing sanctions under sections 271 (promote settlement and reduce [*28] the cost of litigation) and 2107 (failure to comply with the disclosure statutes) and attorney's fees under section 1100, subdivision (g), the issues [**37] turn on the application of the statute, as discussed in Appellant's Opening Brief:

1) Under the disclosure statutes of sections 2100 *et seq.*, what do the words "material changes" mean in the context of the business of a corporation or company? Is the spouse required to report on every contemplated transaction of the business?

2) Must every transaction of a business be reported under section 2102, even when the transactions are within the "ordinary course of business" of the reported asset?

3) Are sections 271 and 2100 *et seq.* strictly construed, such that ***any*** breach, independent of damages or consequences, must result in punishment?

4) Is section 271 correctly applied mid-case or should it be reserved to the end of the case where the extent of a party's conduct can be judged?

5) Are damages required under section 1101, subdivision (a) before attorney's fees can be imposed under subdivision (g)?

6) In applying section 1101, subdivision (g), if attorney's fees can be imposed without some impairment to the other spouse's [*29] interests in property, what do the words in subdivision (g) -- "[r]emedies ...shall include,..., an award [**38] to the other spouse of 50 percent, or an amount equal to 50 percent, ***of any asset undisclosed or transferred in breach of the fiduciary duty plus*** attorney's fees ...." -- mean? (Emphasis added.)

This Court is called upon to clarify the fiduciary duty statutes and the threshold requirements for the imposition of sanctions and attorney's fees.

3. In Interpreting the Statutes, the Court Should Look to the Words of the Statutes Themselves: Defining the Duties.

It is a fundamental rule of statutory construction that the court should ascertain the intent of the Legislature so as to effectuate the purpose of the law. "In determining such intent the court turns first to the words themselves for the answer. We are required to give effect to statutes according to the usual, ordinary import of the language employed in framing them." (*Moyer v. Workmen's Comp. Appeals Bd. (1973) 10 Cal.3d 222, 230.)*

3-A. Section 1100

The intention of the Legislature is clear from the language of the statutes. Under section 1100, subdivision (a), either party has management [*30] and control of the community property. Here, Aaron has management and [**39] control of Sunroad Holding.

Under section 1100, subdivision (d), the spouse who is operating a business with a community interest "has the primary management and control" of the business. "Management and control" is defined in subdivision (d) as meaning that the managing spouse "may act alone in all transactions," except that he must give prior written notice of any sale or disposition of "all or substantially all of the personal property used in the operation of the business." Under this statute, Aaron is empowered to manage and control Sunroad Holding alone, as he does. He must only give notice if he disposes of the personal property used in the business. There were no allegations that Aaron had attempted to transfer or otherwise liquidate Sunroad Holdings or the personal property used in Sunroad.

Under section 1100, subdivision (e), the managing spouse must make full disclosure of "***all material facts*** and information regarding ***the existence, characterization, and valuation of all assets***" in which the community has or may have an interest and provide equal access to all information that pertains to the value and character of the assets and debts. (Emphasis added. [**40]) To the extent that section 1100, subdivision (e) overlaps the disclosure requirements

of section 2104, it is beyond dispute that Aaron fully disclosed the existence of all assets in which ***he, as an individual,*** has [*31] an interest. [See A.A. 7.] He listed as an asset his interest in Sunroad Holding [A.A. 7] and his individual interest in several of the Sunroad entities. [A.A. 8.]

To the extent that section 1100, subdivision (e) overlaps section 721 and requires equal access to all information, records and books that pertain to the value and character of the assets, there has not been any allegation that Aaron prevented Elena from having access to the books and information of the corporation. Indeed, though Elena said that she never attended any Sunroad Holding board meetings [C.T. 290; A.A. 833:22-834:18], she made no allegations that she was precluded from attending the meetings.

To the extent that section 1100, subdivision (e) relates to information which must be provided during dissolution litigation to assist in the valuation of any community assets, Aaron arranged for Elena's accounting expert to review the accounting program for Sunroad Holding [C. [**41] T. 110 P2.c] and his forensic accountant met with Elena's forensic accountant to review the tracing of certain assets. [C.T. 311 P3.] These cooperative steps ***in addition to*** providing ***25,000*** pages of documents to Elena. [C.T. 110 P2.d, 149, 302-309; A.A. 858-862 (list of documents produced to Elena).] Furthermore, the parties retained the services of a joint appraiser of the business. [C.T. 304.] There were no allegations that Aaron did not cooperate with the joint appraiser. The parties also retained a joint expert to determine monies [*32] available for support [C.T. 283], and Aaron provided her with extensive documentation. [A.A. 858-862.] Again, there were no allegations that Aaron did not cooperate with this joint accountant.

Thus, it would appear that Aaron has fully complied with the requirements of section 1100(e).

3-B. Section 2102, subdivision (a)(1)

The plain language of section 2102, subdivision (a)(1) requires the ***accurate and complete disclosure of all assets and liabilities*** in which ***the spouse*** has or may have an interest or obligation, including the obligation to make ***"immediate, full, and accurate*** [**42] ***update[s]"*** to the extent there have been ***"any material changes"*** since any earlier disclosure statement.

Section 2102 reflects the public policy articulated in section 2100, to ensure fair and sufficient support awards and to achieve an equal division of assets and liabilities (§ 2100 (a)), to reduce the costs of dissolution litigation and foster full disclosure and cooperative discovery (§ 2100 (b)), and to assure that "a full and accurate disclosure of all assets and liabilities" are made in the early stages of the proceedings (with a "continuing duty to immediately, fully, and accurately update and augment the disclosure to the extent there have been any material changes") so that both parties will have a [*33] complete knowledge of the relevant facts for settlement or trial (§ 2100 (c)).

. Failure to Disclose Sunroad Holding's Assets

Under section 2102, the issue arises of whether Aaron was required to disclose the ***assets of Sunroad Holding.*** It is undisputed that he disclosed his interest in Sunroad Holding and the few Sunroad entities in which he had a direct interest. [A.A. 7, 8.] To the extent that Aaron was sanctioned for failing [**43] to disclose the individual entities held by Sunroad Holding, this Court must decide whether that requirement is a reasonable and fair reading of section 2102(a)(1).

Section 2102, subdivision (a)(1) requires the disclosure of the asset, and section 1100, subdivision (d) allows the spouse who is managing and controlling the asset to act alone in all transaction except those which would result in a liquidation of the business. Thus, reading the two statutes together, Aaron's conduct was consistent with his fiduciary duties.

. Failure to Disclose the Israel Bond/Loan Package and the 401(k) Plan

To the extent that Aaron was sanctioned for forgetting the Israel Bond and corresponding debt (which had a zero effect on his net worth) and for forgetting his $ 8,600 interest in a company 401(k) plan, this Court must decide whether the sanction was a reasoned application of the statute. [*34] Ironically, section 2102(a)(1) calls for updates, and when Aaron updated his information to include the forgotten assets (updates which took place early in the proceedings), he was sanctioned for not having included them in the first place! Aaron submits that that is a harsh and chilling reading [**44] of the statute.

3-C. Section 2102, subdivision (a)(2)

Section 2102, subdivision (a)(2) requires the written disclosure of any business or investment opportunity ***that results from any business activity outside the ordinary course of business.*** The various business activities which Elena cites as breaches of Aaron's fiduciary duty were ***all within the ordinary course of Sunroad's business.***

As discussed in the *Statement of Facts, supra,* and in the Appellant's Opening Brief, the business of Sunroad is investing in real estate and in businesses related to the real estate holdings. [A.A. 711-712.] In defining "usual course of business" for the purposes of exclusions from the automatic restraining orders in family law matters, the appellate court in *Gale v. Superior Court (Gale) (2004) 122 Cal.App.4th 1388, 19 Cal.Rptr.3d 554* looked at the nature of Mr. Gale's business, Management VI, and his relationship with the business. As Mr. Gale's business was to "own, manage, *sell,* lease, mortgage, pledge or otherwise acquire or *dispose* of Company [*35] property," the court held that the sale of a piece of property [**45] was within the usual course of business and was not a violation of the automatic restraining orders. *(122 Cal.App.4th at 1392;* emphasis original.)

Further, Mr. Gale was exempt from having to disclose the sale of a particular piece of property because his management company, Management VI, was a bonafide business entity. It was not the alter ego of the parties. (*Gale, supra, 122 Cal.App.4th at 1393.)*

Similar to Mr. Gale and his Management VI, Sunroad is a bonafide company in the business of investing in real estate and related businesses. Thus, the purchase and sale of real estate (Calumet Avenue house, Borst property, Centrum property, for example) and the creation of entities to hold various projects (Sunroad Financial Plaza, Immobiliaria Camino del Sol, Sunroad Marina Partners, or Sunroad Eastgate Mall Partners, LP, for example) were within the usual course of business. As such, the transactions of Sunroad were excluded from the notice requirements of section 2102(a)(2).

Elena argues that there is no exception for "ordinary course of business" or for "big business" in complying with the disclosure statutes. [R.B, pages 34-35.] However, the statutes [**46] themselves include the "ordinary course of business" exception. (See, as discussed *supra,* sections 1100(d) and 2102(a)(2).)

[*36] Elena also relies on *Marriage of Brewer and Federici (2001) 93 Cal.App.4th 1334* to support her argument. [R.B., page 35.] This reliance is misplaced as *Marriage of Brewer and Federici* did not address whether the individual transactions of a business, done within the ordinary course of business, must be disclosed. *Brewer and Federici* involved the wife's failure to disclose the correct values of her interest in two deferred compensation plans through her employer (one a pension plan and the other a savings plan). *(93 Cal.App.4th at 1340-1341.) Brewer and Federici* is completely inapposite to the facts and issues at bar.

3-D. Section 2102, subdivision (a)(3)

Section 2102, subdivision (a)(3) requires the highest good faith, consistent with section 721, in the management of a business with a community property interest. Though the community interest in Sunroad has not yet been determined, there have not been any allegations of mismanagement of Sunroad.

[*37] **3-E. Section 2104,** [**47] **subdivision (c)**

Section 2104, subdivision (c) requires that each party serve the other with a preliminary declaration of disclosure which lists the identity of all assets and liabilities in which ***the declarant*** may have an interest (whether separate or community) and ***the declarant's*** percentage of ownership in each asset. Aaron complied with this section with the service of his schedule of assets and debts on November 24, 2003 [A.A. 5], three months after the filing of the petition for dissolution. [A.A. 1.]

The controversy surrounds his two omitted personal assets (the Israel Bond and corresponding loan, which he included in a corrected statement on February 27, 2004 [A.A. 20], and his interest in the 401(k) plan, which he provided on September 9, 2004 [A.A. 724]) and the individual entities owned by Sunroad Holding. This Court must decide whether the corrected disclosures of the personal assets satisfy the statute, and whether the statute required the listing of the assets held by Sunroad.

[*38] **4. Interpreting the Statutes: Defining the Breach.**

Elena argues that the fiduciary statutes must be strictly construed, such that "substantial [**48] compliance" is irrelevant. [R.B., pages 40-41.] In effect, she is arguing that any breach must result in punishment. In support of this argument she relies upon *Goehring v. Chapman College (2004) 121 Cal.App.4th 353, 17 Cal.Rptr.3d 39.* [R.B., page 41.] However, *Chapman College* addressed a substantially different kind of statute, such that the reasoning of the court in requiring strict compliance there is not helpful here.

Goehring v. Chapman College, supra, involved Business and Professions Code section 6061 which creates a private right to a refund of tuition from unaccredited law schools in certain circumstances. The statute requires the unaccredited school to give a notice of non-accreditation to students before the student pays the tuition. If the school fails to give such notice, the school must fully refund the tuition. *(121 Cal.App.4th at 377.)* Chapman failed to give the required notice and was held liable for a return of several students' tuition. Chapman argued that strict compliance with the statute was not required. (At 384.)

The court rejected Chapman's arguments. The court looked first to the purpose of the statute. [**49] The purpose of Business and Professions Code section 6061 is to give students notice of the school's accreditation status [*39] before the payment of tuition so that the student could make an informed decision about enrolling in the school. *(121 Cal.App.4th at 385.)* Thus, the failure to give notice defeated the very purpose of the statute. (*Ibid.*) The court said that "substantial compliance" excuses technical imperfections "only after the statutory objective has been achieved." (*Id., at page 384.)* When the notice requirements of a statute are not met, the defense of substantial compliance is inapplicable. (*Id., at 385.)*

The holding in *Chapman* is not directly applicable to the facts at bar. *Chapman* was addressing a statute which requires the giving of notice before accepting tuition and Chapman wholly failed to give the required notice. *(121 Cal.App.4th at 385.)* The Family Code statutes at issue are not notice statutes; they are disclosure statutes. Family Code sections 1100 and 2102 require the disclosure of information, allowing for updates of material changes to the information and excluding certain information [**50] from the mandatory disclosure. (See discussion of Family Code §§ 1100(d) and (e), and 2102(a)(2), *supra.*)

The Family Code disclosure statutes require analysis to determine whether or not the missing information was required, fell within the statutory exceptions, or was material. Absent such analysis, a party could provide thousands of pages of documents and could cooperate with all joint experts (as did Aaron), but be punished for the failure or delay in providing [*40] information which has little relative impact (as was Aaron). The missing information should be measured against the purposes of the disclosure statutes. (As discussed *supra,* the purpose of disclosure is to marshal community assets and obligations, to assure fair and sufficient support, to enable parties to be fully informed for settlement or trial, and to reduce the adversarial nature of marital dissolution actions. (Fam.C. § 2100(a), (b), and (c).)) This measuring militates against a strict construction of the disclosure statutes.

Further, the language in section 2107, subdivision (c), which allows for attorney's fees if there is a violation of the disclosure provisions of section 2100 *et seq.*, [**51] invites a weighing of whether sanctions are appropriate: "Sanctions ... shall include reasonable attorney's fees ..., unless the court finds that the noncomplying party acted with substantial justification or that other circumstances make imposition of the sanction appropriate." This language implies that the court must consider the circumstances -- timing of compliance, degree of cooperation, impact of a delayed compliance or non-compliance -- with the disclosure statutes before imposing sanctions.

This weighing is directly counter to Elena's argument that the fiduciary duty statutes should be strictly applied.

[*41] **5. Interpreting the Statutes: Defining When in Time Sanctions or Attorney's Fees Apply.**

Aaron was sanctioned under sections 271 and 2107(c) and attorney's fees were imposed under section 1101(g). This Court must interpret the statutes to determine when in time -- relative to the litigation or to the party's conduct -- such sanctions may be applied.

5-A. Section 271

Section 271 allows for attorney's fees to the extent that a party's conduct furthers or frustrates the public policy to promote settlement and reduce the cost of litigation. [**52] The question of ***whether*** attorney's fees were correctly imposed will be discussed later in this Reply Brief. The issue here is ***when in the time*** should they be addressed. In *Marriage of Freeman (2005) 132 Cal.App.4th 1, 6, 33 Cal.Rptr.3d 237, 239,* the court explained that section 271 should be applied at the end of the lawsuit, "when the extent and severity of the party's bad conduct can be judged." (In accord, *Marriage of Quay (1993) 18 Cal.App.4th 961, 970, 22 Cal.Rptr.2d 537, 543.)* This suggests that, here, sanctions under section 271 were considered prematurely. Indeed, at the end of the litigation, the extent of Aaron's omissions may be seen as fairly inconsequential.

Beyond their explanations that "bad conduct" should be evaluated at [*42] the end of a case, *Freeman, supra,* and *Quay, supra,* also imply that the impact of the conduct must be weighed and evaluated. This is contrary to Elena's suggestion that the disclosure statutes are to be strictly construed [R.B., pages 40-41], as discussed *supra.* The language is consistent with Aaron's argument, *supra,* that not every breach [**53] or omission must necessarily give rise to sanctions.

5-B. Section 2107

Elena rejects Aaron's argument that the remedies of section 2107 should be read serially, such that before attorney's fees may be imposed under subdivision (c), a party should seek relief under subdivisions (a) and (b). [R.B., page 31-32, 36-37.] But Elena provides no authority for her rejection of this reading. She relies exclusively on legislative history. Her reliance must be rejected for two reasons. First, when the language of a statute is clear and unambiguous, the court does not "resort to extrinsic indicia of the Legislature's intent." (*Marriage of Hokanson, supra, 68 Cal.App.4th 987, 993.)* The language of section 2107 is clear. This Court must decide only whether the remedies are to be applied serially.

Second, Elena has cited to a Senate Judiciary Committee report and an Assembly report, but she has not indicated which version of Assembly Bill 583 (the bill which introduced changes to section 2107) was being [*43] addressed. [R.B, pages 36-37.] The Senate Judiciary Committee report does not include critical language which is part of the statute, suggesting that [**54] the report is on an early version of the bill and may be of little weight in evaluating the current section 2107. [R.B., page 36.] The language omitted from the report is the statutory safety-valve, the language which states that attorney's fees shall be awarded "unless the court finds that the noncomplying party acted with substantial justification or ...." (See Fam.C. § 2107(c).)

Ironically, the very language omitted by Elena suggests that the court should be weighing the reasons for a party's

conduct.

5-C. Section 1101, subdivision (g)

The trial court awarded attorney's fees under Section 1101, subdivision (g). n8 The critical question is whether remedies under subdivision (g) can be imposed if there is no "impairment" to the claimant-spouse's interest in the community estate, as stated in subdivision (a). Aaron argued that section 1101, subdivisions (a) and (g) must be read together. [A.O.B., pages 62-63.]

n8 In this section only, references to subdivisions (a) and (g) are to Family Code section 1101.

[**55]

Elena rejected Aaron's reading of the statute, relying on *Marriage of* [*44] *Hokanson, supra, 68 Cal.App.4th 987* for her position that fees are mandatory upon a showing of breach, independent of damages. [R.B., page 48.] But her reliance is misplaced. In *Hokanson*, the trial court made the determination that Mrs. Hokanson had violated her fiduciary duty to Mr. Hokanson (involving the sale of the family residence), causing Mr. Hokanson to lose $ 30,000. *Hokanson* was not addressing the question about whether imposition of fees under section 1101, subdivision (g) required loss under section 1101, subdivision (a); the loss under subdivision (a) was a given. The issue in *Hokanson* was whether, having found an impairment under subdivision (a), fees under subdivision (g) must be imposed.

Hokanson was addressing exactly the reverse of the issue at bar. In effect, *Hokanson* held that fees under (g) follow impairment under (a). Our question is whether (a) is a condition precedent to the imposition of fees under (g). Aaron submits that it is.

Elena has not submitted a reasoned counter-reading of section 1101. A core problem with Elena's argument that [**56] subdivision (g) stands alone is that she omits critical language from the statute to reach her conclusion. [R.B. 48.] In entirety, section 1101, subdivision (g) reads that the remedies for a breach of fiduciary duties shall include "***an award to the other spouse of 50 percent, or an amount equal to 50 percent, of any asset undisclosed or transferred in breach of the fiduciary duty plus*** attorney's fees and [*45] costs." (Emphasis added.) The emphasized language is the portion omitted from Respondent's Brief.

It is unavoidable from this omitted language from subdivision (g) that attorney's fees accompany some financial loss in an asset. The loss is defined in section 1101, subdivision (a): "A spouse has a claim against the other spouse for any breach of the fiduciary duty ***that results in impairment*** to the claimant spouse's ***present undivided one-half interest in the*** community ***estate, ..."*** When subdivision (g) is read in entirety, it becomes self-evident that a loss under subdivision (a) is required.

This reading of section 1101, subdivision (g) is supported by the elementary rules of statutory construction, which include giving significance [**57] to every word, phrase, sentence and part of the statute and avoiding a construction which would make some words surplusage. (*Marriage of Hokanson, supra, 68 Cal.App.4th 987, 992; Moyer v. Workmen's Comp. Appeals Bd., supra, 10 Cal.3d 222, 230.)* Words must be construed in context, keeping in mind the nature and obvious purpose of the statute. (*Moyer, supra, 10 Cal.3d at 230.)* Moreover, the various parts of a statutory enactment must be harmonized by considering the particular clause or section in the context of the statutory framework as a whole. *(Ibid.)*

Elena suffered no loss to her one-half interest in the community [*46] estate. n9 Thus, she suffered no damages under section 1101, subdivision (a) and, therefore, is not entitled to attorney's fees under section 1101, subdivision (g).

n9 Again, any reference to a community estate is not a concession on the issue of property characterization.

This issue has not yet been resolved between the parties.

[**58] **II. SUFFICIENCY OF THE EVIDENCE TO SUPPORT THE SANCTIONS**

6. The Evidence Does Not Support Disregarding the Separate Legal Identities of Aaron and Sunroad Holding.

Once the interpretation of the statutes is resolved, the factual findings to support the imposition of sanctions are reviewed for sufficiency of the evidence. (*Marriage of Hokanson, supra, 68 Cal.App.4th 987, 994; Marriage of Rossi (2001) 90 Cal.App.4th 34, 40.)* The last step, the imposition of sanctions on the supported facts, is reviewed for an abuse of discretion. (*Burkle v. Burkle, supra, 144 Cal.App.4th 387, 399.)*

Turning now to the second step, to determining if the factual findings are supported by the evidence, Elena has repeatedly confused Aaron and Sunroad Holding and fostered the trial court's similar confusion by using the names, Aaron and Sunroad, interchangeably. There were no grounds for doing this. A trial court's finding of alter ego liability is reviewed for sufficiency [*47] of the evidence. (*Arnold v. Browne (1972) 27 Cal.App.3d 386, 394,* overruled on other grounds in *Reynolds Metals Co. v. Alperson (1979) 25 Cal.3d 124, 129.)* [**59]

Before a corporation's acts and obligations can be legally recognized as those of a particular person, and vice versa, there must be such a unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist, and, further, there must be a showing that adhering to the fiction of the separate existence of the corporation would, under the particular circumstances, sanction a fraud or promote injustice. (*Arnold v. Browne, supra, 27 Cal.App.3d 386, 393 -394.)* There was no such showing with regard to Aaron and Sunroad Holding. Indeed, there was no evidence -- no hint, no whisper -- that Aaron is the alter ego of Sunroad.

Elena suggests that the trial court was correct to look beyond Sunroad to find that Aaron owned the Calumet Avenue property and, by implication, that Aaron breached his fiduciary duty by not disclosing it and the various other assets of Sunroad. [R.B., pages 17-18.] In support of her argument, Elena relies upon *Marriage of Imperato (1975) 45 Cal.App.3d 432, 119 Cal.Rptr. 590* and *Marriage of Dick (1993) 15 Cal.App.4th 144, 18 Cal.Rptr.2d 743.* [R.B. 17.] Neither case [**60] assists her. Both cases illustrate the validity of Sunroad as a bonafide corporation separate from Aaron.

[*48] In *Marriage of Imperato, supra,* the community owned a business, Personalized Data Delivery (PDD), which Mr. Imperato had incorporated during marriage. The issues were the appropriate valuation date for the corporation (date of separation or date of trial) and the characterization of the post-separation appreciation in the value of *PDD. (45 Cal.App.3d at 434-435.)* Mr. Imperato wanted to ignore the corporate status of his company so that a substantial portion of the appreciation would be deemed to be his separate property. (*Id., at 439.)* The appellate court remanded the matter for a determination, *inter alia,* of whether the corporation was the alter ego of Mr. Imperato.

In reaching its decision, the court noted that a court is "correct in piercing the corporate veil in order to settle the rights of the parties *inter se* when the evidence sustained the fact that the parties did not intend to limit themselves to corporate procedures in the management of the corporate property but merely used it as a convenient device. [**61] " (*Imperato, 45 Cal.App.3d at 440.)* At bar, there is no evidence that Aaron and Elena did not treat Sunroad as a corporation or that they used Sunroad as a convenient device.

The court recognized in *Imperato* that a "special situation" might exist when a "husband and wife who are the sole stockholders of a corporation are dissolving their marriage ***and the other factors mentioned exist.***" [*49] (*Imperato, 45 Cal.App.3d at 440;* emphasis added.) The other factors are that the evidence supports a finding that the parties disregarded the corporate structure and did not treat the business as a separate entity. Elena's citation to language from *Imperato* omits this qualifying language. [R.B., page 17.]

The court in *Imperato* noted that "[o]ne reason for justifying the alter ego doctrine is that it prevents injustice." *(45 Cal.App.3d at 440.)* Here, applying the alter ego doctrine would create an injustice: it would justify sanctioning Aaron for not naming the assets of Sunroad Holding on his schedule of assets and debts and for not telling Elena about each of the business transactions of Sunroad.

Elena's reliance on [**62] *Marriage of Dick, supra,* is similarly unavailing. [R.B., page 18.] In *Dick,* the court instructed that "[w]hen a corporation is used by an individual or individuals, or by another corporation, to perpetrate a fraud, circumvent a statute, or accomplish some other wrongful or inequitable purpose, a court may disregard the corporate entity and treat the acts as if they were done by the individuals themselves." *(15 Cal.App.4th 144, 161.)* Few would quarrel with this statement of the law. (See, also, *Arnold v. Browne, supra, 27 Cal.App.3d 386, 393 -394.)*

But the facts in *Dick* are so completely dissimilar to the facts at bar that they illustrate why piercing the corporate veil of Sunroad would be unwarranted. Mr. Dick placed $ 20,000,000 of his assets into the control of [*50] others to avoid support and attorney's fees obligations to his wife. *(15 Cal.App.4th at 161.* 162-164.) In addition, Mr. Dick organized his assets to create "a labyrinth of trusts and corporations designed by him to shield and protect him from creditors." *(15 Cal.App.4th 144, 161;* internal punctuation omitted.)

Contrast those facts [**63] with Aaron who is paying $ 30,000 per month in expenses related to Elena's home and $ 40,000 per month directly to her. [R.T. 75:5-15.] Contrast the nature of Aaron's disclosure of assets with Mr. Dick's secretion of assets. And contrast Mr. Dick's corporation, designed to avoid creditors, with Sunroad which, though complex, is designed for the efficient and profitable conduct of its business.

There is nothing in the evidence which supports treating Sunroad as an extension of Aaron. This is critical because Aaron was sanctioned, in significant part, for failing to name the assets ***of Sunroad*** on his preliminary schedule of assets and debts, even as he disclosed his ownership of Sunroad. (He may have been sanctioned for failing to tell Elena of various business transactions of Sunroad, but the record is silent on this. Elena appears to believe that Aaron was sanctioned for this conduct. [See R.B., pages 2, 14-24.])

[*51] **7. The Court Did Not Weigh the Alleged Omissions to Determine Their Materiality.**

Section 1100(e) requires the parties to make full disclosure of all "material facts and information" regarding the community assets. In exercising its discretion [**64] to impose sanctions, the trial court did not weigh the alleged omissions to determine their materiality. Instead, the court concluded if that the asset was omitted, it was material. [C.T. 579; R.T. 84:6-11.] In effect, the omission became self-defining. The court expressly rejected any argument about the financial impact of the alleged breaches. [C.T. 580 P10.]

No evidence supports the finding of materiality. (Further, even if examined under the abuse of discretion standard in the following section, the failure to consider materiality would be a failure to exercise any discretion.)

8. Elena Failed to Show How She Was Damaged By Aaron's Conduct.

Elena failed to show how she was damaged by Aaron's conduct. She did not show how his conduct increased the costs of litigation. (A sanction is warranted under section 271 for conduct which increases the cost of litigation.)

Without a doubt, discovery in this case has been costly. Elena and [*52] Aaron have each had their depositions taken; the complexity of Sunroad Holding has necessitated the taking of Mr. Tronboll's and Mr. Vann's depositions as officers of the corporation, and the parties have hired joint experts to [**65] determine monies available for support and the value of Sunroad Holding. But Elena has not shown any causal connection between Aaron's disclosures and the cost of litigation.

In her motion of breach of fiduciary duty, Elena states that she has incurred fees and costs of $ 400,800 (presumably related to discovery and the experts) [C.T. 27], but she initially claimed only $ 65,000 (and showed only $

40,590) related to "this problem." [C.T. 33-35, 36.] "This problem" is never defined, but later Elena implies that it is the underlying motion for breach of fiduciary duty. [C.T. 174.]

In *Schnabel v. Superior Court (Schnabel) (1993) 5 Cal.4th 704, 21 Cal.Rptr.2d 200,* cited by Elena [R.B., page 37], the appellate court held that Mrs. Schnabel was entitled to information about the community corporation through Mr. Schnabel or third parties. *(5 Cal.4th at 715.)* This has never been an issue at bar. [R.B, pages 37-38.] Here, Aaron provided substantial information about Sunroad: with documents, through his corporate officers, and through inspection of corporate documents and financial computer-programs.

[*53] **III. IMPOSITION OF SANCTIONS MUST** [**66] **BE A REASONABLE EXERCISE OF DISCRETION**

This being the third step, the imposition of sanctions, it is reviewed for abuse of discretion. (*Burkle v. Burkle, supra, 144 Cal.App.4th 387, 399.)*

9. Sanctions Were Not Justified Under Section 271.

In his Appellant's Opening Brief, Aaron challenged the trial court's imposition of sanctions on all statutory grounds, including section 271. [See A.O.B., pages 48, 61, 64.] Aaron discussed the thematic relationship between section 271 and the other sanction statutes. [A.O.B., pages 48-50, 64.] Thus, Aaron has not waived his claim that he was incorrectly sanctioned pursuant to section 271 and the other statutes. [See R.B., pages 28-29.]

9-A. Aaron's Conduct Did Not Warrant Sanctions

Elena cites a number of cases to support the section 271 sanctions against Aaron. [R.B., pages 30-31.] Most of the cases are inapposite as they were addressing issues irrelevant to the issues at bar. Nevertheless, ironically, each of the cases cited by Elena underscores by contrast that the imposition of section 271 sanctions against Aaron was an abuse of discretion.

[*54] In *Marriage of Petropoulos (2001) 91 Cal.App.4th 161, 110 Cal.Rptr.2d 111,* [**67] the issue was whether Mrs. Petropoulos had been given sufficient notice and opportunity to be heard on the imposition of sanctions. *(91 Cal.App.4th at 167.)* Finding her procedural challenge to be without merit, the court affirmed the sanction fees-award against her. The trial court had sanctioned Mrs. Petropoulos because it found her to be not credible, found her tax returns to be inaccurate, and found that she had submitted duplicative expense receipts. (*Id., at 176 and fn. 10.)*

In *Burkle v. Burkle, supra, 144 Cal.App.4th 387,* the issue was whether Mrs. Burkle could bring a separate civil action against her husband and his accountants to enforce a family-law, temporary support order and for intentional infliction of emotional distress while the family law action was pending. The appellate court affirmed the dismissal of her civil lawsuit, calling it "a textbook example of an improper attempt to wage family law by other means." *(144 Cal.App.4th at 393,* internal punctuation omitted.) The appellate court also affirmed the sanctions imposed against Mrs. Burkle for filing the action in the civil court, where it "clearly [did] [**68] not belong," and for filing the action when she knew the separate suit would increase the costs of litigation. (*Id., at 400, 403, fn. 7.)*

[*55] In *Marriage of Freeman (2005) 132 Cal.App.4th 1, 33 Cal.Rptr.3d 237,* the issue was the timeliness of Mr. Freeman's request for sanctions following his successful defense against an earlier appeal filed by *Mrs. Freeman. (132 Cal.App.4th at 4.)* In the earlier case, in an unpublished opinion, the appellate court stated that it would have been inclined to issue sanctions for a frivolous appeal against Mrs. Freeman, but that Mr. Freeman had not filed the requisite motion in the court of appeal. Mr. Freeman's motion for sanctions was then filed in the trial court, but it was deemed to be untimely. (*Id., at page 5.)*

In *Marriage of Melone (1987) 193 Cal.App.3d 757, 238 Cal.Rptr. 510,* superseded by statute on other grounds, as stated in *Marriage of Daniels (1993) 19 Cal.App.4th 1102, 1108-1109,* the review court held Mr. Melone's conduct

warranted the attorney's fees sanction ordered against him. After contacting counsel for Mrs. Melone to seek a [**69] delay of her order to show cause for temporary support, Mr. Melone's counsel did not respond to the stipulation prepared by Mrs. Melone's counsel and neither he nor Mr. Melone appeared at the hearing on Mrs. Melone's support request. Temporary support orders were issued against Mr. Melone. Several months later, he moved to set aside the support order; and his motion was denied. He appealed from the denial of his motion. *(193 Cal.App.3d at 760-761.)* The [*56] appellate court held that Mr. Melone's conduct, in the trial proceedings and in filing a meritless appeal, warranted sanctions for behavior which frustrated the public policy to promote settlement and reduce the cost of litigation. (*Id., at 765-766.)*

Elena cites *Marriage of Norton (1988) 206 Cal.App.3d 53, 253 Cal.Rptr. 354* for the proposition that one may be sanctioned for taking an unreasonable position in the litigation. [R.B., page 30.] Elena does not articulate which of Aaron's positions she believes are unreasonable. It cannot be that correcting the preliminary schedule of assets and debts within two months of serving it and within six months of the filing of the petition [**70] for dissolution was unreasonable. [See C.T. 123, A.A. 1, 5-9, 202-203.] It cannot be that forgetting about an asset valued at $ 8,600, on which there had been no activity for twelve years and about which Elena knew well before commencement of the dissolution action, was unreasonable. [See C.T. 120 P12, 305 P13; A.A. 273, 724, 728, 741-742, 876.] It cannot be that not listing assets which belonged to Sunroad Holding on his schedule of ***personal*** assets and debts was unreasonable. And it cannot be that not disclosing the individual transactions of Sunroad, undertaken within the usual course of business, was unreasonable.

[*57] *Marriage of Norton, supra,* also does not assist Elena because the facts are so distinguishable. Mrs. Norton filed an unfounded order to show cause to change custody of the children from Mr. Norton to herself and brought several other claims to harass him. *(206 Cal.App.3d at 59.)* There was no such conduct at bar.

Similarly, Elena cites *Marriage of Daniels (1993) 19 Cal.App.4th 1102, 23 Cal.Rptr.2d 865* for the proposition that a party may be sanctioned for intransigent conduct. [R.B. 30.] In *Daniels,* [**71] the issue was whether wife could be sanctioned for the obstreperous conduct of her attorney. *(191 Cal.App.4th at 1104.)* The court affirmed the sanction, effectively holding Mrs. Daniels liable for the poor conduct of her attorney. The objectionable conduct included failing to return phone calls to husband's counsel, mailing correspondence to an incorrect address, improperly seeking an entry of default, seeking to capitalize unfairly on the untimely death of husband's first counsel, failing to inform husband's new counsel of the scheduled default hearing, refusing to return calls to husband's new counsel to discuss settlement, refusing to stipulate to set aside the default, and opposing the motion to set aside the default without good reason. (*Id., at 1106-1107.)*

Last, Elena cites to *Marriage of Quay, supra, 18 Cal.App.4th 961,* to support the sanction award against Aaron. In *Quay,* Mr. Quay refused for two [*58] years to provide an accounting of monies he received from the sale of community stock; he violated restraining orders regarding the use of the sale proceeds; he took unreasonable legal positions and "shopp[ed] around [**72] for a law firm willing to support that position, something more than simply taking a hard stand and aggressively litigating it"; he failed to cooperate with the simplest of discovery; and he so mismanaged community funds that the court appointed a trustee to manage the funds. *(18 Cal.App.4th at 969-970.)*

These cases effectively illustrate the kinds of obstreperous, intransigent, uncooperative conduct which justifies sanctions. Aaron's conduct does not approach the behavior in these cases.

Further, as discussed in Section 8, *supra,* Elena did not show how Aaron's conduct increased the cost of litigation.

[*59] **10. The Order Does Not Sufficiently Describe the Objectionable Behavior As to Be a Guide for Future Conduct.**

Elena argues that the sanction was imposed under section 2107, subdivision (c) to deter future objectionable conduct by Aaron. [R.B., pages 37-38.] However, the order is vague and does not describe what behavior the court

found objectionable, such that Aaron can avoid it in the future. Given the nature of the alleged breaches ***and the breadth of Aaron's cooperation with discovery and the jointly-retained experts,*** words like [**73] "hide-the-ball," "go fish," and "you figure it out" have little meaning and do not help Aaron to measure his future conduct.

The same can be said of the court's description of Aaron's behavior as "a clear pattern that [Aaron] had no intentions of complying with the policy ... that information is to be shared from the very beginning." [C.T. 577.] Elena argues that this was a reasonable exercise of the court's discretion [R.B., page 40], but she does not defend the court's order by articulating the details of the "pattern." Likely she provides no defense because she cannot defend it; there was no pattern. There were oversights, corrected early in the proceedings, and there were transactions and assets of the business which Aaron believed he did not have to disclose, as discussed *supra.* Again, given Aaron's compliance and the statutes, the order does not assist Aaron in [*60] knowing how to conduct himself in the future.

Indeed, given the statutes and sanction order at bar, any business person would not know what to disclose in the future. If the trial court is correct that every business transaction must be disclosed whether or not in the usual course of business, then [**74] that requirement will unduly burden the conduct of any business. Consider, for example, the business of a car dealership: must the managing spouse disclose every sale of an automobile under the fiduciary duty and disclosure statutes? Every increase in inventory? Every change in the models carried? Or, the business of a doctor, lawyer, or accountant: must the practicing spouse disclose the existence of every new patient or client? Or the decision to expand the area of one's practice? Or the business of a merchant: must the entrepreneurial spouse disclose the acquisition of each new line carried? Each new vendor or customer?

Elena also contends that the trial court had the advantage of "seeing and hearing a video of Aaron and his employee during portions of their depositions, and observing their demeanor." [R.B., page 39.] However, this is irrelevant because the court expressly stated that it was not relying on the deposition sound-bytes. [C.T. 580 P9.] The court said, "Whether or not Respondent [Aaron] was rude or not is not a factor that's gone into this decision." [C.T. 580 P9.]

[*61] **IV. THE ATTORNEY'S FEES UNDER SECTION 1101(g)**

11. The Attorney's [**75] **Fees Issued Pursuant to Section 1101, Subdivision (g),** ***If in Error,*** **Cannot Be Affirmed Under Any Theory.**

The court issued attorney's fees of $ 140,000 against Aaron pursuant to section 1101, subdivision (g). Aaron has discussed the necessity for damages under section 1101, subdivision (a), as a condition to imposed attorney's fees under subdivision (g) in Section 5-C, *supra.* Elena argues that even if Aaron is correct that there must be some injury before attorney's fees can be imposed under subdivision (g), the $ 140,000 fee order can be affirmed under the other sanctions statutes because an order can be affirmed if correct under any theory of law. n10 [R.B., page 47-49.] However, Elena too broadly applies the established rule that orders of the courts will be affirmed if correct on any theory of law applicable to the case. (See *Davey v. The Southern Pacific Co. (1897) 116 Cal. 325, 329.)*

> n10 Elena references a "section 2701, subdivision (c)." [R.B., page 47.] As there is no section 2701, and as section 271, subdivision (c) is not relevant to this argument, it is assumed that the reference to "section 2701" is a typographical error and that the intended citation is to section 2107, subdivision (c).

[**76]

In the case at bar, the court determined that Aaron should be sanctioned $ 250,000 to punish him for past conduct and to deter future such conduct. If the $ 140,000 attorney's fee order fails, there is nothing in the [*62] record upon which to base an assumption that the court would have ordered $ 390,000 in sanctions.

In *Marriage of Abrams (2003) 105 Cal.App.4th 979, 130 Cal.Rptr.2d 16,* Mr. Abrams was sanctioned on three

grounds, two of which were held to be insufficient to support the sanction. n11 *(105 Cal.App.4th at 991-992.)* The appellate court held that the third ground did justify the imposition of sanctions. (*Id., at 992-993.)* The court remanded the issue of sanctions back to the trial court to determine whether it would impose the same sanction on the one ground that it had on the three grounds. (*Id., at 993* ["[W]e cannot say with any certainty that the court necessarily would have exercised its discretion in the same fashion based only on one valid reason."].)

> n11 The two grounds which were struck down as insufficient to support sanctions are of particular interest to case at bar. The first ground was that Mr. Abrams had unreasonably pursued an unmeritorious legal position. But the appellate court held that his theory "was not so devoid of merit that no reasonable person would have pursued it." *(105 Cal.App.4th at 991.)* Here, too, with the exception of Aaron's oversights regarding his two personal assets, all of his non-disclosures were based on the legal theory that the transactions were part of the usual course of business of Sunroad Holding and the various entities were assets of Sunroad. If his theory is incorrect, it is not so devoid of merit that no reasonable business-person would have asserted it. If incorrect, it is not so devoid of merit that it warrants sanctions.
>
> As to the second ground, that Mr. Abram put his own parenting needs above the best interests of his children, note that the validity of this ground was reviewed under the sufficiency of the evidence standard. (*Id., at 991-992.)*

[**77]

[*63] At bar, too, it cannot be said with any certainly that the court would have imposed $ 390,000 in sanctions if it could not have issued attorney's fees under section 1101(g).

12. If, *Arguendo,* Fees Were Correctly Issued Under section 1101, They Must Still Be Just and Reasonable.

Assuming, *arguendo,* that an award of fees under section 1101, subdivision (g) is appropriate, Elena rejects Aaron's argument that such fees must be "just and reasonable under the circumstances of the ... parties." [R.B., page 49.] Aaron is well aware that the challenged fees were issued pursuant to section 1101, subdivision (g), and not under section 2032(a). However, section 1101, subdivision (g) includes no qualifying language about the measure of damages. Thus, Aaron suggested that the measure of the damages should be that established for the general attorney's fees statute in the Family Code. Aaron submits that statutes do not exist in a vacuum and established bodies of law can lend insight where a statute is silent or a body of law is undeveloped.

As to the cases which Elena cites to support her argument that a declaration is not needed in support of an attorney's fee [**78] declaration pursuant to *Marriage of Keech (1999) 75 Cal.App.4th 860, 89 Cal.Rptr.2d 525,* all of [*64] the cases she cites pre-date *Keech.* [R.B., page 50-51.] Thus, they are of questionable value.

As to Elena's argument that Aaron had not challenged her fee-request until after the court issued an order of $ 140,000 [R.B., pages 51-52], it should be recalled that Elena's request ***until the day of the hearing*** was $ 89,528.75. [C.T. 36, 174, 235.] While her request had continued to climb, Aaron may have determined that the sum did not warrant a challenge. However, a decision to not challenge $ 89,500 is not a concession to $ 140,000 in fees! Indeed, Aaron challenged the $ 140,000 immediately in objections to the order. [C.T. 374, 377-378, 394.]

[*65] **V. THE STATEMENT OF DECISION**

13. A Statement of Decision is Appropriate in this Matter.

Aaron has set forth the sound reasons that a statement of decision should have been issued in this matter in his Appellant's Opening Brief. [See A.O.B., pages 67-69.]

He did not waive his right to a statement of decision as asserted by Elena. [R.B. 53-54.] Elena cites to a letter [**79] to the court from Aaron's trial counsel, but she cites to only a portion of the critical language. [C.T. 572; see R.B. 53.] In entirety, the letter states: "Mr. Feldman agrees that a statement of decision is not required. ***Nonetheless, the Court has discretion to issue a statement of decision even when it is not required. Under the circumstances of this case, the Court ought to exercise its discretion to issue a formal statement of decision.***" [C.T. 572; emphasis added.]

At the hearing on Elena's motion for breach of fiduciary duty, her counsel requested a statement of decision that would give Aaron guidance in the future [R.T. 70:18-20], and Aaron's counsel joined in the request. [R.T. 79:7-8.] Though neither party then asked that the statement address attorney's fees, Aaron asked for a statement on that issue in his objections to the findings and order after hearing. [C.T. 374, 377-378, 394.] The absence of an issue in the initial request for a statement of decision is not fatal to the [*66] request. It simply means that the court is not mandated to issue the statement on that issue. (*Khan v. Superior Court (Khan) (1988) 204 Cal.App.3d 1168, 1173, fn. 4.)* [**80]

But, the question here is not that the court failed to issue a mandated statement of decision. The issue is that the court abused its discretion by refusing to enter a discretionary statement of decision. As such, the request for explaining the amount of the attorney's fees award falls within that abuse of discretion argument.

[*67] **CONCLUSION**

For all of the reasons discussed herein and in Aaron's Appellant's Opening Brief, Aaron respectfully submits that the trial court erred by sanctioning him in the amount of $ 250,000 and by ordering him to pay Elena's attorney's fees and costs in the amount of $ 140,000, the sanction being an incorrect application of the law, being unsupported by the evidence, and being an abuse of discretion. For these reasons, Aaron respectfully requests that the sanction and attorney's fee order against him be reversed in entirety.

Aaron further submits that the trial court erred by failing to issue a statement of decision on the issues of what conduct violated the fiduciary duty statutes and on how the attorney's fees and sanctions were calculated. For these reasons, he requests, if this Court is inclined to affirm the orders, that the matter [**81] be remanded for a statement of decision.

Dated: February 13, 2007

Respectfully submitted,

/s/ [Signature]
HONEY KESSLER AMADO
Attorney for Appellant,
AARON FELDMAN

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Please check the applicable box:
[X] There are no interested entities or persons to list in this Certificate per California Rules of Court, Rule 14.5(d)(3).

[] Interested entities or persons are listed below:

Name of Interested Entity or Person	Nature of Interest
1.	
2.	

Name of Interested Entity or Person	Nature of Interest
3.	
4.	

Please attach additional sheet with Entity or Person Information, if necessary.

/s/ [Signature]
HONEY KESSLER AMADO
261 South Wetherly Drive
Beverly Hills, California 90211

State Bar No. 75256
Attorney for: Appellant, Aaron Feldman

February 13, 2007

Date

CERTIFICATION OF WORD COUNT

I, appellate counsel for Respondent, Aaron Feldman, certify that the word count for the text of this Reply Brief, exclusive of Title pages, Tables of Content and of Authorities, and this Certification page, is **13,767** words. The words were counted by the Corel WordPerfect 8.0 program.

I declare under penalty of perjury [**82] that the foregoing is true and correct. Executed on February 13, 2007, at Beverly Hills, California.

/s/ [Signature]
HONEY KESSLER AMADO
Declarant

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February 13, 2007

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