2d Civ. No. B303161

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION 8

FOXCROFT PRODUCTIONS, INC., et al.,

Plaintiffs and Appellants,

v.

UNIVERSAL CITY STUDIOS, LLC

Defendant and Respondent.

Appeal from Los Angeles Superior Court
Case No. BC683206
Honorable Richard J. Burdge Jr.
Honorable David S. Cunningham III

APPELLANTS' OPENING BRIEF

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Court of Appeal
State of California
Second Appellate District

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Court of Appeal Case No.: B303161

Case Name: Foxcroft Productions, Inc., et al. v. Universal City Studios, LLC

[ ] There are no interested entities or parties to list in this Certificate per California Rules of Court, Rule 8.208.

[X] Interested entities or parties are listed below:

Name of Interested Entity or Person	Nature of Interest
1. Law Finance Group	Partial assignee of Plaintiffs' interest
2.	
3.	

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INTRODUCTION

"Hollywood accounting" has a deservedly bad name. It can be summarized as a studio agreeing to share profits with talent according to the motto, "Promise them anything, pay them nothing." It is accomplished by virtually incomprehensible contracts that leave "accounting" in the studio's hands. The studio then finds ways to offset revenue with hidden fees and charges, resulting in plenty of money for the studio but minimal or no net profits for the talent.

This case is a prime example. Plaintiffs created the iconic television series *Columbo*. Defendant Universal City Studios LLC ("Universal") promised to share with them 10-20% of the series' net profits (while retaining 80-90% of profits for itself). *Columbo* was extremely popular, running for seven years on NBC and another eight seasons on ABC, and airing in 44 countries. Its self-effacing protagonist, Detective Columbo, with his signature trench coat and "just one more thing" question, is one of the most well-known characters in television history.

Columbo generated over $580 million in worldwide revenue. Its production costs were approximately $192 million. Yet, for decades, Universal—which held all the accounting

records and had no duty to report to Plaintiffs unless it declared a profit—deemed *Columbo* to have made *no* net profits. When Universal finally provided accounting statements in 2016, it represented that the series made less than $40 million in net profits from the NBC run, and had lost $65 million from the ABC run.

How could this be? Because Universal deducted more than $162 million in "distribution fees" on top of its fully-reimbursed costs. The "distribution fees" were not paid to anyone and bore no relation to any actual cost or expense—they were simply a percentage of gross receipts that Universal deducted from revenue before determining whether *Columbo* was profitable, amounting to 25% of gross revenue. Universal claims that a reference to "standard charges" in a generic Universal rider attached to the Universal-drafted contract allowed it to take these enormous, self-dealing deductions. Universal's claim depends on interpreting an undefined term, "Photoplays," in isolation from the rest of the contract. The typewritten contract, however, was clear: Plaintiffs were to receive 10% (or 20%) of net profits of "the series." Period.

The jury determined that Universal was not entitled to the "distribution fees" deductions, and a panel of court-appointed

accountants found that Universal owed Plaintiffs $66.9 million in contract damages, including prejudgment interest.

The trial court then granted a new trial based on an error in law. The error? The court concluded that in the one paragraph that Universal relied on to justify its distribution-fee deductions, the undefined term "Photoplays" included all "episodes" of *Columbo*, however sold, and that the court should have instructed the jury with that definition. (The court instructed the jury on contract interpretation principles generally, not on the meaning of any specific contract term.)

In fact, the trial court's contract interpretation was wrong. To begin with, the trial court erred in interpreting the Universal rider in isolation from the rest of the contract, the terms of which prevail over the attached form rider. In context, the term "Photoplays" is ambiguous, triggering the rule that ambiguities must be interpreted against the drafter—here, Universal.

In any event, the Universal rider defines "subsidiary rights" as including television re-runs and foreign broadcasting rights. "Subsidiary rights" are conspicuously absent from the specific rider provision that Universal claims allows it to deduct "distribution fees" before calculating whether there are profits to share. Television re-runs and foreign broadcasting rights account

for the bulk of distribution fees that Universal took. As to that portion of the judgment, the jury's verdict was correct, regardless of what "Photoplays" means.

And even as to first-run domestic television rights, the contract, read as a whole, is best understood as not allowing Universal to deduct distribution fees for sales of the "series" as a package, which is what occurred. That's certainly true given that Universal drafted the barely penetrable rider, meaning that any ambiguity must be construed against it.

Universal's construction would make the rider unconscionable by any standard—a dense, small-print, jargon-laden document with undisclosed fees that completely defeat Plaintiffs' reasonable expectation that they would share in profits from a wildly popular and successful television series. Contracts should be interpreted to avoid unconscionability. Under that canon, the trial court's hypothesized "Photoplays" instruction would have been improper.

For all these reasons, the new trial order must be reversed and the judgment reinstated.

There are also other rulings that need to be rectified. The damages award was understated because the accounting panel erroneously applied Universal's recent payments to principal, not

interest, and placed on Plaintiffs the burden of proof to present accounting data that resided solely in Universal's hands (and which Universal claimed it had lost). The case should be remanded for an award of additional damages applying the correct interest calculation and standard of proof.

In addition, the trial court summarily adjudicated Plaintiffs' fraud claims on statute of limitations grounds, holding that Universal had conclusively proven its affirmative defense beyond any possible factual dispute. Plaintiffs are prepared to live with that decision if the breach of contract liability judgment is reinstated. Otherwise, the summary adjudication ruling should be reversed, and Plaintiffs should be allowed to proceed with their fraud cause of action on remand.

STATEMENT OF FACTS

Richard Levinson and William Link created, wrote, and produced the shows *Columbo* and *Murder She Wrote,* among others. (7-RT-2859.)[1] They were inducted into television's Hall of Fame, and *Columbo* received multiple Golden Globe awards. (7-RT-2859-2860.) This suit involves their entitlement to share net profits for the original *Columbo* series and a later iteration of the series, *Mystery Wheel Columbo.*

A. 1967: Universal Hires Plaintiffs To Write A Television Movie Based On Their Stage Play *Prescription: Murder*.

Link and Levinson wrote a play called *Prescription: Murder* that introduced the Columbo character. (6-RT-2470-2471.) Universal acquired the rights to the play and, in 1967, hired Link and Levinson to write and produce a television movie based on it. (*Ibid.*; 6-AA-3279-3283.) *Prescription: Murder* was made into a television movie under that deal. (5-RT-2182-2184; 6-AA-3280-3283.)

[1] Record citations are in the format [vol.]-AA-[page] for the Appellants' Appendix and [vol.]-RT-[page] for the Reporter's Transcript. (Cf. Ninth Cir. Rule 30-1.6.)

B. 1971: Universal Enters A New Contract With Plaintiffs—The Deal Memo—Promising Them A Share Of Net Profits For The Television Series *Columbo*.

Link and Levinson wrote a second television film script called *Columbo* based on *Prescription: Murder* characters. (6-AA-3284-3285.) In 1970, Universal agreed to pay Link and Levinson a royalty (i.e., a fixed amount per episode) if the *Columbo* script was filmed and resulted in a television series sale. (*Ibid.*)

In 1971, Universal drafted and entered into a Deal Memo with Link and Levinson, through their companies Foxcroft Productions, Inc. and Fairmount Productions, Inc. ("the Deal Memo"). (6-AA-3287-3304, 3309; 4-RT-1859.)

Link and Levinson were to write "theatrical features, pilot, and/or projected series and/or spin-offs and 2-hour television photoplays," write "other anthological photoplays, and . . . episodic photoplays," and provide producer and executive producer services. (6-AA-3288 ¶2*.)[2]

[2] Relevant portions of the Deal Memo (trial exhibit 10), and a court-appointed accounting panel's findings, are attached at the end of this brief for the Court's convenience. (Cal. Rules of Court, rule 8.204(d).) Citations to attached pages are marked with an *.

1. The Deal Memo promises Plaintiffs a share of "net profits" of the "series."

The Deal Memo promised Plaintiffs fixed royalties, plus "10% of 100% of the net profits of said television series" developed from a "pilot photoplay."[3] (6-AA-3300-3301 ¶6*.) They were to receive an additional 10% of net profits for "episodes of a series" that they also produced or executive produced. (*Ibid.*)[4]

The net profits entitlement expressly applied to the *Columbo* series: "'COLUMBO' shall be considered a series coming within the purview of this Paragraph (i.e., they shall be entitled to at least 10% of 100% of the net profits from 'COLUMBO' with an additional 10% payable under the contingencies set forth above)." (6-AA-3301 ¶6*; 4-RT-1886-1887.)

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[3] In studio accounting speak, 10% of 100% means that that the promised 10% net profits share is not reduced by the amount paid to other profit participants. (4-RT-1887.)

[4] Link and Levinson were executive producers of the two *Columbo* pilots and produced the series' first season. (6-RT-2419; Documents In Support Of Joint Motion To Augment Record On Appeal filed December 23, 2020 ("Dec. 23 Augmentation") 15 [Link deposition testimony, p. 8].)

2. The Deal Memo attaches a Universal boilerplate rider, whose terms Universal agrees to negotiate in good faith.

The Deal Memo directs that net profits are to be computed "as per the attached EXHIBIT A." (6-AA-3301 ¶6*.) Exhibit A is a pre-printed Universal form "Rider to Agreement" between a "Producer" and a "Participant." (6-AA-3303-3304*.) Exhibit A's terms were expressly left subject to further negotiation. (6-AA-3302 ¶9*.)

Net profits, gross receipts, and distribution expenses. The Universal rider promises that "[a]s additional compensation Producer [presumably Universal] shall pay to Participant [presumably Plaintiffs] sums equal to ___ percent (___%) of Producer's net profits from the exhibition of photoplays and exploitation of subsidiary rights of the television series now entitled _____, which shall herein be referred to as 'the Photoplays' and 'the Series' respectively. Payments shall be computed and made as herein provided." (6-AA-3303*.) The blanks were not filled in. (*Ibid.*)

Net profits are the excess of gross receipts over production costs and distribution expenses. (6-AA-3303 ¶A(a)*.) "Gross Receipts" are the "total of all monies actually received by Producer as consideration for the right to exhibit the Photoplays

and to exploit subsidiary rights in the Series" with certain exclusions not relevant here. (*Id.* ¶A(b)*.) "Distribution Expenses" are "all costs and expenses *incurred* and *payments made by* Producer, directly or indirectly." (*Id.* ¶A(c)*, italics added.)

Producer Companies. The rider defines "Producer Company" as Universal or a related company. (6-AA-3304 ¶A(e)*.) On the second page of the rider is a paragraph titled "Producer Companies":

> (C) **Producer Companies:** Participant agrees that a Producer Company may act as distributor of the Photoplays, and that a Producer Company may furnish facilities, materials, equipment and personnel for the Photoplays. All fees and charges of each Producer Company shall be distribution expenses or production costs as the case may be, and the Producer Company may retain its fees and charges as its own property without accounting therefor to Participant. However, such fees and charges shall not exceed those charged by Producer Company according to its then existing standard practices, applicable to photoplays owned, financed or distributed by a Producer Company, and in all other matters affecting gross receipts, distribution expenses, and production costs the Producer Company shall adhere to the same practices and procedures according to which it normally conducts its business at the time in question with respect to photoplays owned, financed or distributed by a Producer Company.

(6-AA-3304 ¶(C)*.)

This paragraph refers only to "Photoplays"; unlike other provisions in the rider, it does not mention "subsidiary rights." (*Ibid.*)

No list of "standard practices" is attached to the Deal Memo.

Distribution fee schedule. No schedule of standard distribution fees accompanied the Deal Memo, although Universal attached such schedules to other contracts it had with other people. (4-RT-1985-1986; 5-RT-2211.)

Accounting limitations. "Accountings and payments of sums due [to] Participant shall be made to Participant" periodically by the "Producer," i.e., Universal. (6-AA-3304 ¶(B)(b)*.) But, "[n]o accountings shall be required for periods as to which Participant is not entitled to any payments." (*Ibid.*) That meant that until Universal deemed that it owed money, it would not give Plaintiffs any information they could use to independently determine whether that was so or not. Plaintiffs had one year after any accounting to object to it. (*Id.* ¶A(B)(c)*.)

Rider terms subject to further negotiation. The Deal Memo specified that the rider's pre-printed terms were still open to negotiation: "[A]lthough EXHIBIT A is attached hereto, we agree to negotiate in good faith with respect to the terms and conditions and make the changes we would normally make in said EXHIBIT A (to the extent requested) notwithstanding EXHIBIT A being attached." (6-AA-3302 ¶9*.)

3. The undefined and defined terms.

Photoplays. Neither the Deal Memo nor the rider defines the term "Photoplays." The Deal Memo references "2-hour television photoplays," "anthological photoplays," "episodic photoplays," "pilot photoplays," "photoplays (one or more) which together relate one complete work," but does not otherwise define "Photoplays." (6-AA-3288-3302 ¶¶2, 3(B)(7)(c), 3(C)(1)(b), (d), 3(C)(2), 3(C)(7)(d), 5, 6*.)

Episode. The Deal Memo's profit-sharing paragraph uses the term "episodes of a series." (6-AA-3300 ¶6*.) That term is not defined or used in the rider.

Subsidiary rights. The rider defines "Distribution Expenses" as encompassing "subsidiary rights, including, but not limited to, payments for television re-runs, foreign telecasting and theatrical exhibition of the Photoplays as well as any other payments for use or re-use of the Photoplays . . . ." (6-AA-3303 ¶A(c)*.) It defines "Subsidiary Rights" non-exhaustively, as "*includ[ing]* live television, radio, theatrical motion picture, stage, merchandising and publication rights." (6-AA-3304 ¶A(i)*, italics added.)

Series. The Deal Memo makes multiple references to the "Series," including tying the net-profits sharing promise

specifically to those "of said television series." (6-AA-3200-3301 ¶6*.) *Columbo* is repeatedly referenced as a "series." (E.g., 6-AA-3289 ¶¶(3)(A) ["the television series now entitled 'Columbo'"], (3)(B)(1) [the "'COLUMBO' television series (90 minutes)"], 3301 ¶6* ["'COLUMBO' shall be considered a series coming within the purview of this [profit-sharing] Paragraph"].)

The rider references "the Series" as something distinct from "Photoplays," but does not otherwise define "series" except circularly defining a "Spinoff Series" as "a series of television programs based on a character or other material telecast on the Series." (6-AA-3304 ¶A(h).)

4. The contemplated forthcoming formal agreement.

The parties contemplated that Universal would prepare a formal written agreement documenting the 1971 deal. (6-AA-3302 [Deal Memo constitutes the agreement, "[p]ending preparation and execution of formal agreements"], 3309 [Universal representative "requested that a formal contract be submitted for signature"].)

Based on his experience, Plaintiffs' lawyer, Hirsch, expected Universal to send him a proposed formal written agreement, and once received, he would commence negotiations "to eliminate or reduce the amount of distribution fees."

(4-RT-1891-1892, 1909.) But Universal never sent a formal written agreement. Instead, after an exchange of letters between Universal and Hirsch, Universal created an internal memorandum in which the author noted some amendments to the Deal Memo and asserted "I have been advised that the Deal is now firm . . . ." (6-AA-3313-3315.) Plaintiffs and Hirsch were not on that memorandum's distribution list (see 6-AA-3313), but apparently obtained a copy at some point.

C. 1971-1978: During *Columbo*'s First Run On NBC, Universal Deducts Millions Of Dollars In Hidden "Distribution Fees," Obliterating Any Net Profits To Share With Plaintiffs.

Link and Levinson wrote the *Columbo* series as the Deal Memo contemplated. Universal produced, distributed, and owned it. (6-RT-2462-2463.) Universal licensed the series to NBC for seven seasons between 1971 and 1978. (See 3-AA-2104*; 6-RT-2418.)

NBC paid Universal for the right to broadcast *Columbo* on a per season basis. (6-RT-2417-2418, 2420.) Universal deducted its actual production costs, and *also* deducted a "distribution fee" for each season that the series aired. (4-RT-1986; see, e.g., 6-AA-3417, 3423.) The distribution fee was not based on any actual expense that Universal incurred or paid to a third party.

(4-RT-1988-1989.) Rather, it was a percentage of gross receipts that Universal simply deducted from the revenues otherwise owed to Plaintiffs. (4-RT-1899, 1988-1989; 7-RT-2833.)

Universal's distribution fee percentage varied by exhibition category, from 10% of gross receipts for the first national domestic exhibition, up to 50% for foreign television broadcast. (6-AA-3286; see also, e.g., 6-AA-3421-3422.)

Universal deducted over $82 million in distribution fees, on what it calculated as gross receipts of $226 million, for NBC *Columbo* from inception through the end of 2017. (3-AA-2104*.)[5] Because the distribution fees created a cumulative net loss, Universal also imputed interest of over $36 million on the net loss, which further dramatically reduced the show's net profits—i.e., the pool that Plaintiffs would share in. (*Ibid.*)

Link and Levinson did not know that Universal was deducting distribution fees, much less the magnitude of those fees: There had been no distribution fee schedule attached to the

[5] $226 million was Universal's calculation. (3-AA-2104* ["Participation Statement" columns].) A court-appointed accounting panel calculated $321 million in gross receipts for NBC *Columbo*, based on a trial court order rescinding a Deal Memo amendment that affected home-video revenue accounting. (*Ibid.* ["Order P. 4" columns].) The trial court later conditionally vacated its rescission order. (See p. 49, *post*.)

Deal Memo, and Universal did not send them accounting statements. (4-RT-1985-1986; 7-RT-2788.)

D. 1988: Representing That There Were No NBC *Columbo* Profits And Never Would Be, Universal Amends The Deal Memo To Cover A New Run Of *Columbo* On ABC's *Mystery Wheel* In Return For Plaintiffs Receiving A Reduced Share Of Home-Video Profits.

In 1988, ABC expressed interest in incorporating the *Columbo* series into *Mystery Wheel,* a collection of mystery television series shown in rotation. (6-RT-2426-2427.) The Deal Memo continued to govern *Mystery Wheel* profit-sharing, but was modified in two ways. (5-RT-2132; 6-RT-2428-2429.)

Universal represented that *Columbo*'s NBC run had not been, and never would be, profitable. (5-RT-2131.) Link had a long relationship with the "big people" at Universal, whom he trusted and who confirmed the representation. (Dec. 23 Augmentation 19; see also *id.* at 24 [Universal's Paul Miller told Link he was not owed money].)[6]

Based on Universal's no-NBC-run profits representation, Plaintiffs sought and obtained a provision that losses from the

[6] Levinson had passed away by this point, leaving his widow—and later his daughter—to run plaintiff Fairmount. (7-RT-2856-2858.)

NBC run would not be deducted from *Mystery Wheel Columbo*'s gross receipts (not "cross-collateralized" in studio accounting speak). (5-RT-2130, 2132; 6-AA-3316-3317.)

In exchange, Universal obtained a new method of calculating home-video profits more favorable to Universal. (6-AA-3316.) Previously, Plaintiffs shared in profits calculated as 100% of gross receipts minus actual expenses. (5-RT-2201-2202.) Under the 1988 amendment, Plaintiffs shared in only 20% of home-video gross receipts with no expense deductions. (6-RT-2434-2435.) Plaintiffs would not have agreed to the home video change if not for Universal's representation that the NBC run was in the red. (5-RT-2132.)

Universal deducted over $79 million in distribution fees, on what it calculated as gross receipts of $241 million, for *Mystery Wheel* from inception through the end of 2017. (3-AA-2104*.)[7]

[7] $241 million was Universal's calculation. (See 3-AA-2105* ["Participation Statement" columns].) The court-appointed accounting panel calculated $262.8 million in gross receipts for *Mystery Wheel Columbo*, based on the trial court's (later-vacated) order rescinding the Deal Memo amendment affecting home-video accounting. (*Ibid.* ["Order P.4" columns].) The accounting panel's calculations total approximately $584 million in gross receipts. (3-AA-2104-2105* ["Order P.4" columns].)

E. 2013-2016: Plaintiff Foxcroft Requests An Accounting Statement; Three Years Later, Universal Sends Initial Statements Showing $155 Million In "Distribution Fee" Charges.

In the 40 years after *Columbo* first aired, Universal did not send Plaintiffs a *single* accounting statement. (7-RT-2778-2788; Dec. 23 Augmentation 17 [Link deposition testimony played at trial, p. 10].)[8] Given the Deal Memo's no-profits/no-accounting provision (6-AA-3304 ¶(B)(b)*), this failure to provide any accounting statements was an ongoing representation that the series had no net profits. When Plaintiffs asked about profits, Universal told them there were none. (5-RT-2131.)

In 2013, plaintiff Foxcroft asked Universal for an accounting for "'Columbo' (1989-2003)"—i.e., for *Mystery Wheel Columbo*. (6-AA-3413.) The letter requested tolling of "all applicable contractual and legal deadlines" until after an audit could be performed. (*Ibid.*)

Despite Foxcroft's request, another *three years* went by with no accounting. Then, in November 2016, Universal abruptly sent Foxcroft a check for $2,321,634, which Universal

[8] Universal *prepared* draft statements (see, e.g., 6-AA-3356, 3361-3412), but at the direction of its vice-president Bob Bradley, did not share them with Plaintiffs. (6-AA-3357-3360; 7-RT-2780, 2782-2784, 2802-2803, 2807-2809, 2813.)

represented was Foxcroft's share of net profits for NBC *Columbo*, and a participation statement for NBC *Columbo* from inception through 2015. (7-RT-2788; 6-AA-3413-3453.) Universal also sent a *Mystery Wheel Columbo* participation statement that represented that the show had no net profits. (7-RT-2793, 2796; 6-AA-3454-3501.) Universal sent a similar check and statements to plaintiff Fairmount in January 2017. (7-RT-2790; 6-AA-3502-3540; 7-AA-3542-3587.)

This was the first time that Universal paid Foxcroft or Fairmount any net profits for *Columbo*, or gave them a participation statement. (7-RT-2788, 2791.) Universal has not explained how it finally determined that Foxcroft and Fairmount were entitled to payment or decided to send accounting statements.

The statements Universal sent showed that through the end of 2015, Universal had deducted over $155 million in distribution fees: $78 million for NBC *Columbo* and $77 million for the ABC *Mystery Wheel Columbo*, both including foreign telecasts and television re-runs. (6-AA-3418-3453, 3455-3501.)[9]

[9] Accounting referees later found a total of $162 million in distribution fee charges taken through the end of 2017, $82 million for NBC *Columbo* and $80 million for ABC *Mystery Wheel Columbo*. (3-AA-2104-2105*.)

Universal later sent Foxcroft and Fairmount participation statements for 2016 and 2017, along with checks for $98,725 (2016) and $107,470 (2017) representing a further share of NBC *Columbo* net profits. (7-AA-3588-3801, 3762.) The accounting statements showed additional distribution fees, and represented that *Mystery Wheel Columbo* still had no net profits. (7-AA-3543, 3586, 3667, 3712, 3715, 3760.)

STATEMENT OF THE CASE

A. Plaintiffs Sue Universal For Breach Of Contract And Fraud; Universal Cross-Complains.

Foxcroft and Fairmount sued Universal on November 14, 2017, less than one year after Universal first sent them participation statements for NBC *Columbo* and *Mystery Wheel Columbo*. (1-AA-53.) Plaintiffs alleged that Universal had breached the Deal Memo by failing to pay all the net profits that it owed them. (1-AA-59-60.) And, they alleged that Universal fraudulently represented that they would receive a share of net profits despite knowing that its accounting legerdemain would ensure that there never would be such net profits, fraudulently represented in 1988 that there never were and never could be any NBC *Columbo* profits, and fraudulently continued to represent

until 2016 that *Columbo* had no net profits by not sending participation statements. (1-AA-61-64.)[10]

Universal cross-complained for declaratory relief, seeking an entitlement to offset supposed losses from *Mystery Wheel Columbo* against profits from NBC *Columbo* in contravention of the 1988 amendment. (1-AA-78-82.)

B. The Trial Court Denies Summary Adjudication On Plaintiffs' Contract Claim, But Rules That The Statute Of Limitations Bars Their Fraud Claim.

Universal moved for summary judgment or summary adjudication on statute of limitations grounds. (1-AA-91-118.) Foxcroft opposed the motion. (1-AA-307-333.)

The court ruled against Universal on the breach of contract claim. (1-AA-651-664.) Under the Deal Memo, accountings are not presumed correct until a year after they were "'rendered.'" (1-AA-660-661.) Universal first provided an accounting statement to Plaintiffs on November 22, 2016. (1-AA-661.) Their right to challenge the accuracy of the statement did not accrue until that date. (*Ibid.*) The lawsuit was filed less than a year later, and therefore was timely. (*Ibid.*)

[10] Plaintiffs voluntarily dismissed several other causes of action, which are not at issue on appeal. (1-AA-647.)

But the court granted summary adjudication on the fraud cause of action. (1-AA-661-662.) It reasoned that Plaintiffs "suspected" that they were owed money more than three years before suit, because Link testified that he believed sometime before 2013 that he was owed profits, and he told Levinson's daughter about his suspicions.[11] (*Ibid.*) The court concluded that these "suspicions were sufficient to require them to actively seek" supporting facts. (*Ibid.*)

The court rejected Plaintiffs' equitable estoppel argument. (1-AA-662.) That argument was based on (1) Universal's 1988 representation that *Columbo* would never be profitable and (2) Universal's failure to provide accounting statements, which it only had to do if there was a net profit. (*Ibid.*) The court found that in light of testimony by Link and by Levinson's daughter about Link's suspicions, it was unreasonable as a matter of law for them to rely on Universal's 1988 representation and its failure to provide accounting statements. (*Ibid.*)

[11] Link's testimony was in a videotaped deposition. He has since passed away.

C. Trial Phase I: The Jury Trial.

1. Pretrial: The trial court rules that the distribution-fee and contract statute of limitations issues will go to the jury.

Before trial, the trial court determined that conflicting evidence on certain issues required jury resolution of whether the Deal Memo entitled Universal to deduct "distribution fees." (1-AA-700-701.) Among other things, the court concluded that the jury would hear evidence on (1) whether the Deal Memo rider allows Universal to take distribution fees; (2) if yes, whether such distribution fees were barred by Universal failing to attach a schedule of distribution fees to the Deal Memo; (3) what the term "Photoplays" means as used in the Deal Memo; and (4) Universal's statute of limitations defense. (*Ibid.*)

The court reserved other issues for itself to decide after the jury trial, and it later decided that a panel of accounting referees would determine damages in a separate phase of trial based on the jury and court's contract interpretation findings. (1-AA-700-701, 864-869; see also 1-AA-679-682 [parties' stipulation re bifurcation].)

2. At trial: Plaintiffs argue multiple reasons why Universal is not entitled to take its hidden distribution fees.

The case proceeded to a multi-day jury trial. (1-AA-723-733, 784-785.) At trial, Plaintiffs argued that the Deal Memo does not allow Universal to deduct distribution fees for several reasons.

First, the rider paragraph Universal relied on only allows Universal to assess distribution fees when it self-distributes "Photoplays." (4-RT-1905; 8-RT-3036-3037.) The Deal Memo does not define the term "Photoplays." Plaintiffs argued that the term is ambiguous, that there was conflicting extrinsic evidence on its meaning, and that, in context, it is best read not to include episodes of *Columbo*, which the Deal Memo defines as a "series." (4-RT-1872-1875, 1879-1880, 1902-1907.) Plaintiffs noted that the rider's introductory paragraph referred to "Photoplays" and "subsidiary rights of television series" as "two different things," and that the Producer Companies paragraph that Universal relies on for distribution fees "does not include the term 'series.'" (8-RT-3041.)

Second, the Deal Memo expressly states that the parties were to negotiate the Exhibit A rider terms in good faith, "notwithstanding EXHIBIT A being attached." (8-RT-3030-3033,

3066-3067; 6-AA-3302 ¶9*.) Plaintiffs' transactional lawyer testified that studios typically draft a formal contract memorializing a deal memo, and that he negotiates open items, including distribution fees, upon receiving the draft formal contract. (4-RT-1866, 1909; see also 6-AA-3302 [Deal Memo expressly contemplated "preparation and execution of formal agreements"].) Universal never sent Plaintiffs a draft formal contract here, and there was no schedule of distribution fees attached to the Deal Memo as Universal did with other deal memos sent to other writers. (4-RT-1985-1986; 6-RT-2211.) In light of that omission, Universal could not enforce the supposed distribution fee paragraph. (See 4-RT-1908-1909.)

Third, the rider requires that Producer Company fees and charges "shall not exceed those charged by Producer Company according to its then existing standard practices," and Universal failed to establish that the distribution fees it deducted were in line with its "standard practices." (4-RT-1910-1911.)

3. At trial: Plaintiffs lacked access to facts regarding unpaid profits before 2016.

Regarding the statute of limitations, Plaintiffs argued that Universal repeatedly represented until 2016 that there were no net profits. (5-RT-2131.) Levinson's daughter testified that she first discovered *facts* causing her to suspect she'd been underpaid

in 2016, when Link's wife told her she'd received an accounting statement and check. (7-RT-2861.) Two other witnesses testified that just because a show is popular does not mean it is profitable—it is impossible to tell without a participation statement, which Universal did not send until 2016. (5-RT-2174-2715, 2252; 6-RT-2513-2514.)

4. After the close of evidence: The court again finds conflicting extrinsic evidence on distribution fees and instructs the jury on contract interpretation.

After the close of evidence, Universal continued to argue that there was no conflicting extrinsic evidence on contract meaning for the jury to resolve. (8-RT-3004; 1-AA-743-748.) The court decided that there *was* conflicting evidence on Universal's entitlement to a distribution fee when it distributes *Columbo*, including on whether "Photoplays" includes *Columbo* episodes. (8-RT-3004 ["The extrinsic evidence is all over the map"].)

The court instructed the jury on general contract interpretation principles, as well as on the elements of the breach of contract claim and statute of limitations defense. (1-AA-788-813.) It did *not* instruct the jury on the meaning of any specific term in the Deal Memo or its Exhibit A rider. (*Ibid.*)

5. The court uses Universal's special verdict form.

The trial court submitted to the jury a special verdict form that asked whether Universal was entitled to distribution fees and, only if the jury answered "yes," then asked if the term 'Photoplays' as used in the Deal Memo rider encompassed "an episode of *Columbo*." (1-AA-789, 815-817.)

Universal proposed this format, including the instruction to skip over the Photoplays question if the jury determined that Universal was not entitled to take a distribution fee. (4-AA-2471-2475; 8-RT-3007.)

6. The unanimous jury verdict: Universal was not allowed to take self-dealing distribution fees and Plaintiffs' suit is timely.

The jury returned a unanimous verdict in Plaintiffs' favor. (8-RT-3302-3303.)

Distribution fees. The jury answered "no" to the first question on the verdict form, whether the Deal Memo allowed Universal to take a distribution fee when it acts as a distributor. (3-AA-2123.) Following instructions on the verdict form, the jury then skipped over the next three questions, including the meaning of the term "Photoplays." (3-AA-2123-2124.)

Statute of limitations. The jury found that Plaintiffs did not discover facts before November 14, 2013 that caused them, or would have caused a reasonable person, to suspect that Universal failed to pay them money owed or render a required accounting statement. (3-AA-2124.)

Universal declined to have the jury polled and did not object before the jury's discharge that the jury should have answered the questions that it skipped over, including whether "Photoplays" includes *Columbo* episodes. (8-RT-3303.)

D. Trial Phase II: The Court Rescinds The 1988 Home-Video Amendment As Resulting From Mutual Mistake And Revisits The Rider's "Photoplays" Term.

After the jury's verdict, the court decided issues it had reserved for itself (Phase II).

1988 amendment. During the trial, the court allowed Plaintiffs to amend their answer to Universal's cross-complaint, to allege that the 1988 amendment that changed the home-video accounting method resulted from mutual mistake—namely, the belief that *Columbo*'s NBC run was not profitable, when in fact it was, once the distribution fees were disallowed. (8-RT-3002-3004.) Based on the jury's finding that Universal was not entitled to deduct distribution fees, the court agreed that the

1988 amendment was based on mutual mistake and granted rescission. (1-AA-857-858.)

Photoplays. Universal also asked the court to determine the meaning of "Photoplays" as used in the rider, purportedly for purposes of the accounting referees. (8-RT-3603.) The court found that "Photoplays" unambiguously includes "individual episodes of Columbo." (1-AA-859; see also 8-RT-3925.) But the court cautioned that its finding did not mean that Universal could deduct distribution fees: "I don't think you get the right—get distribution fees because that's what the jury decided. Could be because they didn't think that the Exhibit A [rider] adequately let the other side know that's what you were doing." (8-RT-3603-3604.)[12]

E. Trial Phase III: Without Any Burden Of Proof Directive, A Panel Of Accounting Referees Determines Damages, Accepting Universal's Unsupported Accounting Numbers.

Phase III of the trial centered on the accuracy of Universal's accounting statements from inception to 2015, and on the impact of disallowing Universal's improper distribution fee deductions. A panel of three accounting referees heard evidence,

[12] The court also found Plaintiffs entitled to prejudgment interest under Code of Civil Procedure section 3287. (1-AA-859.)

then issued findings in a report and supplemental report. (2-AA-1274-1565; 3-AA-1567-1790, 2096-2121.)

Missing records and burden of proof. Despite belatedly producing during Phase III certain financial records that it claimed to have just found to support its accounting, Universal could not locate other missing records. (See 2-AA-1285-1287, 1289, 1292-1293.) In particular, there was *no* support for several years' production costs. (November 2, 2020 Motion to Augment, 6/6/19 transcript at 630-631, 633-634.)

Plaintiffs asked the court to instruct the accounting referees that Universal had the burden of proving the accuracy of the participation statements and of its accountings because Universal had exclusive access to its financial records. (1-AA-827, 882-883, 887-888, 890-893; 8-RT-3624-3625, 4207-4208.) The Court declined to do so. (8-RT-4207-4208.)

The referees assume support for Universal's accounting figures. The referees accepted at face value many of Universal's asserted production costs, despite having virtually *no* backup for 23 of the 24 *Mystery Wheel Columbo* episodes. (2-AA-1289.) The referees simply took Universal's word for various numbers without backup. As the referees put it: "The Panel's analysis is limited, since we have not received the

detailed production costs for season 1 and seasons 3 through 8." (2-AA-1292.) The panel did not find any "obvious entries listing indirect or overhead costs" based on "the limited information" available. (2-AA-1292-1293.) But it stressed that "we did not receive the underlying support for the entries and could therefore not verify whether the information displayed is accurately input and accounted for, or if it is valid or overstated." (2-AA-1293.)

The referees also accepted Universal's numbers for pre-1985 foreign syndication revenue, despite Universal providing no evidentiary support for its position: "The Panel's testing of foreign syndication revenues was restricted because Universal provided limited (i) license agreements and (ii) details of foreign receipts." (2-AA-1287.)

The unpaid profits share. Even largely accepting Universal at its word, the referees found that Universal owed Plaintiffs $66.9 million, including prejudgment interest, through December 31, 2017. (3-AA-2101.) That amount largely reflects the increase in profits after disregarding the improper distribution fees. (*Id.*, fns. 1-3, 6-8.)[13]

[13] The referees' summary calculations, from their supplemental report, are attached at the end of this brief.

Recent payments applied to principal, not outstanding interest. Universal paid Plaintiffs approximately $5 million beginning in 2016. (3-AA-1797.) In determining how much Universal still owes Plaintiffs, the accounting panel applied those payments to principal, not to outstanding interest. (See 3-AA-1797-1798.)

Objections overruled. Plaintiffs objected to several aspects of the accounting panel's report. (3-AA-1791-1808.) The trial court overruled most of the objections. (3-AA-2058-2063.)[14] It found the panel's application of payments to principal proper because prejudgment interest had not yet been awarded (even though it ultimately was deemed to start accruing earlier). (3-AA-2059-2060.) And, the court rejected Plaintiffs' objection that the panel erred in crediting Universal's production cost and foreign syndication revenue numbers despite Universal's failure to provide support for them. (3-AA-2060-2063.) The court found the burden of proof to be "a non-issue" because, in its view, the accounting panel did not ultimately decide any issue based on the burden of proof. (*Ibid.*)

[14] The court also rejected most of Universal's objections, but ordered the accounting panel to address one issue. (3-AA-2063-2072.)

F. The Court Enters A $70.6 Million Judgment For Plaintiffs.

The trial court entered judgment on October 31, 2019. (3-AA-2122-2130.) The judgment awarded Plaintiffs $70,681,812.40, comprising the referees' damages calculation plus amounts owed for 2018 and prejudgment interest through entry of judgment. (3-AA-2128.)

On Universal's cross-complaint, the court rescinded the 1988 amendment based on mutual misunderstanding because, in fact, without the improper distribution-fee charges the original *Columbo* would have been profitable. (3-AA-2125, 2129.) Rescinding the 1988 agreement meant that Universal could apply losses across ("cross-collateralize") all runs of the *Columbo* television series but also that the home-video profit calculation reverted to its original formulation as included in the accounting referees' calculations. (*Ibid.*; see 3-AA-2104-2105*.)

G. The Court Denies JNOV, But Grants A New Trial For Error Of Law On The Distribution-Fee Issue And Concomitantly Vacates Its Order Rescinding The 1988 Home-Video Amendment.

1. Universal's motion.

Universal moved for judgment notwithstanding the verdict (JNOV), a new trial, and vacatur. (3-AA-2142-2163.)

JNOV. Universal argued that (1) the court's Phase II observation that "Photoplays" includes *Columbo* episodes retroactively precluded the jury's distribution-fees verdict; and (2) Link's suspicions, shared with Levinson's daughter, that Universal owed money compelled judgment for Universal on its statute of limitations defense. (3-AA-2151-2156, 2159-2160.)

New trial. Universal alternatively argued that the jury's verdict that Universal was not entitled to take distribution fees *might* have rested on Plaintiffs' theory that "Photoplays" does not include episodes of *Columbo*. (3-AA-2156-2158.) That possibility, Universal argued, required a new trial in light of the court's Phase II observation that "Photoplays" in the rider's distribution-fees paragraph encompasses all *Columbo* episodes. (*Ibid*.)

Vacatur. Universal argued, in part, that if Universal could charge distribution fees, there was no mutual mistake regarding the 1988 amendment because then NBC *Columbo*, in fact, had no net profits in 1988. (3-AA-2160-2163.)

Plaintiffs opposed the motions. (4-AA-2336-2367.)

2. The trial court's ruling.

The trial court denied JNOV, finding that the jury properly decided the statute of limitations issue, and that its no-distribution-fee verdict could have rested on something other

than the meaning of "Photoplays"—the jury may have found, for example, that the parties "didn't negotiate exactly what the terms of the distribution fees would be." (5-AA-3136-3146.)[15]

But, the court granted "a limited new trial" on whether Universal was permitted to charge distribution fees for episodes it distributed. (5-AA-3138-3139, 3144-3146.) The court premised its order solely on its perceived error-in-law in failing to instruct the jury that, as a matter of law, "Photoplays" in the rider included *Columbo* episodes. (*Ibid.*) The court concluded that its failure to so instruct the jury was prejudicial because allowing the jury to interpret "Photoplays" could have "affected their decision that the 1971 Deal Memo did not permit Universal to charge distribution fees, regardless of whether they reached a final conclusion on the meaning of photoplays or what their decision was." (5-AA-3139.) The trial court did not purport to reweigh the evidence.

The court also conditionally vacated its rescission ruling, because it was premised on the falsity of Universal's no-profits representation which, in turn, may change on a new trial.

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[15] Plaintiffs had also pointed out that Universal failed to disclose what the distribution fees would be and failed to prove its standard practice on distribution fees. (4-AA-2342-2344.)

(5-AA-3137, 3139-3140.) Thus, the court determined that the rescission ruling was "subject to being reinstated if the new trial does not result in a different verdict on distribution fees." (5-AA-3137.)[16]

H. Plaintiffs Appeal; Universal Cross-Appeals.

The court entered its formal order granting a limited new trial and vacatur on December 10, 2019, and Universal served notice of entry on December 19, 2019. (5-AA-3136-3140, 3155-3156.)

Plaintiffs timely appealed from the new trial order and, with an amended notice, from the judgment as well. (5-AA-3152 [December 18, 2019 notice], 3210 [January 9, 2020 amended notice]; Cal. Rules of Court, rules 8.104(a)(1)(B), 8.108(d)(1)(A) [notice of appeal from underlying judgment timely when filed within 30 days of service of notice of denial of judgment notwithstanding the verdict].) Universal timely cross-appealed from the judgment. (5-AA-3194 [December 26, 2019 notice].)

[16] In granting a *conditional* vacatur the trial court implicitly rejected Universal's claimed bases for unconditional vacatur, i.e., that its false representation did not warrant rescission and that Plaintiffs were to blame for taking Universal at its word.

STATEMENT OF APPEALABILITY

The trial court's partial new trial order is appealable under Code of Civil Procedure section 904.1, subdivision (a)(4). If the new trial order is reversed, the judgment (which has been appealed from) will be reinstated as a final judgment appealable under section 904.1, subdivision (a)(1). (If the new trial order is affirmed, appeal of other aspects of the judgment will await entry of judgment after retrial, see *Marshall v. Brown* (1983) 141 Cal.App.3d 408, 415-416.)

ARGUMENT

I. The Judgment Must Be Reinstated Because The New Trial Order Is Premised Solely On A Nonexistent Error Of Law.

The trial court found that it committed legal error by not instructing the jury that "Photoplays" as used in one paragraph of the rider includes *Columbo* episodes. It ruled that the lack of an instruction requires a new trial because the jury's no-distribution-fee finding *may have* relied on a view that "Photoplays" does not include *Columbo* episodes.

As we now show, the trial court's failure to instruct the jury that "Photoplays" includes *Columbo* episodes was *not* an error in law requiring a new trial: The court was right not to instruct the

jury that "Photoplays" includes *Columbo* episodes because, interpreted in context, "Photoplays" does *not* include *Columbo* episodes—and to the extent the term is ambiguous, it must be interpreted against Universal, and therefore against distribution fees.

A. This Court Reviews The New Trial Order De Novo, Because It Was Based Solely On A Perceived Error Of Law.

The trial court granted a new trial on a single ground: error in law, based solely on the court's post-trial interpretation of "Photoplays." (5-AA-3137-3140.) Unlike new trial orders *generally*, this Court reviews de novo whether there was, in fact, an error in law. (*Tun v. Wells Fargo Dealer Services, Inc.* (2016) 5 Cal.App.5th 309, 323.) "It is the rule that there is no legal ground for granting a new trial if it is granted for an error of law which did not occur." (*R. E. Tharp, Inc. v. Miller Hay Co.* (1968) 261 Cal.App.2d 81, 85.) If there was no error in law, the new trial order *must* be reversed.

As the trial court found no conflicting extrinsic evidence on the meaning of "Photoplays," contract interpretation here is a pure question of law. It calls for de novo analysis of the contract language without regard to how legal arguments were framed in the trial court. (See *Eisen v. Tavangarian* (2019) 36 Cal.App.5th

626, 635 [interpreting CC&R's de novo on appeal]; *Palmer v. Shawback* (1993) 17 Cal.App.4th 296, 300 [same re contract attorney fees interpretation].) It was Universal's burden to establish that its proffered meaning is the *only* reasonable reading of the contract language—if the contract is ambiguous, the ambiguity is construed against the drafter, Universal (*Rebolledo v. Tilly's, Inc.* (2014) 228 Cal.App.4th 900, 913 (*Rebolledo*)), and Universal was not entitled to a jury instruction that the contract means what *Universal* claims. Universal cannot make that showing.

B. The Trial Court Erred In Interpreting "Photoplays" As Used In The Rider, Without Considering The Deal Memo As A Whole.

Contracts must be construed *as a whole,* not piecemeal. (Civ. Code, § 1641; *Jones v. Jacobson* (2011) 195 Cal.App.4th 1, 18.) The rule applies as much to riders as to any other portion of a contract. (*Pulte Home Corp. v. American Safety Indemnity Co.* (2017) 14 Cal.App.5th 1086, 1105.) A word used in multiple places in a contract shall be given the same meaning throughout. (*E.M.M.I. Inc. v. Zurich American Ins. Co.* (2004) 32 Cal.4th 465, 475; *People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.* (2003) 107 Cal.App.4th 516, 526.) Plus, by statute, the *typewritten* use of a term prevails over a pre-printed form. (Civ. Code, § 1651.)

The trial court violated all these precepts. It interpreted "Photoplays" in Universal's pre-printed rider in isolation, independent from how the same word was used in the typewritten Deal Memo. In its words, "There was evidence that photoplays was used in the Deal Memo for various purposes other than describing episodes of Columbo, but as a matter of law the term 'photoplays' *in Exhibit A* [i.e., the rider] included episodes of Columbo." (5-AA-3138, italics added.)

The fact is that "Photoplays" has no clear, unambiguous meaning *anywhere* in the Deal Memo and rider. Universal does not get to draft a contract with a term that can mean many different things, then assert after-the-fact that as a matter of law, the term in one place means something favorable to Universal, even if the term means something different elsewhere. As we now explain, the most reasonable reading of "Photoplays" in the rider is that it does *not* include *Columbo* episodes. To the extent the term is ambiguous, that ambiguity must be interpreted against Universal.

C. Correctly Interpreted, The Rider Does Not Allow Universal To Deduct Distribution Fees For Foreign Syndication, Re-Runs, Home Video, And Other Subsidiary Rights.

Most of the distribution fees Universal deducted were on foreign syndication, domestic re-runs and miscellaneous "other" uses including merchandising and publishing: For NBC *Columbo* and *Mystery Wheel Columbo* combined, Universal calculated those categories as generating approximately $320 million in revenue, and deducted "distribution fees" on them of between 20% and 50% of gross receipts, amounting to approximately $148 million. (3-AA-2104-2105*; e.g., 7-AA-3768-3771, 3807-3811.)[17]

In fact, under the plain terms of the *Universal-drafted* rider to the Deal Memo, Universal was not entitled to deduct *any* distribution fees on foreign syndication, re-runs, or the miscellaneous uses in its "other" category. The same is true as to

[17] Universal deducted total distribution fees of $162 million for NBC *Columbo* and *Mystery Wheel Columbo*. (3-AA-2104-2105* ["Participation Statement" columns].) Just under $14 million of that related to the network run (i.e., 10% of $137 million in network gross receipts). (*Ibid.*; 6-AA-3286 [distribution fee percentages]; see also, e.g., 7-AA-3807 [applying 10% fee].) That leaves $148 million in distribution fees on everything else, including foreign rights, re-runs (domestic syndication, basic cable and pay tv), "non-theatrical," and "other."

home video, which Universal did not deduct distribution fees for on its accounting statements (based on the 1988 amendment, Universal deducted 80% of home-video revenue instead), but which Universal now argues will be subject to distribution fees if the 1988 amendment is rescinded. Universal may get to keep up to 90% of the net profits from those exploitations, but it does not also get to deduct a distribution fee off the top before calculating if there are any profits. That is because these exploitations are *subsidiary rights*, and the rider paragraph that Universal relies on for distribution fees (the Producer Companies paragraph) addresses only "Photoplays," not subsidiary rights.[18]

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[18] In the trial court, Plaintiffs consistently emphasized the rider's differentiation between "Photoplays" and "subsidiary rights in the series," and the Producer Companies paragraph's singular focus on "Photoplays." (E.g., 1-RT-608 [Plaintiffs arguing to the court that the Distribution Expenses paragraph references expenses for distribution of "'Photoplays, *or of subsidiary rights*'"; "that language is not included in the big C on page 2 [i.e., the Producer Companies paragraph]. That's a huge difference"]; 8-RT-3041-3043 [Plaintiffs' closing argument: rider differentiates between "exhibition of photoplays" and "exploitation of subsidiary rights of television series"; body of the Deal Memo defined *Columbo* as a "series"; Producer Companies paragraph references only "Photoplays," not "series"].) That they may not have phrased or fully developed the analysis as they do here is of no moment. Universal sought a new trial on the ground that "Photoplays" *unambiguously* has to include *all* exploitations of *Columbo* episodes as a matter of law. If an alternative reading exists, the trial court's "error of law" new trial order must be reversed.

1. Re-runs, foreign syndication, home video, and the items in Universal's "other" category are subsidiary rights.

Universal's rider treats "Photoplays" and "subsidiary rights" as two separate items. The rider defines "Net Profit Participation" as a share of "Producer's net profits from the exhibition of *photoplays and exploitation of subsidiary rights* of the television series." Similarly, it defines "gross receipts" as money received for "the right to exhibit the *Photoplays and to exploit subsidiary rights* in the Series." (6-AA-3303 ¶A(b)*; see *id*. at ¶ A(d)* ["production costs" are those for "production of the *Photoplays, or exploitation of subsidiary rights*," italics added].) "Photoplays" and "subsidiary rights," thus, necessarily do not encompass each other.

The distinction between "Photoplays" and "subsidiary rights" leads to the question, what is a subsidiary right? The rider defines "subsidiary rights" as "*includ[ing]* live television, radio, theatrical motion picture, stage, merchandising and publication rights." (6-AA-3304 ¶A(i)*.) But that list is not exclusive: "The words 'include' and 'including' are ordinarily words of enlargement, and not of limitation." (*People v. Laird* (2018) 27 Cal.App.5th 458, 468, citations and internal quotation marks omitted.)

The rider's "distribution expenses" paragraph sheds further light. It defines "distribution expenses" as "[a]ll costs and expenses . . . in connection with the sale, lease, license, exhibition, distribution or other disposition of the Photoplays*, or of subsidiary rights, including, but not limited to, payments for television re-runs, foreign telecasting and theatrical exhibition of the Photoplays* as well as any other payments for use or re-use of the Photoplays, ..." (6-AA-3303 ¶A(c)*, italics added.)

Under the last antecedent rule, qualifying phrases "are to be applied to the words or phrases immediately preceding and are not to be construed as extending to or including others more remote." (*Jones v. IDS Property Casualty Ins. Co.* (2018) 27 Cal.App.5th 625, 638, citation and internal quotation marks omitted.) Applying that rule, the "including but not limited to" list modifies "subsidiary rights" (the term immediately preceding the list), not "Photoplays" (the more remote term). (*Ibid.*) In other words, television re-runs, foreign telecasting, theatrical exhibitions, publishing, merchandising, and other re-uses of the Photoplays are subsidiary rights, which is distinct from exhibiting, distributing, or otherwise disposing of "Photoplays."

Applying the last antecedent rule makes particular sense here. Otherwise, the provision circularly defines "Photoplays" to include the "re-use" of the Photoplays.

Thus, television re-runs, foreign telecasting, publishing, merchandising, and other exploitations along these lines are, per Universal's own standardized contract language, "subsidiary rights." The same would be true for home video which can only be a "re-use" of the series.

2. The Producer Companies paragraph that Universal says allows distribution fees applies only to "Photoplays," and *not* to "subsidiary rights."

The provision Universal relies on for distribution fees (the "Producer Companies" paragraph) only addresses "Photoplays," with no mention of a right to deduct fees for distributions in the separate subsidiary rights category: "Participant agrees that a Producer Company [defined as Universal or a commonly owed entity] may act as distributor *of the Photoplays*, and that a Producer Company may furnish facilities, materials, equipment and personnel *for the Photoplays.*" (6-AA-3304 ¶(C)*.)

As discussed above, other paragraphs of the rider—including the paragraph allowing deduction of actual distribution *expenses*—refer *both* to Photoplays *and* to subsidiary rights. (6-AA-3303-3304*.) The absence of any reference to "subsidiary rights" in the Producer Companies paragraph must be given meaning: It is well-settled that "where different words or phrases are used in one section than in other sections, it is

presumed a different meaning is intended." (*Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2018) 29 Cal.App.5th 410, 418; see *Kleffman v. Vonage Holdings Corp.* (2010) 49 Cal.4th 334, 343 [same re statutory construction]; *Christian v. Flora* (2008) 164 Cal.App.4th 539, 551 [contracts are construed under "substantially the same canons of interpretation as statutes"].) The clear implication of the Producer Companies provision referencing just "Photoplays," and *not* "subsidiary rights," is that Universal cannot pay itself a distribution fee for "subsidiary rights," including television re-runs, foreign telecasts, merchandizing, publishing, and home video.

Thus, *on its face*, the Producer Companies provision that Universal says allows it to deduct distribution fees does not apply when Universal distributes things in the "subsidiary rights" category. (See 2-RT-608 [Plaintiffs drawing this distinction at a pre-trial hearing]; 8-RT-3044 [Plaintiffs' closing argument to the jury: under the Producer Companies paragraph, "Universal can only charge a fee if it relates to a Photoplay," which is distinct from "subsidiary rights of television series"].) That means Universal is *not* entitled to deduct distribution fees for "television re-runs, foreign telecasting and theatrical exhibition," home

video, or the other re-uses encompassed in its "other" category of gross receipts.

3. To the extent there is any ambiguity in the Producer Companies paragraph, the ambiguity is construed against Universal.

As just discussed, the Producer Companies paragraph on its face does *not* permit Universal to deduct distribution fees for distributions in the subsidiary rights category, including re-runs, foreign syndication, and home video. But even if the paragraph were ambiguous, it would have to be so interpreted. The provision is in a pre-printed Universal form. (6-AA-3303-3304*.) Any ambiguity must be construed against drafter Universal: "'[A]mbiguities in standard form contracts are to be construed against the drafter. [Citations.]'" (*Rebolledo, supra*, 228 Cal.App.4th at p. 913.)

4. As "Photoplays" does not include re-runs, foreign syndication, home video, or other re-uses, the trial court properly did not instruct the jury otherwise.

The new trial order is premised on the court's finding that as a matter of law, "Photoplays" in the rider includes *Columbo* episodes, and that it should have so instructed the jury. (5-AA-3138.) That finding necessarily includes a finding that "Photoplays" includes *all* forms of *Columbo* episodes, including re-runs, foreign syndication and home video. To that extent, the

order is clearly wrong. Those items are not "Photoplays" within the meaning of the rider's Producer Companies paragraph—they are excluded subsidiary rights. Accordingly, there was no legal error in failing to instruct the jury that they are Photoplays. And without that legal error, there was no basis for granting a new trial on Universal's entitlement to deduct distribution fees on those categories. The new trial order therefore must be reversed, and the judgment reinstated, to disallow those fee deductions.

D. Read In Context Of The Whole Deal Memo, The Rider Also Does Not Allow Universal To Deduct Distribution Fees For First-Run Domestic Exhibitions Of *Columbo*.

The Deal Memo is even more incomprehensible as to whether Universal could deduct "distribution fees" for first-run domestic television exhibitions of the *Columbo* series, but ultimately the most reasonable answer is the same: It can't.

1. The better contract reading is that Universal may not deduct distribution fees for selling the *Columbo* series as a whole.

NBC and ABC did not buy individual episodes of *Columbo*. Rather, they purchased the "series" as a whole, for one or more seasons at a time. (E.g., 6-AA-3318-3320, 3351-3355 [ABC *Mystery Wheel Columbo*]; 8-AA-3942-3943, 3955, 3965-3966, 3972-3973, 3976-3977 [NBC].)

The Deal Memo's paragraph (3)(C)(6) (the "net profits paragraph") promises that Plaintiffs are to receive 10% of the net profits of a "television series," plus another 10% of net profits of any "episodes of a series" for which they are a producer. (6-AA-3300 ¶6*.) The net profits paragraph expressly defines *Columbo* as a "series" for these purposes. (6-AA-3301 ¶6*.) The net profits paragraph then says that "[t]he computation of net profits shall be as per the attached EXHIBIT A," a pre-printed Universal rider. (*Ibid.*) The referenced "net profits" must be for a "*series*," as that is what the net profits paragraph grants.

"Exhibit A" grants Plaintiffs a share of "net profits from the exhibition of photoplays and exploitation of subsidiary rights of the television *series*." (6-AA-3303-3304*, italics added.) It defines "'the Photoplays'" and "'the Series'" as separate items. (*Ibid.*) Its definition of "Gross Receipts" encompasses "the Photoplays" and "subsidiary rights *in the Series*." (*Ibid.*, italics added.) But by contrast, its Producer Companies provision makes *no* mention of "the Series." (*Ibid.*)

Universal's using "the Series" in reference to "gross receipts" but omitting that term in the Producer Companies paragraph suggests that any distribution fee authorized by that paragraph could apply *only* to sales of an individual episode and *not* to deals selling "the Series" as a package. (See *Cornette v.*

Department of Transportation (2001) 26 Cal.4th 63, 73 [statutory construction: "When one part of a statute contains a term or provision, the omission of that term or provision from another part of the statute indicates the Legislature intended to convey a different meaning"].)

This construction conforms to the rule that "the written or specially prepared portions of a contract control over those which are printed or taken from a form." (*Continental Cas. Co. v. Phoenix Constr. Co.* (1956) 46 Cal.2d 423, 431; see also Code Civ. Proc., § 1862 ["When an instrument consists partly of written words and partly of a printed form, and the two are inconsistent, the former controls the latter"].) The specially prepared profit-sharing paragraph dictates that profits are to be shared "in the series," but the rider's Producer Companies paragraph mentions only "Photoplays," not the separately enumerated "series." (6-AA-3300-3301, 3304*.)[19] As a consequence, Universal could not

[19] The only reference to "photoplay" in the Deal Memo's profit-sharing paragraph, Paragraph (3)(C)(6), is to a "pilot photoplay" for a "new television series." (6-AA-3300*.) Where the term "photoplay" appears elsewhere in the Deal Memo, it is almost always qualified with an adjective making clear that "photoplay" refers to an individual, separate installment: e.g., "anthological photoplays" (i.e., a collection of disparate installments), "episodic photoplays" (i.e., those that are divisible portions of an overall series), "pilot photoplays" (i.e., single episodes made in hopes of generating a series). (6-AA-3288 ¶2 [anthological, episodic], 3291 ¶3(B)(7)(c) [anthological], 3293 ¶¶3(C)(1)(b) [pilots], (3)(C)(1)(c)

deduct distribution fees when NBC and ABC licensed entire seasons of *Columbo*—i.e., the series as a whole.

As a practical matter, this makes sense. It takes much less effort and expense to sell and distribute a series as a whole, a season at a time, than it would to sell and distribute each episode individually. Thus, whatever justification there might be for an on-top-of-actual expenses "distribution fee" in other contexts, there is no justification for one as to a series-as-a-whole deal.

2. Any ambiguity must be resolved against Universal, which is consistent with the jury's no-distribution-fee finding.

At a minimum, the net-profit-sharing language in the Deal Memo and rider is confusing, uncertain, and ambiguous. The controlling, specially-drafted portion of the Deal Memo references only "net profits of said television series" with no mention of individual "photoplay" profits. In the attached pre-printed rider, "net profits" and "gross receipts" reference "the Series"; "distribution expenses" and self-dealing Producer Companies charges do not.

[individual 2-hour scripts], 3294 ¶3(C)(1)(d) [individual photoplays, including those intended for "a series of photoplays encompassing one literary work"], 3298 ¶3(C)(7)(c), (d) [individual theatrical releases], 3299-3300 ¶5 [pilot]; see 6-AA-3292 ¶3(B)(8) ["Per Assignment" fee for rewriting individual script].)

In the context of the Deal Memo and rider as a whole, if the Producer Companies paragraph does not unambiguously disallow distribution fees on first-run distributions, it is at least ambiguous as to whether Universal can take such fees.

The ambiguity is compounded by the fact that the Deal Memo fails to identify the amount of any distribution fees to be deducted. Unlike other deal memos contemporaneously entered into by Universal, the Deal Memo with Plaintiffs did not attach any standard "distribution fee schedule." (4-RT-1985-1986; 5-RT-2211.) It only says that Universal *may* take *up to* its "standard" fees and charges, an amount that itself is to be negotiated. (6 AA 3304 ¶(C)*.)

These multiple ambiguities must be construed against Universal, which drafted both the Deal Memo and the rider. (*Rebolledo*, *supra*, 228 Cal.App.4th at p. 913.) The trial court therefore *properly* did not instruct the jury that "Photoplays" in the Producer Companies paragraph includes *Columbo* episodes. The error that the trial court relied on in granting a new trial did not exist—and the jury reached the correct result in disallowing Universal's distribution fees.

E. The Trial Court's And Universal's Proffered Interpretation Would Create An Unconscionable Contract—An Interpretation To Be Avoided.

There is another problem with Universal's and the trial court's interpretation that "Photoplays" in the rider's Producer Companies paragraph includes *Columbo* episodes: It creates an unconscionable contract.

An unconscionable contract is unlawful. (Civ. Code, § 1670.5; see *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 124 [unconscionable aspects of arbitration provision are "unlawful"].) But wherever possible, contracts must be interpreted to be lawful. (Civ. Code, §§ 1643 ["A contract must receive such an interpretation as will make it lawful"], 3541 ["An interpretation which gives effect is preferred to one which makes void"]; *Alameda County Deputy Sheriff's Association v. Alameda County Employees' Retirement Association* (2020) 9 Cal.5th 1032, 1068-1069; *Edwards v. Arthur Andersen LLP* (2008) 44 Cal.4th 937, 953-954.) Thus, this Court must adopt an interpretation that makes the contract conscionable over one that makes it unconscionable.

Unconscionability has two aspects: (1) procedural unconscionability—such as "'terms of the bargain [being] hidden in a prolix printed form'" and (2) substantive unconscionability—

an "overly harsh," "one-sided" result. (*De La Torre v. CashCall, Inc.* (2018) 5 Cal.5th 966, 982-983 (*CashCall*).) It exists where there are "*fine-print terms*, or provisions *that seek to negate the reasonable expectations of the nondrafting party*, or unreasonably and unexpectedly harsh terms having to do with price or other central aspects of the transaction." (*Sonic–Calabasas A, Inc. v. Moreno* (2013) 57 Cal.4th 1109, 1145, italics added.)

Unconscionability operates on a sliding scale. The greater the procedural unconscionability, the less substantive unconscionability that needs to be shown and vice versa. (*CashCall*, *supra*, 5 Cal.5th at pp. 982-983.)

Both aspects of unconscionability are amply present under Universal's and the trial court's interpretation.

1. Procedural unconscionability: A prolix form with hidden terms.

Procedural unconscionability involves "oppression *or* surprise." (*CashCall*, *supra*, 5 Cal.5th at p. 982, italics added.) The quintessential formulation of "surprise" is "the 'terms of the bargain [being] hidden in a prolix printed form.'" (*Id.* at p. 983, citations omitted.) That perfectly describes the rider that Universal says entitles it to deduct distribution fees. The rider is not just long and wordy, it is impenetrable and jargon-filled. It uses "Photoplays" without any definition other than a completely

circular one—"exhibition of photoplays and exploitation of subsidiary rights of the television series . . . which shall herein be referred to as 'the Photoplays' and 'the Series' respectively." (6-AA-3303*.)

The rider makes no effort to correlate with the terms "anthological photoplays," "episodic photoplays," or "pilot photoplays" used in the typed contract. Given the dense, prolix nature of the language, Universal's proffered supposedly "clear" meaning eluded the trial court until *after* the verdict. (1-AA-704; 5-AA-3137.)

The paragraph that Universal claims gives it the right to deduct huge fees not tied to actual expenses appears under a misdirecting heading "**Producer Companies.**" Nowhere does the paragraph say that Universal can deduct a straight percentage of gross revenues as a fee unrelated to actual costs or expenses before deciding whether there are profits to share with Plaintiffs. Rather, it says only that Universal may take an amount up to its "standard" fees and charges without having to account to Plaintiffs. (6-AA-3304 ¶(C)*.)

Universal's "standard" charges are nowhere identified. No list is provided. There is no ready reference. Although Universal regularly attached distribution fee schedules to other contracts in

1971, it did not do so here. (5-RT-2211-2213.) The hidden nature of the charges was compounded by the fact that by taking them, Universal obliterated shareable profits and thereby relieved itself of *any* accounting obligation—that is, of any obligation to tell Plaintiffs that it was deducting them. Universal hid its charges for nearly 40 years, only revealing them after plaintiff Foxcroft inquired in 2013—an inquiry Universal did not deign to answer for *three years*.

There is also unequal bargaining power—"oppression"—here. Although Plaintiffs were represented by counsel during the Deal Memo negotiations, Universal had far more bargaining power. Plaintiffs were individuals negotiating with a large, well-financed company. Universal drafted the Deal Memo and attached its form rider. The Deal Memorandum obligated Universal to negotiate in good faith the terms of the rider, but that never happened as to distribution fees. (4-RT-1866, 1891-1892, 1909.) Universal simply unilaterally imposed whatever distribution fees it sought to deduct.

2. Substantive unconscionability: A hugely successful television series that grossed over $580 million yields just $5 million in shared "profits" for Plaintiffs solely because of Universal's unilaterally imposed hidden fees.

There is also substantive unconscionability—that is, "'overly harsh' or 'one-sided' results." (*CashCall*, *supra*, 5 Cal.5th at p. 982.) Universal promised Plaintiffs a 10-20% share of net profits from the *Columbo* series. Even under Plaintiffs' reading, Universal recovers *all* its *actual* production and distribution costs, plus 20% administrative overhead, *plus* 80-90% of the net profits. That *still* would have left $70 million (including interest) as Plaintiffs' share of profits—but for Universal taking distribution fees on top of all the other money it kept.

The *Columbo* series was wildly popular, grossing more than $580 million. So, how is it that for 40 years it yielded *no* profits for its creators and thereafter only a pittance? The explanation is Universal's distribution fee deductions amounting to $162 million. Those fees did not reflect additional expenses that Universal had to incur that were somehow not accounted for in its 20% overhead or 80-90% profit share—to the contrary, they are just a fixed percentage of gross receipts. (4-RT-1899, 1988-1989; 7-RT-2833.)

These fees (averaging over 25% of all revenues) are the second largest line-item expense in Universal's accounting, just behind actual production expenses. (See 3-AA-2104-2105*.) Is it overly harsh and one-sided for Universal to promise Plaintiffs a small piece of the profits pie and then claim that it gets to eat the whole pie first based on its own hidden self-created fees and charges with no accountability? The answer can only be yes. The Court should adopt the contract interpretation that avoids this unconscionable result.

The only "error in law" here was the trial court's disregard of the rules of contract interpretation in misinterpreting the Universal form rider attached to the Deal Memo.

F. The New Trial Order Must Be Set Aside In Whole Or, At A Minimum, In Part.

The new trial order must be reversed and the original jury verdict must be reinstated. At a minimum, the new trial order must be reversed as to re-runs, foreign, and "other" subsidiary rights with a remand (1) to an accounting panel to recalculate how much Universal owes Plaintiffs once its impermissible subsidiary-rights distribution fees are removed and (2) to a jury to retry first-run distribution fees.

II. Even If The Trial Court Was Right On The Issue Of Law (It Was Not) The New Trial Order Was Not Justified.

A. Alternative, Independent Grounds Support The Jury's Verdict.

Plaintiffs argued that *multiple* paths allowed the jury to find Universal had no right to deduct distribution fees, including:

1. Properly interpreted, and resolving ambiguity against Universal, the Producer Companies paragraph does not entitle Universal to take distribution fees.

2. Universal failed to attach a schedule of distribution fees, even though it attached such a schedule to other contracts it entered around the same time, further supporting a jury finding that Plaintiffs never agreed to the distribution fees taken here.

3 Universal committed in the Deal Memo to negotiate terms in the Universal-drafted rider in good faith, but Universal never presented a draft formal contract that Plaintiffs' counsel would have considered the starting point to discuss distribution fees.

(See pp. 38-39, *ante*.)

B. Universal Cannot Profit From The Verdict Ambiguity It Invited When It Told The Jury Not To Specify What "Photoplays" Meant.

The trial court found that it could not determine whether the jury's no-distribution fees finding was premised on its construction of "Photoplays" or one of the other multiple paths by which the jury could have reached the same result. (9-RT-5402.) But the responsibility for that situation lies at Universal's feet, and Universal cannot profit from an ambiguity that it created. Specifically:

The trial court gave the jury a special verdict form that Universal proffered. (3-AA-2123-2124; 4-AA-2372 ¶6, 2374-2375 ¶¶12, 14-15, 2433-2439, 2471-2475.) That form instructed the jury to skip over a question about what "Photoplays" meant once it decided that Universal was not entitled to distribution fees. (3-AA-2123.) By contrast, Plaintiffs' proposed form would have had the jury first resolve the meaning of "Photoplays," and thereafter resolve whether the Deal Memo permitted distribution fees. (4-AA-2372 ¶6, 2442.)

When the jury returned its verdict, a verdict whose basis Universal now deems ambiguous, Universal sat silent. Not until *after* the jury had been discharged did Universal argue that the lack of specificity in the verdict required a new trial because the

jury *may* have based its conclusion on a supposedly incorrect contract interpretation.

Having induced the trial court to use a verdict form that instructed the jury not to reveal how it interpreted "Photoplays," and having failed to object to the lack of a finding before the jury was discharged, Universal cannot complain that the exact basis for the jury's decision is unclear. (*Taylor v. Nabors Drilling USA, LP* (2014) 222 Cal.App.4th 1228, 1242-1243 [due to erroneous skipping instruction on verdict form, jury failed to make findings on two elements of plaintiff's claim; defendant forfeited challenge to lack of findings by approving the defective verdict form, and failing to object to the lack of findings before jury was discharged]; *Greer v. Buzgheia* (2006) 141 Cal.App.4th 1150, 1158 [defendant's burden to obtain necessary findings in verdict as to segregating damages; failure to do so waived offset claim].)

The trial court rejected Plaintiffs' argument on this point on the ground that this was not "really a special verdict form problem," but rather a problem from letting the jury interpret "Photoplays." (9-RT-5402.) But the premise of the new trial order *is* a special verdict problem—namely, that Universal's special verdict form hid whether the jury's no-distribution-fee verdict depended on a "Photoplays" interpretation that differed from the trial court's interpretation or whether it rests on one of

the other grounds Plaintiffs identified. Universal should not be allowed to rely on an uncertainty *that it created* as the basis for the verdict to upset the result of a multi-day jury trial.[20]

The cases Universal relied on in the trial court (see 3-AA-2156) are not to the contrary. None involved a verdict ambiguity that the complaining party created. "[C]ases are not authority for propositions that are not considered." (*Kim v. Reins International California, Inc.* (2020) 9 Cal.5th 73, 85, fn. 4.)

Given that there were alternative paths for the jury to reach the same decision, Universal's role in obscuring the basis

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[20] Post-judgment, Universal sought to duck responsibility for the verdict form's opacity, emphasizing that its *initial* proposed form would have required the jury to answer whether *Columbo* episodes were Photoplays. (4-AA-2710.) But Universal's later proposals reordered the questions and instructed the jury to skip that question if it found Universal was not entitled to take distribution fees. (See 4-AA-2471-2473.)

Universal also emphasized post-judgment that on the morning of closing arguments, after the trial court had already adopted its verdict form, Universal proposed deleting from the verdict form the first question (whether Universal was entitled to deduct distribution fees), asserting that the distribution-fee question was indistinguishable from whether *Columbo* episodes are Photoplays. (4-AA-2710-2711.) But Universal's last-minute assertion was wrong. The jury could find distribution fees impermissible for reasons having nothing to do with the meaning of "Photoplays." (See pp. 38-39, *ante*; 9-RT-5402.)

for the jury's decision bars it from relying on that opaqueness to win a new trial.

III. Because The Court Vacated Its Home-Video Rescission Order Solely Based On Its New-Trial Grant, The Vacatur Order Must Also Be Reversed And The Rescission Judgment Reinstated.

The trial court initially ruled that Plaintiffs could rescind the 1988 amendment that changed their entitlement to home-video profits because the amendment was based on a mutual mistake—i.e., a view that NBC *Columbo* was not profitable, when in fact it was profitable but for Universal's improper distribution fees. (1-AA-857-858.) The accounting panel's damages calculation was premised on the amendment having been rescinded. (1-AA-866.)

The court conditionally vacated its rescission order when it granted a new trial. (5-AA-3137.) Although Universal had argued to vacate the rescission order on multiple grounds (3-AA2160-2163), the court relied on only one: that rescission was premised on distribution fees being disallowed, and that issue was going to be retried. (5-AA-3137.)

In so ruling, the court impliedly rejected Universal's unconditional vacatur arguments—and with good reason. The two cases Universal cited to argue that a mutual mistake about *Columbo*'s profitability would not justify rescission are readily

distinguishable, as both involve one party's *unilateral* mistake not induced by the other party. (4-AA-2362-2364 [discussing *Hedging Concepts, Inc. v. First Alliance Mortg. Co.* (1996) 41 Cal.App.4th 1410, 1421 and *Dowling v. Farmers Ins. Exch.* (2012) 208 Cal.App.4th 685].) Here, Universal expressly represented that the initial *Columbo* run was not profitable. Any misunderstanding Plaintiffs had about profitability was either mutually shared or induced by Universal. For the same reason, Plaintiffs did not bear the risk of any mistake as Plaintiffs had no way to test the veracity of Universal's representation as Universal controlled all the financial data and did not share it with Plaintiffs. (See 4-AA-2364-2366.)

The only basis for the court's conditional vacating of its rescission ruling was its grant of a new trial on the distribution-fee issue. As demonstrated above, the new trial order must be reversed. (See pp. 53-57, *ante*.) The trial court's vacatur order, premised solely on the perceived need for a new trial on the distribution-fee issue, also must be reversed, and the full damages award reinstated.

IV. The Damages Award Must Be Increased: The Referees Misapplied Universal's Tardy Recent Payments And Improperly Approved Accounting Numbers For Which Universal Produced No Documentation.

A. The Referees Improperly Applied Recent Payments To Principal Instead Of Outstanding Interest.

The law is clear: "Partial payment of an interest-bearing obligation after maturity must be applied first to discharge the accrued interest after which, if the payment exceeds the interest, the surplus is applied to discharge the principal; any portion of the principal remaining unpaid continues to draw interest." (*Big Bear Properties, Inc. v Gherman* (1979) 95 Cal.App.3d 908, 915; accord, *Brown v. California Unemployment Ins. Appeals Bd.* (2018) 20 Cal.App.5th 1107, 1115 (*Brown*).)

In 2016-2018, Universal paid Plaintiffs $5,055,658 as their purported share of net profits. (3-AA-1797; 6-AA-3414, 3502; 7-AA-3588, 3627, 3762; 8-AA-3899.) The accounting panel found that Universal owed Plaintiffs substantially more than that. (3-AA-2104-2105*.) Nevertheless, it applied the 2016-2017 partial payments to reduce the "principal" owed to the Plaintiffs, which, in turn, reduced prejudgment interest on the amounts owed. (See 3-AA-1797-1798, 1881.) That was clear error. It understated the amount owed in prejudgment interest by

$559,249. (3-AA-1798.)[21] That amount must be added to the judgment, on which postjudgment interest is running.

The trial court ruled that the payments should be credited to principal because the *determination* as to the prejudgment interest owed was not made until the court entered judgment in 2019, after Universal made the partial payments. (3-AA-2059-2060.) But the relevant date is that from which prejudgment interest *accrues*, not when it is awarded. Prejudgment interest begins to accrue when the amount owed is certain or capable of being made certain. (Civ. Code, § 3287.) The payments had to be credited to *accrued* interest no matter when that interest was awarded or calculated. (*Brown*, *supra*, 20 Cal.App.5th at 1115-1116 [collecting cases, including a 1962 decision "noting that this has been the prevailing rule throughout the United States and that it applies 'whether interest arises from an express contract or as damages'"].) The interest began to *accrue* long before Universal made the payments: Universal has owed Plaintiffs their share of net profits for decades.

[21] $559,249 was the amount of understatement claimed in Plaintiffs' objections to the panel report. Plaintiffs' expert calculated the understatement to be slightly larger, $583,611.78. (See 3-AA-1881 ¶5.) Plaintiffs rely on the lower number.

B. The Trial Court Prejudicially Failed To Instruct The Referees That Universal Had The Burden Of Proof.

1. As the party with the duty to maintain all of the records, Universal had the burden of proof to justify its accounting statements.

Universal received all of the revenue for *Columbo*. It paid all of the costs. It had all of the records. And, it had the obligation to account for all such revenue and costs. (6-AA-3304 ¶(B)(b)*.)

Plaintiffs argued that Universal's control of all the information meant that Universal had the burden of justifying its accounting calculations and bore the risk of any incompleteness. (1-AA-827, 882-883, 887-888, 890-893; 8-RT-3624-3625, 4207-4208.) That is because "in contingent compensation and other profit-sharing cases *where essential financial records are in the exclusive control of the defendant* who would benefit from any incompleteness, public policy is best served by shifting the burden of proof to the defendant, *thereby imposing the risk of any incompleteness* in the records on the party obligated to maintain them." (*Wolf v. Superior Court* (2003) 107 Cal.App.4th 25, 35 italics added; *Fredianelli v. Jenkins* (N.D.Cal. 2013) 931 F.Supp.2d 1001, 1023 ["In a case involving an alleged profit-sharing agreement, the burden of proof at summary

judgment and at trial is on the party in control of financial records, in this case Defendants, to demonstrate the party claiming breach was paid"].)[22]

The trial court refused to instruct the accounting referees that Universal had the burden of proof. (8-RT-4208.) Instead, it contemplated that the accounting referees would "point out what they find and what they can't find, and then" the court would decide whether *Wolf v. Superior Court* applies. (*Ibid.*)

2. The trial court prejudicially erred in concluding, after it read the referees' report, that imposing the burden of proof on Universal would not have made a difference.

After the referees issued their report, the trial court found that the burden of proof "is really a non-issue at this point." (3-AA-2061.) The court reasoned that the burden of proof is only relevant where a trier of fact "cannot determine whether [a] fact is more probably true than not true" after reviewing all the evidence, and that the referees' report "does not indicate they

[22] This rule is consistent with Supreme Court mandate: "'Where the evidence necessary to establish a fact essential to a claim lies peculiarly within the knowledge and competence of one of the parties, that party has the burden of going forward with the evidence on the issue although it is not the party asserting the claim.'" (*Sanchez v. Unemployment Ins. Appeals Bd.* (1977) 20 Cal.3d 55, 71, citation omitted.)

determined any issue based on the burden of proof . . . ." (*Ibid.*) The trial court was wrong: The failure to instruct the referees to shift the burden was prejudicial.

The referees made clear that Universal failed to provide large amounts of information, and confirmed that their conclusions might well have differed had they been instructed that the lack of accounting data should be held against Universal, e.g.:

- "Complete production cost details are not available from Defendant for 23 of the 24 ABC Columbo episodes." (2-AA-1289.)
- "The Panel's analysis is limited, since we have not received the detailed production costs for season 1 and seasons 3 through 8." (2-AA-1292.) "[W] e did not receive the underlying support for the entries and could therefore not verify whether the information displayed is accurately input and accounted for, or if it is valid or overstated." (2-AA-1293.)
- "The Panel's testing of foreign syndication revenues was restricted because Universal provided limited (i) license agreements and (ii) details of foreign receipts." (2-AA-1287.)

- "It should be noted that the Panel was provided only limited sources for this analysis, and if additional documents become available and admitted into evidence, *our findings may be different*." (2-AA-1291, italics added.)

The referees made assumptions in the absence of that information. But it is more than reasonably probable that they would have come to a different conclusion had they known that Universal had the burden to provide definitive, accurate, supported data, and that the absence of evidence had to be held against Universal. (See *College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715 [prejudice exists where there is a reasonable probability of a different outcome; "'probability' in this context does not mean more likely than not, but merely a reasonable chance, more than an abstract possibility," citations and italics omitted].)

The judgment therefore should be reversed as to the *amount* of damages only, and remanded with instructions for the accounting panel to recalculate damages with the understanding that it is *Universal*'s burden to justify the numbers in its accounting and that any risk of incomplete records falls on *Universal*, which maintained and controlled the records.

V. Plaintiffs' Fraud Claim Conditionally Must Be Reinstated: The Trial Court Erred In Summarily Adjudicating It On Statute Of Limitations Grounds.

If the Court affirms the new trial order as to liability on any basis, it should order that the new trial also include Plaintiffs' fraud claim because the trial court erred in summarily adjudicating that claim for Universal. Plaintiffs, however, will forego their fraud claim if the Court reverses the new trial order and reinstates the jury's determination that Universal was not entitled to deduct distribution fees (with or without a resubmission to accounting referees to recalculate damages). In that event, this Court need not address this fraud statute of limitations argument.

The statute of limitations is an affirmative defense. A defendant must establish not just that the statute of limitations *might* apply, but that it undoubtedly and completely applies. (E.g., *Ladd v. Warner Bros. Entertainment, Inc.* (2010) 184 Cal.App.4th 1298, 1309-1311.)

A. Contract Limitations Period: The Jury Found The Contracts Limitations Period Not Triggered Before 2013 In Light Of Universal's 2016 First-Ever *Columbo* Accounting.

The trial court, on summary adjudication, properly found that the statute of limitations did not bar Plaintiffs' contract

claim as a matter of law. It correctly reasoned that under the Deal Memo rider, the time to bring an action on the contract did not commence until one year from when an accounting was rendered, as specified in the rider. (1-AA-673-674; 6-AA-3304 ¶(B)(c)*.) Universal did not render *any* accounting until November 22, 2016, less than one year before Plaintiffs filed suit. (7-RT-2777-2778, 2791.)

At trial, the jury found that Plaintiffs did not discover facts before November 14, 2013 that caused them, or would have caused a reasonable person, to suspect that Universal failed to pay them money owed or render a required accounting statement. (3-AA-2124.) The trial court then denied Universal's motion for judgment notwithstanding the verdict or a new trial on the jury's statute of limitations finding. (5-AA-3145-3146.)[23] In other words, the trial court concluded that there was evidence to support the jury's finding that Plaintiffs could not have discovered facts causing a reasonable person to concluded Universal failed to pay them.

[23] The judge who ruled on the summary adjudication motion is a different judge than the one who presided at trial. (See 1-AA-652 [summary judgment heard by Judge Cunningham], 699 [pre-trial ruling by Judge Burdge].)

B. Fraud Limitations Period: The Trial Court Summarily Adjudicated The Statute Of Limitations In Universal's Favor Based On Plaintiffs' Supposed "Suspicion" Of Injury.

In contrast to its contract limitations-period holding, the trial court held that under the discovery rule, Plaintiffs' *fraud* claims based on Universal's failure to pay profits were barred by the statute of limitations, Code of Civil Procedure section 338. (1-AA-675-676.) It reasoned that Plaintiffs' principals Link (for Foxcroft) and Levinson's wife and daughter (for Fairmount) suspected sometime before 2013 that *Columbo might be* profitable and that, as such, the three-year statute of limitations to challenge what Universal was actively hiding from them ran before they sued in 2017. (*Ibid.*)

This Court reviews the summary adjudication grant de novo, viewing the evidence in the light most favorable to Plaintiffs and drawing all reasonable inferences in their favor. (*Weiss v. People ex rel. Department of Transportation* (2020) 9 Cal.5th 840, 864.) Universal did not establish its statute-of-limitations defense as a matter of law under that standard.

1. The trial court improperly read equivocal evidence of supposed suspicion of injury in a light favorable to Universal.

A summary adjudication ruling must be reversed where the evidence supports differing interpretations: What matters is not

whether the trial court's view of the evidence was "'reasonable,'" but rather whether "a contrary view would be *unreasonable as a matter of law* in the circumstances presented." (*Sandell v. Taylor-Listug, Inc.* (2010) 188 Cal.App.4th 297, 308, citation and quotation marks omitted, italics added.) Here, the evidence the trial court cited did not compel concluding that each Plaintiff knew or should have known of its injury more than three years before suing.

The evidence was that (1) Link suspected he was not being paid moneys owed "maybe" at least 20 years ago, (2) Link expressed that sentiment to Levinson's daughter, and mentioned the possibility of suing, sometime before 2013, and (3) Levinson's daughter had ongoing discussions with her mother at some unspecified time expressing "frustration" that no money had been paid despite *Columbo*'s popular success. (1-AA-675-676; see also 1-AA-220, 228-229, 234, 236.)

The trial court thought this meant that both Link/Foxcroft and the Levinsons/Fairmount suspected wrongdoing. (1-AA-675-676.) But that is not *necessarily* so, as required for summary adjudication.

First, Link testified that he thought Universal would have paid him if it owed him money, because he had a long

relationship with Universal, "knew all the big people there," and "trusted them." (1-AA-443.) That was reinforced by Universal's ongoing contractual obligation to tell Plaintiffs when there were profits. (6-AA-3304 ¶(B)(b)*.) Its continuing failures to produce any participation statement constituted an ongoing representation of no profits, akin to an ongoing violation subject to the continuing violation doctrine. (See *Richards v. CH2M Hill, Inc.* (2001) 26 Cal.4th 798, 823-824 [limitations period does not begin to run until last discriminatory act violating plaintiff's rights].) In the context of the evidence as a whole, the record does not *compel* a conclusion that Plaintiffs suspected wrongdoing, as would trigger the limitations period, more than three years before they sued. Plaintiffs were entitled to an opportunity to litigate the impact of Universal's ongoing representations and Link's trust in Universal on any suspicions Link may have had. Universal certainly never proved that Link's trust in it, and its continuing no-profits representation, did *not* allay any suspicions of wrongdoing until at least 2014.

Second, as to Fairmount, there is no evidence that it subjectively thought it had a cause of action. Link told Levinson's daughter that *he* had suspicions (1-AA-228-229, 234), but there is no evidence that Levinson's daughter shared those suspicions or that either Plaintiff had any knowledge that they

had been damaged. Levinson's wife and daughter discussed their *frustration* that a show as successful as *Columbo* did not result in profits to share (7-RT-2868, 2871-2872), but again, that is short of suspicions of wrongdoing by Universal. (1-AA-235-236.) Any contrary *inference* the trial court implicitly drew runs afoul of the summary adjudication standard.

Third, it is not clear whether Plaintiffs' supposed "suspicions" related just to the *Columbo* series' second (ABC) run, to its first (NBC) run, or to both. Universal specifically represented that the first run would *never* earn a profit and entered into a better deal for Universal for the second run by agreeing to not "cross-collateralize" losses from the first run. (1-AA-339-341, 408, 410, 412-413.) Again any *inference* that the suspicions related to both seasons would be contrary to the summary adjudication standard, which requires drawing inferences in favor of Plaintiffs.

2. The "suspicion" rule only applies when a party has reasonable means to discover the truth.

Not only did the trial court fail to view the evidence and inferences in favor of Plaintiffs, it misapplied the law on the discovery rule. The premise behind the discovery rule is that the limitations period should not run when a plaintiff is in the dark

about its injury and the cause, and has no reasonable means to discover the truth. In that circumstance, immediate accrual would unjustly "'deprive plaintiffs of a cause of action before they are aware that they have been injured.'" (*April Enterprises, Inc. v. KTTV* (1983) 147 Cal.App.3d 805, 826 (*April Enterprises*).) Defendants may not "knowingly profit from their injuree's ignorance." (*Id.* at p. 831.) Accordingly, the limitations period does not run where the breach is "committed in secret" and "will not be *reasonably discoverable* by plaintiffs until a future time." (*Id.* at p. 832, italics added; see also *Gryczman v. 4550 Pico Partners, Ltd.* (2003) 107 Cal.App.4th 1, 6 [rule applies where injury or act causing it is "'difficult' for the plaintiff to detect, not impossible"].)

As recognized in *Wind Dancer Production Group v. Walt Disney Pictures* (2017) 10 Cal.App.5th 56, 81-83 (*Wind Dancer*), in-the-dark talent participants have no basis to proceed with any objection to the lack of profit payments or with any lawsuit in good faith, unless and until they receive information from the studio. Until that happens, they have no way of knowing that they have been injured.

Plaintiffs should not have to "continually monitor whether the other party is performing some act inconsistent with one of many possible terms in a contract," or be compelled "to file 'hair

trigger' lawsuits over every possible secretive breach the defendant may have committed merely to smoke out whether the breach indeed has occurred." (*April Enterprises*, *supra*, 147 Cal.App.3d at p. 832 & fn. 15.)

The test is "*[i]f the means of knowledge exist* and the party is aware of *facts* which would make a reasonably prudent person suspicious"; "under such circumstances means of knowledge are equivalent to knowledge." (*Tognazzini v. Tognazzini* (1954) 125 Cal.App.2d 679, 687, italics added, citations omitted; see *Krolikowski v. San Diego City Employees' Retirement System* (2018) 24 Cal.App.5th 537, 562.) The necessary corollary is that the limitations period does not begin to run, no matter how suspicious a plaintiff might be, if the plaintiff has no reasonable means of obtaining the knowledge required to ascertain if there really is a claim.

Suspicion or not, Plaintiffs had *no* reasonable opportunity to discover the fraudulent conduct unless and until Universal came clean. That is what the jury found. Subjective suspicion (let alone lesser "frustration") does nothing to make Plaintiffs more capable of reasonably learning the truth. Nor does an expensive audit right; there is no more a requirement to conduct ongoing, expensive audits to ferret out hidden wrongdoing than there is to file hair-trigger lawsuits. (See *Weatherly v. Universal*

Music Publishing Group (2004) 125 Cal.App.4th 913, 919-920 [songwriter's failure to exercise right to audit participation statements earlier did not negate application of the discovery rule].) A suspicion that moneys were owed but not being paid brought Plaintiffs no closer to having any evidence or basis on which they could file suit.

Lawsuits cannot be filed based solely on suspicion that the plaintiff has been injured. Any other rule would require "hair trigger" lawsuits (or expensive audits) whenever a work appears to be commercially successful but a studio provides no accounting statement. "Withhold all information, keep them in the dark, but assert the statute of limitations" is not a legally recognizable rule.

The discovery-rule case the trial court relied on, *Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383 (*Norgart*), is not to the contrary. *Norgart* stemmed from a suicide by prescription drug overdose. (*Id.* at pp. 389-390.) Bottles of the drug Halcion and another drug were found next to the decedent. (*Id.* at p. 392.) Six years later, the decedent's parents sued Halcion's manufacturer, alleging that it caused depression leading to the death. (*Id.* at pp. 392-393.) The Supreme Court held that the discovery rule did not justify the delay in bringing the suit, because the plaintiffs "learned of [the decedent's] depression and

suicide by overdose of prescription drugs, including Halcion," on the day of the suicide; Halcion's package insert warned that intentional overdosage was more common in patients with symptoms of depression. (*Id.* at p. 407.) In addition, within a year of the suicide, one plaintiff came to believe that someone "'ha[d] done something wrong' to cause [the] death." (*Id.* at p. 406.) In other words, the plaintiffs (1) *knew* of their injury (decedent's death), (2) suspected someone had caused that injury, *and* (3) had the means to discover Halcion as a possible cause.

Here, in contrast to *Norgart*, Plaintiffs did not even *know* they had been injured—at most, the court found that they *suspected* they were owed money. (1-AA-675.) There is no basis to conclude, as a matter of law, that they knew or should reasonably have suspected that Universal was *defrauding them*—i.e., that their "injury was caused by wrongdoing, that someone has done something wrong to [them]." (*Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103, 1110; see also *id.* at p. 1112 ["suspicion of wrongdoing, *coupled with a knowledge of the harm and its cause*, will commence the limitations period," italics altered].) And although the trial court found that Plaintiffs were required "to actively seek facts to support their suspicions" that Universal owed them money, they had no means to discover the truth because Universal controlled all the information.

The jury's verdict reinforces that the court erred in ruling pretrial that, as a matter of law, Plaintiffs were on notice before 2013. The jury unanimously found that Plaintiffs *did not* and *could not* discover *facts* before November 14, 2013 that caused them, or would have caused a reasonable person, to conclude that Universal had failed to pay them money owed or to render a required accounting statement. (3-AA-2124.) The jury made that finding after hearing much of the same testimony by Plaintiffs' principals that Universal's summary adjudication motion relied on. (1-AA-220, 228-229, 234, 236 [Link and Levinson deposition testimony in summary judgment papers]; 7-RT-2870-2871 [Levinson trial testimony]; Dec. 23 Augmentation 10-11 [Levinson deposition testimony played at trial, pp. 22-23, 34].) That finding is as applicable to a fraud claim as to a contract one.

Although the fraud limitations period is one year shorter, Universal has the burden of proof. There is *no* showing that every possible fraudulent act (e.g., the knowing failure to provide accounting statements for profits that were due) necessarily falls outside the limitations period, as would be required for summary adjudication.

3. If the limitations period was running by 2013, it was equitably tolled from 2013 to 2016.

The summary adjudication was wrong for another reason, too. A defendant moving for summary adjudication based on the statute of limitations must conclusively demonstrate that there is no basis for estoppel or other reason not to enforce the limitations bar. (See *Wind Dancer, supra*, 10 Cal.App.5th at pp. 78-79, 81-83.) Universal did not meet that burden.

The trial court assumed that Link and Fairmount "had suspicions that they were entitled to royalties *since before 2013*, and as early as 20 years before the filing of the complaint, and Link further testified that he discussed the possibility of suing Universal for monies [sic] allegedly owed 'more than five years before the complaint was filed.'" (1-AA-676, italics added.) Thus, the three-year span from 2013 to 2016 was critical to the trial court's conclusion that, as a matter of law, the limitations period *must have* run—without the 2013-2016 period, a suspicion since "before 2013" would not necessarily be outside the three-year statute of limitations.

But the limitations period was equitably tolled between 2013 and 2016. Link wrote to Universal in 2013 requesting an accounting and a participation statement. (6-AA-3413.)

Universal did not send Foxcroft a statement until 2016, or Fairmount a statement until 2017. (7-RT-2777-2778, 2865.) When one party has all of the information and the other party is awaiting its decision, the limitations period is tolled.

The situation is analogous to a party seeking administrative redress before filing suit. The statute of limitations is tolled until the issue is determined by the informal process (See *McDonald v. Antelope Valley Community College Dist.* (2008) 45 Cal.4th 88, 100-104 (*McDonald*) [Fair Employment and Housing Act statute of limitations tolled during voluntary pursuit of internal administrative remedies]; *Marcario v. County of Orange* (2007) 155 Cal.App.4th 397, 407 (*Marcario*) [employee's union grievance proceeding tolled statute for later civil rights and intentional infliction of emotional distress claims against employer].)

Equitable tolling "'operates independently of the literal wording of the Code of Civil Procedure' to suspend or extend a statute of limitations as necessary to ensure fundamental practicality and fairness." (*Lantzy v. Centex Homes* (2003) 31 Cal.4th 363, 370 (*Lantzy*).) It "prevent[s] the unjust technical forfeiture of causes of action, where the defendant would suffer no prejudice." (*Ibid.*, citations omitted.)

Equitable tolling applies in a broad spectrum of circumstances, including when a party is awaiting a decision by someone else that is out of their hands. (E.g., *Lambert v. Commonwealth Land Title Ins. Co.* (1991) 53 Cal.3d 1072, 1077 [limitations period to sue carrier for failure to defend tolled until final judgment in underlying case to be defended]; *Archdale v. American International Specialty Lines Ins. Co.* (2007) 154 Cal.App.4th 449, 476 [same re bad faith claim against carrier for failure to accept reasonable settlement offer].) And, it applies when a party is seeking a response or decision by the defendant who is to invoke the limitations period. (*Prudential-LMI Com. Insurance v. Superior Court* (1990) 51 Cal.3d 674, 693 [one-year contract limitations period for claim against carrier equitably tolled until carrier unequivocally denies claim].)

Equitable tolling is particularly appropriate where a party is attempting to resolve the issue, nonjudicially, with the other party. (*McDonald*, *supra*, 45 Cal.4th at p. 104 [administrative grievance process]; *Marcario*, *supra*, 155 Cal.App.4th at p. 407 [union grievance proceeding].)

Universal has *all* the information regarding profitability. The request for an accounting was a reasonable first step to attempt to resolve any uncertainty (indeed, it resulted in Universal admitting that *some* profit amount was owed).

Under the circumstances, any limitations period is equitably tolled from the time Link requested that information (which Universal construed as a request by both Foxcroft and Fairmont) until Universal, in fact, cooperated.

Once the equitably-tolled period from 2013 to 2016 is taken out of the equation, Universal's evidence is indefinite "maybe," "perhaps," and "could have been" descriptions of when suspicions arose. That is not good enough for Universal's burden to show that, as a matter of law on summary adjudication, Plaintiffs had real, supportable, suspicions outside the limitations period.

4. Universal is equitably estopped from asserting the limitations period.

In addition to equitable tolling, equitable estoppel applies. Equitable estoppel is distinct from equitable tolling. (*Lantzy, supra*, 31 Cal.4th at p. 383.) It arises out of the defendant's conduct. (See *Wind Dancer, supra*, 10 Cal.App.5th at p. 79.) Here, that conduct includes: (1) Universal's express 1988 representation that *Columbo*'s first (NBC) run had no profits and never would, (2) its continuing failure to provide any accounting statements, equivalent to repeated representations that *Columbo* had no sharable profits, and (3) its failure to respond to the 2013 accounting request that specifically indicated Link was counting on all deadlines being suspended while awaiting Universal's

response. (5-RT-2131, 2158; 6-RT-2457; 7-RT-2778, 2804.) Those were all representations of no profits—i.e., no reason for Plaintiffs to sue. They estop Universal from relying on the statute of limitations.

The trial court rejected estoppel on the ground that "it was not reasonable" for Plaintiffs to rely on Universal's affirmative no-profits representation and failure to provide accounting statements once Plaintiffs suspected they were entitled to royalties and Link had considered suing Universal. (1-AA-676.) But, as discussed above (pp. 87-90, *ante*), above, the evidence does not require that conclusion.

And, independent of any "suspicion" theory, Link's 2013 letter requesting an accounting also "request[ed] tolling of all applicable contractual and legal deadlines in connection with the above Statements through the date which is one year following the date that the audit commences." (6-AA-3413.) Universal understood, or should have understood, that Plaintiffs were relying on the pending accounting request to toll any limitations deadlines. It had a duty to speak if it thought otherwise. (See *Wind Dancer, supra*, 10 Cal.App.5th at pp. 81-83 [proceeding with participant statement audit, with long delays as here, without mentioning any limitations issue could constitute an estoppel].) It never did. As discussed in the prior section, the

2013 to 2016 period was critical to the trial court's summary adjudication order. Equitable estoppel therefore compels reversing that order.

CONCLUSION

This is a classic "Hollywood accounting" story. It has all the elements of the genre. The scene is set with an ostensibly straightforward promise to share profits. Profit accounting, however, is left entirely in the studio's hands. As the plot unfolds, the promised profits are imprisoned by obscure and dense contractual jargon and undisclosed supposed terms. The studio manipulates the process to keep all the revenue as undisclosed fees, thereby negating any "profit," and, at the same time, keeps the profit participants in the dark about it accounting legerdemain.

The trial court's grant of a new trial and vacatur should be set aside. The jury's verdict and the trial court's Phase II rulings must be reinstated. The judgment should be remanded solely (1) to recalculate interest with Universal's meager recent payments credited to outstanding interest, not to principal, and (2) to allow a panel of referees to award further unpaid profits, based on a correct understanding that Universal had the burden

of proof to justify its accounting numbers, and bore the risk of incomplete records.

Alternatively, if the new trial order is for some reason affirmed, the Court should reverse the summary adjudication ruling and order that the new trial include Plaintiffs' fraud claim.

Date: January 21, 2021

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CERTIFICATION

Pursuant to California Rules of Court, rule 8.204(c)(1), I certify that this **Appellants' Opening Brief** contains **16,723** words, including 150 words inserted as an image, but not including the tables of contents and authorities, the caption page, signature blocks, or this Certification page.

Date: January 21, 2021 s/ Robert A. Olson

PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 5900 Wilshire Boulevard, 12th Floor, Los Angeles, California 90036. On **January 21, 2021**, I served the foregoing document described as: **Appellants' Opening Brief** on the parties in this action by serving:

SEE ATTACHED SERVICE LIST

BY E-SERVICE VIA TRUEFILING: All participants in this case who are registered TrueFiling users will be served by the TrueFiling system.

BY MAIL: As follows: I am "readily familiar" with this firm's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with United States Postal Service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than 1 day after date of deposit for mailing in affidavit.

Executed on **January 21, 2021**, at Los Angeles, California.

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

s/ Rebecca E. Nieto

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ADDENDUM

INTEROFFICE MEMORANDUM • Universal City

FORM 2022

DATE: April 29, 1971, Revised June 11, 1971

TO: JOE Di MURO

FROM: PAUL MILLER (Deal: Rudy Petersdorf)

SUBJECT: WILLIAM LINK & RICHARD LEVINSON - NEW TERM CONTRACT

COPIES:

The current term agreement with Link & Levinson shall be deemed terminated as of the end of the fourth contract year (July 18, 1971) and in lieu of exercising our option for the fifth contract year both parties have entered into the following new exclusive term agreement for one year with two optional years. The agent is Marvin Moss, International Famous Agency, Inc., 9255 Sunset Boulevard, Los Angeles, California, 90069.

(1) The initial contract year shall commence July 19, 1971, and shall continue for one year. We shall have two successive options for one contract year per option, each exercisable on or before thirty days prior to the commencement of the contract year for which exercised. During the first contract year and each contract year for which an option is exercised, Link & Levinson shall be entitled to receive $135,000 annually (one-half to each). The guaranteed compensation shall be payable at the rate of 1/50th for 50 weeks' with the balance of the year "free weeks". The guaranteed compensation is a non-returnable advance against the "per assignment" credits set forth in Paragraph (3) below.

(2) During the term of this agreement, Link & Levinson can only be required to render the following services: (i) Writing services in connection with theatrical features, pilots and/or projected series and/or spin-offs and 2-hour television photoplays (ii) Writing for other anthological photoplays, and for episodic photoplays for series for which they are also employed as Producer or Executive Producer (iii) Writing services for photoplays (one or more) which together relate one complete work or works (e.g. RICH MAN, POOR MAN) (iv) Writing services for specials (e.g. THE SNOW GOOSE) (v) Producer and Executive Producer services. They may render other services during the term agreement but the above are the only services that may be required.

(3) As indicated in Paragraph (1) above, the guaranteed compensation for the initial contract year and subsequent optional contract years shall be an advance against the "per assignment" compensations set forth in this Paragraph (3). If the compensation paid under Paragraph (1) for any contract year hereunder is less than Link & Levinson's total accrued, earned compensation for that contract year, we shall pay them the difference within 30 days after the expiration of the contract year. If the guaranteed

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a sequel royalty of $1,500 per hour-length sequel episode. If they are entitled to some "separation of rights" with respect to the series, regardless of whether or not they wrote the script or receive any "written by" credit, then one-half of the $1,500 shall be deemed for sole "separation of rights" and one-half shall be deemed for sole "written by" and to the extent they receive less than sole "separation of rights" and less than sole "written by", the $1,500 shall be proportionately reduced. Thus, if they receive sole "separation of rights" and one-half "written by" the hour-length sequel royalty shall be $750 plus $375 or $1,125. However, even if they are not entitled to any "separation of rights" if they are entitled to sole teleplay credit on the pilot which results in the series licensing, then they will receive $750 (hour-length) sequel royalty. They shall in no event receive less than the royalty required by the WGA Agreement, of course. For other length episodes the sequel royalty shall be proportionate. Any WGA sequel royalty shall, of course, be deemed an advance against contractual sequel royalties and the converse shall be equally true. Sequel royalties shall be payable as and when sequel royalties are payable under the WGA Agreement.

(B) Link & Levinson will receive residuals on sequel royalties payable as, when and to the extent required by the WGA Agreement.

(C) With respect to all writing assignments hereunder, Link & Levinson shall receive scale residuals payable as, when and to the extent required by the WGA Agreement.

(6) If a new television series is licensed as a result of a pilot they develop (whether or not it is based on an exploited work) and they Produce or Executive Produce the pilot photoplay, then they shall be entitled to receive 10% of 100% of the net profits of said television series. With respect to episodes of a series for which they are entitled to said 10% of 100% of the net profits, for which they also complete their services as Producer or Executive Producer, they will be entitled to an additional 10% of 100% of the net profits (a total of 20% of 100% of the net profits). If, with respect to a series for which they are entitled to such 10% of 100%, they complete their services as regular ("regular" need not mean all e.g., Doug Benton on IRONSIDE is a regular Producer; George Eckstein on NAME OF THE GAME was a regular producer) Producer or Exec. Prod.

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for one telecasting season, and (not because of default) we remove them from the series, then they shall continue to be entitled to the additional 10% with respect to episodes produced for telecasting seasons of the term of their agreement. As to episodes produced for telecasting seasons after the term of their agreement, if we offer them a deal to continue to be employed after the last contract year of the term hereunder which will guarantee them no less than they are guaranteed during the last year of the term hereunder, and they reject such an offer, they will not be entitled to the additional 10% with respect to episodes produced for telecasting seasons after the term of their agreement. If they accept such an offer, or we don't make such an offer, or if we offer them less, then they will continue to receive the additional 10% with respect to all episodes produced for telecasting seasons after the term of their agreement. The computation of net profits shall be as per the attached EXHIBIT A. "COLUMBO" shall be considered a series coming within the purview of this Paragraph (i.e., they shall be entitled to at least 10% of 100% of the net profits from "COLUMBO" with an additional 10% payable under the contingencies set forth above).

(7) During the term of this agreement, Link & Levinson shall have no right to acquire, or dispose of (for their own account or otherwise) rights in and to any literary, motion picture, television and/or related materials. All writing and other materials on which they are engaged during the term of this contract (to the extent not based on source material furnished by us) shall be deemed created by them during the term hereof. (To the extent they have not done so prior hereto) they shall give us forthwith a list of properties owned or controlled by them prior to commencement of this term and their prior term agreement with us. With respect to such properties, notwithstanding the previous sentences of this Paragraph (7), if during the term they desire to license or sell any such properties, they must first offer such properties to us and we shall have a 14 day first-negotiation with respect to the sale or licensing of such properties; if thereafter they desire to sell or license said properties to others on terms less favorable to them than last offered to us, they shall advise us in writing of the terms and conditions of such proposed licensing or sale and we shall have a 14 day first refusal with respect to such deals.

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DATE April 29, 1971, Revised June 11, 1971
TO
FROM
SUBJECT WILLIAM LINK & RICHARD LEVINSON - NEW TERM CONTRACT
COPIES

(8) All payments hereunder shall be payable one-half to Link and one-half to Levinson. If any member of the team is unable or refuses to perform, we can (but we are not required to) require performance by the other member of the team, in which case the other member of the team would receive whatever compensation would otherwise be payable to the non-performing member. Link & Levinson are jointly and severally liable hereunder.

(9) Other terms and conditions shall be our usual for agreements of the nature described. Both parties agree to negotiate in good faith with respect to such "other terms and conditions". As a corollary to this, although EXHIBIT A is attached hereto, we agree to negotiate in good faith with respect to the terms and conditions and make the changes we would normally make in said EXHIBIT A (to the extent requested) notwithstanding EXHIBIT A being attached.

Pending preparation and execution of formal agreements, this Deal Memorandum shall constitute the agreement between the parties.

AGREED:

_____
William Link

_____
Richard Levinson

T4598

RIDER TO AGREEMENT BETWEEN_____

(herein referred to as "Producer") and_____

_____(herein referred to as "Participant")

dated_____.

Net Profit Participation: As additional compensation Producer shall pay to Participant sums equal to_____percent (_____%) of Producer's net profits from the exhibition of photoplays and exploitation of subsidiary rights of the television series now entitled_____

_____,

which shall herein be referred to as "the Photoplays" and "the Series" respectively. Payments shall be computed and made as herein provided.

A. **Definitions:**

(a) **"Net Profits"** means the excess, if any, of gross receipts received by Producer over the total of all distribution expenses and production costs.

(b) **"Gross Receipts"** means the total of all monies actually received by Producer as consideration for the right to exhibit the Photoplays and to exploit subsidiary rights in the Series but not including: (i) rebated advertising agency commissions; (ii) refunds; (iii) monies recevied for exhibiton other than as part of the Series of any pilot Photoplay produced as a sample of the Series; (iv) receipts from use of any portion of a Photoplay as stock footage; (v) monies held as deposits and subject to refund; (vi) payments of tariffs, of import, export, or sales taxes, of imposts or duties, of quota fees or import permit fees, or of fees or taxes which are based on receipts from the Photoplays as transmitted to Producer, other than net income and corporation franchise taxes; (vii) monies received for merchandising and endorsements, if Participant shares in the net profits derived for merchandising or endorsements utilizing Participant's name or likeness pursuant to any provision of this agreement; (viii) monies received for musical compositions contained in the photoplays. In addition, computation of gross receipts shall be subject to the following:

(1) Monies paid in foreign currencies shall not be included in gross receipts unless and until received in the United States in United States dollars, and then the monies shall be computed at the exchange rate prevailing at the time of receipt in the United States, less any costs of transmittal or conversion; however, if Participant so requests in writing, Producer shall deposit to Participant's account, in a foreign depository to be designated by Participant, that portion of any foreign funds not received in the United States to which Participant may be entitled hereunder, if Producer may make the deposit under applicable United States and foreign laws, rules, regulations and the like and subject to payment by Participant of all costs and expenses incurred by Producer in connection with the deposit.

(2) If Producer sells one or more Photoplays or the Series outright or otherwise disposes of Producer's entire ownership interest therein, Producer may, at its discretion, either: (aa) include Producer's receipts from the sale or disposition in gross receipts, in which event the receipts of the purchaser shall be deemed excluded from gross receipts; or (bb) exclude Producer's receipts from the sale or disposition from gross receipts, in which event the receipts of the purchaser shall be deemed included in gross receipts, and Participant shall look solely to the purchaser for any payments hereunder, the assignment being deemed a novation.

(3) Combined receipts from a Photoplay and one or more other photoplays or Photoplays shall be allocated to individual Photoplays as Producer may determine.

(4) If the Photoplays are distributed in whole or in part by a distributor, gross receipts from such distribution shall be the monies paid by the distributor to Producer, after all charges, fees, costs and other deductions have been made pursuant to Producer's agreement with the Distributor, including, but not limited to, any share of gross receipts, net profits or the like, so deducted.

(5) Monies received from spin-off series shall be excluded from gross receipts and Participant shall not participate in the net profits derived therefrom.

(6) Gross receipts are Producer's sole and exclusive property, and are not trust funds or otherwise held by Producer for Participant's benefit. Producer's obligation to make payments to Participant is that of a debtor only. Participant shall not own any interest in the Photoplays, the Series, gross receipts, or net profits or have any lien or other claim thereon.

(7) If a Producer Company shall produce a theatrical motion picture based on the Series or otherwise shall exercise any subsidiary rights, the monies received by the Producer Company as a result of production of such motion picture or other exercise of such rights shall not be included in gross receipts, but Producer's gross receipts therefrom shall be deemed the reasonable value of the theatrical motion picture rights or of the other rights exercised as determined by Producer in the reasonable exercise of its discretion. Participant recognizes and agrees that if a Producer Company exploits merchandising, commercial tie-up or similar rights, the Producer Company may charge a fee of 50% of its gross receipts for its services, and such fees shall be considered a distribution expense in computing Producer's gross receipts.

(c) **"Distribution Expenses"** means all costs and expenses incurred and payments made by Producer directly or indirectly for or in connection with the sale, lease, license, exhibition, distribution or other disposition of the Photoplays, or of subsidiary rights, including, but not limited to, payments for television reruns, foreign telecasting and theatrical exhibition of the Photoplays as well as any other payments for use or re-use of the Photoplays, all payments made by Producer to any distributor, exhibitor, agent or other person in the form of commissions, advertising allowances, distribution fees, expenses of distribution, or a percentage of gross receipts or net profits or the like; but no sum excluded from gross receipts under subparagraph (b) above shall be included as a distribution expense.

(d) **"Production Costs"** means all costs incurred by Producer for or in connection with the production of the Photoplays, or exploitation of subsidiary rights, calculated according to the standard accounting practices now or hereafter employed by Producer for photoplays owned, financed, or distributed by a Producer Company. The costs so described shall include, but shall not be limited to:

(1) All charges and expenses for production facilities, materials, equipment and personnel, and for advertising and publicity furnished by Producer, which Producer customarily includes in the production costs of its television productions, at its standard rates for photoplays produced by a Producer Company.

(2) Charges and expenses paid or incurred by Producer for all production facilities, equipment and personnel furnished by others.

(3) Amounts paid or payable by Producer for services of performers, writers, directors, producers and all other "above-the-line" personnel; however, as to persons under contract to Producer Company, a fee equivalent to a reasonable "loanout" fee may be charged as a production cost instead of actual costs.

(4) Retroactive and deferred items of cost. Deferred compensation and other deferred costs shall be charged as costs when the amount of the liability shall be ascertained, regardless of when actually paid or payable, and Participant shall have no interest in or right to the proceeds of any amount deferred.

(5) Any amounts other than distribution expenses, paid or payable by Producer as or measured by percentage of gross receipts or of net profits or similar payments.

(6) Interest at the rate of the higher of: (i) 6% per annum or (ii) the then prevailing prime interest rate charged by United States banks plus 1%, on the unrecouped amount of all other production costs, including, but not limited to, indirect costs.

(7) All financing costs and charges.

(8) If Producer is or becomes a party to a joint ven-

ture producing the Photoplays, any share of net profits paid by the joint venture to joint venturers other than Universal Television.

(9) The excess, if any, of production costs for a pilot Photoplay subject to subclause A(b)(iii) over gross receipts of the pilot Photoplay from its utilization other than as part of the Series, less distribution expenses. If gross receipts from non-Series utilization less distribution expenses of the pilot Photoplay equal or exceed production costs, then production costs of the pilot shall be excluded from Series production costs.

(10) A charge for Producer's indirect costs computed at that percentage of all other production costs which is Producer's standard percentage for photoplays produced by a Producer Company at the time production costs are incurred. For purposes of information, and without prejudice to Producer's right to change, Producer's standard percentage is currently 20%, except that for feature length television photoplays, its standard percentage is 30%. No charge shall be made under this clause to the extent it would duplicate a charge for indirect costs under clause (d)(1) or (d)(2) above.

(e) **"Producer Company"** is Producer or a company owning or controlling Producer, or owned or controlled by Producer or under common ownership or control with Producer; if Producer is a joint venture, or a party to a joint venture producing the Series, "Producer Company" includes the joint venture, each joint venturer, and any company owning or controlling a joint venturer, or owned or controlled by a joint venturer, or under common ownership or control with a joint venturer.

(f) **"Exhibitor"** means anyone who has acquired from Producer or its licensee the right to televise or to sponsor exhibitions of the Photoplays.

(g) **"Person"** means any natural person and any corporation, partnership, firm, association or other business entity.

(h) **"Spinoff Series"** means a series of television programs based on a character or other material telecast on the Series.

(i) **"Subsidiary Rights"** includes live television, radio, theatrical motion picture, stage, merchandising and publication rights.

(B) **Accountings and Payments:**

(a) **Accounting Units:** Included in accounting units for the determination of net profits shall be such Photoplays as Producer may from time to time determine and there may be one accounting unit including all Photoplays if the Producer so elects. Losses incurred with respect to any one accounting unit may be offset against previously or subsequently accrued net profits derived from any other accounting unit. Net profits from Photoplays and subsidiary rights shall be accounted for together so that losses incurred with respect to one may be offset against profits derived from the other.

(b) **Accounting Periods:** Accountings and payments of sums due Participant shall be made to Participant for the periods ending as of Producer's periodic account closings which occur closest to December 31 and June 30 of each calendar year, within 60 days after each such date; however, if Producer so elects, the times for such accountings and payments and the periods covered thereby may be conformed with those under an exhibition contract. No accountings shall be required for periods as to which Participant is not entitled to any payments. A reasonable sum may be retained from net profits of one or more accounting periods to serve as working capital for subsequent accounting periods, and to establish a reserve for uncomputed retroactive charges and for deferred items of costs. Losses incurred with respect to one accounting period may be applied against profits derived from any preceding or subsequent accounting period.

(c) **Presumption of Correctness:** All accountings and all items contained therein shall be deemed correct, and shall be conclusive and binding upon Participant upon the expiration of one year from the date rendered, and the inclusion of information or items in accounting which had appeared in a previous accounting shall not render any such information or item contestable or recommence the running of the period of one year with respect thereto; however, if Participant delivers a written notice to Producer, objecting to one or more items of an accounting within the one year period after rendition, and if such notice specifies in detail the items to which Participant objects and the nature of and reasons for Participant's objections thereto, then Participant may question the particular items objected to notwithstanding expiration of the one year period, but only for the particular reasons of which Participant gave Producer written notice, and not after expiration of the period of the applicable statute of limitations established by law.

(d) **Examination of Books:** Participant may cause Producer's books and records of account to be examined, to the extent that they have not become incontestable, by either (i) a national firm of certified public accountants of a stature equal to Price Waterhouse & Company or Haskin and Sells, or (ii) such other first class reputable firm of certified public accountants as Producer may in its sole discretion approve.

(e) **Allocations for Subsidiary Rights:** If Participant should not be entitled to share in the net profits of all of the Photoplays, or if any subsidiary rights should be derived from a particular group of Photoplays as to all of which Participant is not entitled to share, then the gross receipts, distribution expenses and production costs with respect to such subsidiary rights shall be allocated in the same proportion as the number of Photoplays in which Participant shares bears to the total number of all Photoplays or to the total number of Photoplays in the group, as the case may be; for the purposes of this sentence, the total number of Photoplays shall be determined as of the end of the applicable accounting period. If any subsidiary rights should be derived from a particular Photoplay or group of Photoplays in which Participant is not entitled to share at all, then gross receipts, distribution expenses and production costs with respect to such subsidiary rights shall not be included at all in any accounting.

(f) **Commingling Funds:** Any gross receipts, net profits, working capital, reserve funds, deferred payments or other sums received or held by Producer may be commingled with Producer's general funds and Participant shall not have any right to interest thereon nor any right to participate in any profit or other income derived by Producer from use of the sums so received or held.

(C) **Producer Companies:** Participant agrees that a Producer Company may act as distributor of the Photoplays, and that a Producer Company may furnish facilities, materials, equipment and personnel for the Photoplays. All fees and charges of each Producer Company shall be distribution expenses or production costs as the case may be, and the Producer Company may retain its fees and charges as its own property without accounting therefor to Participant. However, such fees and charges shall not exceed those charged by Producer Company according to its then existing standard practices, applicable to photoplays owned, financed or distributed by a Producer Company, and in all other matters affecting gross receipts, distribution expenses, and production costs the Producer Company shall adhere to the same practices and procedures according to which it normally conducts its business at the time in question with respect to photoplays owned, financed or distributed by a Producer Company.

(D) **Obligation to Exploit:** Nothing shall be deemed to obligate Producer to produce, distribute, exhibit or otherwise exploit the Photoplays or to exploit subsidiary rights; Producer may do so or refrain therefrom as it may decide in its own absolute discretion, and if it elects to produce, distribute, exhibit or otherwise exploit the Photoplays or to exploit subsidiary rights the manner in which it does so shall not subject it to any liability to Participant. Producer makes no warranty or representation as to the amount of net profits or that there shall be any net profits.

Foxcroft Productions & Fairmount Productions v. Universal Studios, Inc.

NBC Columbo - Comparison of Accounting Panel

Home Video at 100% and With & Without Distribution Fees

Through December 31, 2017

	Participation Statement		Adjustments		Accounting Panel *Order P. 4*		Accounting Panel *Order P. 5*	
	Season 1	Season 2-7	Season 1	Season 2-7	Season 1	Season 2-7	Season 1	Season 2-7
Gross Receipts								
Network	$3,944,894	$39,542,607			$3,944,894	$39,542,607	$3,944,894	$39,542,607
Domestic Syndication	2,730,385	14,328,420			2,730,385	14,328,420	2,730,385	14,328,420
Foreign Syndication	17,424,834	93,396,340			17,424,834	93,396,340	17,424,834	93,396,340
Basic Cable	3,358,544	18,218,403			3,358,544	18,218,403	3,358,544	18,218,403
Pay Television	408,514	1,784,269			408,514	1,784,269	408,514	1,784,269
Home Video	6,796,563	16,894,936	27,186,252	67,579,744	33,982,815	84,474,680	33,982,815	84,474,680
Theatrical	0	56,550			0	56,550	0	56,550
Non-Theatrical	1,067	3,194			1,067	3,194	1,067	3,194
Other	2,339,577	5,174,798			2,339,577	5,174,798	2,339,577	5,174,798
Subtotal	37,004,378	189,399,517	27,186,252	67,579,744	64,190,630	256,979,261	64,190,630	256,979,261
Distribution Fees	13,257,325	69,024,177			0	0	13,257,325	69,024,177
Balance	23,747,053	120,375,340	27,186,252	67,579,744	64,190,630	256,979,261	50,933,305	187,955,084
Distribution Expenses								
Residuals	773,012	6,472,848			773,012	6,472,848	773,012	6,472,848
Prints & Physical Properties	666,948	3,682,793			666,948	3,682,793	666,948	3,682,793
Advertising and Publicity	15,718	160,854			15,718	160,854	15,718	160,854
Foreign Language Dubbing	354,393	1,278,502			354,393	1,278,502	354,393	1,278,502
Post Production and Re-Editing	53,350	387,711			53,350	387,711	53,350	387,711
Foreign Taxes and Exchange	367,049	1,663,601			367,049	1,663,601	367,049	1,663,601
Freight, Customs, Storage, Misc.	171,101	917,514			171,101	917,514	171,101	917,514
Insurance	0	0			0	0	0	0
Dues, Fees, Assessments	174	347			174	347	174	347
Litigation	0	0			0	0	0	0
Home Video Costs	0	0	14,046,473	39,798,809	14,046,473	39,798,809	14,046,473	39,798,809
Subtotal	2,401,745	14,564,170	14,046,473	39,798,809	16,448,218	54,362,979	16,448,218	54,362,979
Balance	21,345,308	105,811,170	13,139,779	27,780,935	47,742,412	202,616,282	34,485,087	133,592,105
Participations	0	0			0	0	0	0
Balance	21,345,308	105,811,170	13,139,779	27,780,935	47,742,412	202,616,282	34,485,087	133,592,105
Production Charges and Interest								
Production & Admin Charges	2,928,343	36,376,025			2,928,343	36,376,025	2,928,343	36,376,025
Participations	3,713,471	8,915,911			3,713,471	8,915,911	3,713,471	8,915,911
Imputed Interest	3,147,688	33,074,271			17,967	3,212,976	2,037,423	80,127,549
Cross-Collateralization with Mystery Wheel							4,186,946	2,423,794
Subtotal	9,789,502	78,366,207	0	0	6,659,781	48,504,912	12,866,183	127,843,279
Net Profits (Losses)	$11,555,806	$27,444,963	$13,139,779	$27,780,935	$41,082,631	$154,111,370	$21,618,904	$5,748,826
Total Claim for Participant Share (20% S1 / 10% S2-7)					$8,216,526	$15,411,137 $23,627,663	$4,323,781	$574,883 $4,898,663
Less: Claim Received to Date						4,840,718		4,840,718
Net Remaining Participant Claim						18,786,945		57,945
Prejudgment Interest						21,879,975		1,023,362
Total Remaining Participant Claim						**$40,666,921**		**$1,081,308**
						Order P. 4		*Order P. 5*

Foxcroft Productions & Fairmount Productions v. Universal Studios, Inc.

ABC Columbo Mystery Wheel - Comparison of Accounting Panel

Home Video at 100% and With & Without Distribution Fees

Through December 31, 2017

	Participation Statement		Adjustments		Accounting Panel *Order P. 4*		Accounting Panel *Order P. 5*	
	Season 1-2	Season 3-8	Season 1-2	Season 3-8	Season 1-2	Season 3-8	Season 1-2	Season 3-8
Gross Receipts								
Network	$41,320,031	$52,560,113		$85,440	$41,320,031	$52,645,553	$41,320,031	$52,645,553
Domestic Syndication	171,428	260,860			171,428	260,860	171,428	260,860
Foreign Syndication	44,714,192	56,933,853			44,714,192	56,933,853	44,714,192	56,933,853
Basic Cable	9,945,869	12,270,757			9,945,869	12,270,757	9,945,869	12,270,757
Pay Television	4,403,416	10,799,844			4,403,416	10,799,844	4,403,416	10,799,844
Home Video	2,944,115	2,463,786	11,776,460	9,855,144	14,720,575	12,318,930	14,720,575	12,318,930
Theatrical	0	0			0	0	0	0
Non-Theatrical	334	500			334	500	334	500
Other	1,290,957	1,096,765			1,290,957	1,096,765	1,290,957	1,096,765
Subtotal	104,790,342	136,386,478	11,776,460	9,940,584	116,566,802	146,327,062	116,566,802	146,327,062
Distribution Fees	34,850,984	45,098,660			0	0	34,850,984	45,098,660
Balance	69,939,358	91,287,818	11,776,460	9,940,584	116,566,802	146,327,062	81,715,818	101,228,402
Distribution Expenses								
Residuals	5,505,836	5,997,078			5,505,836	5,997,078	5,505,836	5,997,078
Prints & Physical Properties	987,876	1,109,544			987,876	1,109,544	987,876	1,109,544
Advertising and Publicity	294,667	372,555			294,667	372,555	294,667	372,555
Foreign Language Dubbing	510,539	711,885			510,539	711,885	510,539	711,885
Post Production and Re-Editing	222,641	505,629			222,641	505,629	222,641	505,629
Foreign Taxes and Exchange	1,320,806	1,869,093			1,320,806	1,869,093	1,320,806	1,869,093
Freight, Customs, Storage, Misc.	221,407	489,432			221,407	489,432	221,407	489,432
Insurance	0	20,794			0	20,794	0	20,794
Dues, Fees, Assessments	19	0			19	0	19	0
Litigation	0	0			0	0	0	0
Home Video Costs	0	0	7,028,651	6,958,411	7,028,651	6,958,411	7,028,651	6,958,411
Subtotal	9,063,791	11,076,010	7,028,651	6,958,411	16,092,442	18,034,421	16,092,442	18,034,421
Balance	60,875,567	80,211,808	4,747,809	2,982,173	100,474,360	128,292,641	65,623,376	83,193,981
Participations	0	0			0	0	0	0
Balance	60,875,567	80,211,808	4,747,809	2,982,173	100,474,360	128,292,641	65,623,376	83,193,981
Production Charges and Interest								
Production & Admin Charges	47,302,079	81,160,204		(4,692,914)	47,302,079	76,467,289	47,302,079	76,467,289
Participations	5,623,770	7,327,470			5,623,770	7,327,470	5,623,770	7,327,470
Imputed Interest	23,813,867	40,859,477			261,042	131,142	9,558,104	22,100,625
Subtotal	76,739,716	129,347,151	0	(4,692,914)	53,186,891	83,925,902	62,483,953	105,895,385
Net Profits (Losses)	($15,864,149)	($49,135,343)	$4,747,809	$7,675,087	$47,287,469	$44,366,739	$3,139,423	($22,701,404)
Total Claim for Participant Share (20% S1 / 10% S2-7)					$9,457,494	$4,436,674 $13,894,168	$627,885	($2,270,140) ($1,642,256)
Less: Claim Received to Date						0		0
Net Remaining Participant Claim						13,894,168		0
Prejudgment Interest						12,342,478		0
Total Remaining Participant Claim						**$26,236,646**		**$0**
						Order P. 4		*Order P. 5*