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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

HLC PROPERTIES, LTD. et al.,

Plaintiffs and Appellants,

v.

MCA RECORDS, INC. et al.,

Defendants and Respondents.

B191608

(Los Angeles County
Super. Ct. No. SC062601)

APPEAL from a judgment of the Superior Court of Los Angeles County, Terry Friedman, Judge. Affirmed in part; reversed in part.

Law Offices of Mark A. Brodka, Mark A. Brodka; Greines, Martin, Stein, & Richland, Kent L. Richland and Cynthia E. Tobisman for Plaintiffs and Appellants.

Irell & Manella, Steven A. Marenberg, Philip M. Kelly and Kara D. McDonald for Defendants and Respondents.

I. INTRODUCTION

Plaintiffs, HLC Properties, Ltd. (HLC Properties) and Thomas E. O'Sullivan, as trustee for the Wilma Wyatt Crosby Trust (the trust), appeal from a judgment in their favor against defendants: MCA Records, Inc. (MCA); GRP Records, Inc.; UMG Recordings, Inc.; MCA, Inc.; and Universal Studios, Inc. Plaintiffs contend: they were denied their right to a jury trial; the summary adjudication motions were improperly granted; and they were the prevailing parties and, as such, were entitled to their costs. We conclude: the judgment must be set aside because plaintiffs were denied their right to a jury trial; the orders granting the summary adjudication motions may not be set aside; and the cost issue is now moot.

II. JURY TRIAL ISSUE

A. Overview

Plaintiffs contend they were denied their jury trial right. We will discuss the relevant facts and procedural aspects of their jury trial contention in chronological order. We will discuss the procedural and relevant factual matters as follows: the allegations in the pleadings; the procedural history of plaintiffs' jury trial request; an analysis of the jury trial issue based on the pleadings as they existed after the strictly equitable claims were removed from the litigation by defendants' two summary adjudication motions and plaintiffs' dismissal of the constructive trust and accounting causes of action; and an analysis of the jury trial issue as it relates to the evidence presented during the court trial.

B. First Amended Complaint And Answer

1. Preliminary allegations

The complaint was filed on July 31, 2000. The first amended complaint was filed on October 10, 2002. Plaintiff, HLC Properties, was formed in 1980 and was the successor to all of the property rights of Harry L. Crosby that existed after his death on October 14, 1977. Mr. O'Sullivan was the trustee of the trust, which was named and formed after Mr. Crosby's first wife died on November 1, 1952. The trust held a one-half community property interest in all of the property accumulated during the marriage of Mr. Crosby and his late wife. Plaintiffs' property rights included Mr. Crosby's royalties or income derived from recording contracts with Decca Records Inc. (Decca) and Decros Corporation (Decros).

2. Contract breach (first cause of action)

Mr. Crosby had a contractual relationship with Decca beginning on February 11, 1937. On March 29, 1943, Mr. Crosby entered into a written contract, which superseded all of their prior agreements, with Decca which granted it his exclusive services for the purpose of recording records. Decca was obligated to pay Mr. Crosby 15 percent of the established wholesale price of records retailing for $1 or more. If the wholesale price increased, Mr. Crosby's royalty was to increase by 10 percent on each record sold. Decca was also obligated to pay Mr. Crosby 50 percent of the proceeds of all public performances. Beginning January 1, 1972, defendants breached the 1943 contract by: failing to pay royalties at an agreed upon rate; releasing Mr. Crosby's recordings in media other than records and failing to pay appropriate royalties even if the recording could be released in cassette and compact disc format; reducing the royalty base by 10 and 20 percent on compact discs and tape cassettes respectively; computing royalties

without regard to the obligation to pay greater sums when the wholesale price increased; failing to remit royalties on all sales; taking unauthorized deductions; recouping unauthorized "sessions costs"; and failing to account and pay for the public performance or broadcasting of Mr. Crosby's records.

On January 3, 1949, Mr. Crosby and Decros entered into a contract. Decros agreed to pay plaintiff 7.5 percent of the suggested retail price less taxes on shellac records with a price of $1 dollar or more. Further, on vinylite records pressed from specified master recordings, where the suggested retail price was $1 or more, the royalty rate under the 1949 contract was 5.25 percent. If an entity other than Decros outside the United States or Canada pressed a double disc record, there was a 7.5 percent royalty rate payable under enumerated circumstances. Moreover, as to other specified master records, Decros agreed to pay 2.5 cents on each double disc shellac record and 2.5 percent of the suggested retail price where the price was $1 or more on double disc vinylite records. The immediately foregoing royalties would be increased by 10 percent in the event of any increase in the wholesale price of records containing selections recorded by Mr. Crosby. Mr. Crosby was the majority shareholder in Decros. The intention of the 1949 contract was that Mr. Crosby, who was at the apex of his career, would share on a pro rata basis in future Decros profits. Finally, Decros was obligated to pay Mr. Crosby 25 percent of the net proceeds it received from the public performance and broadcasting of his recordings. Royalties were payable 45 days after the expiration of each calendar half year. Except as modified by an exhibit attached to the 1949 contract, there was no change in the obligation to pay royalties on recordings subject to the 1943 contract.

Beginning January 1, 1972, defendants breached the 1949 contract by: failing to pay royalties at an agreed upon rate; reducing the royalty base by 10 and 20 percent on compact discs and tape cassettes respectively; computing royalties without regard to the obligation to pay greater sums when the wholesale price increased; failing to remit royalties on all sales; taking unauthorized deductions; recouping unauthorized "sessions

costs"; and failing to account and pay for the public performance or broadcasting of Mr. Crosby's records.

On May 10, 1956, Decros entered into another contract with Mr. Crosby. Decros agreed to pay Mr. Crosby royalties of: 7.5 percent of the suggested retail price less taxes for records retailing at $1 or more; 7 percent of the suggested retail price on double disc 45 and 33 1/3 revolutions per minute records where the price was $1 or more on records manufactured in Canada or the United States; and 7.5 percent of the established retail price less taxes for records manufactured outside Canada and the United States. These royalties would be increased by 10 percent of any increase in the wholesale price of records containing Mr. Crosby's recordings. Royalties were payable to Mr. Crosby 45 days after each "calendar half year." The 1956 contract did not modify the royalty obligations owed under the 1943 and 1949 contracts with Decca and Decros respectively. Beginning January 1, 1972, defendants breached the 1956 contract by: failing to pay royalties at an agreed upon rate; reducing the royalty base by 10 and 20 percent on compact discs and tape cassettes respectively; computing royalties without regard to the obligation to pay greater sums when the wholesale price increased; failing to remit royalties on all sales; taking unauthorized deductions; recouping unauthorized "sessions costs"; and failing to account and pay for the public performance or broadcasting of Mr. Crosby's records.

On April 2, 1986, HLC Properties entered into a contract with MCA. Under the terms of the 1986 agreement, the 1943, 1949, and 1956 contracts were amended to cover compact discs. The first amended complaint alleges that Mr. Crosby was to receive the same royalty rate as if the recording was produced on a black vinyl disc. Further, in light of Mr. Crosby's stature, MCA agreed to pay him a royalty rate equal to that of other artists under specified circumstances. The exact allegation is: "[I]n light of [Mr. Crosby's] stature as one of the most successful recording artists in history, [MCA] agreed to a 'most favored nations' . . . clause which provided that should [MCA] agree to pay any of its artists a royalty which exceeds that artist's rate for top-line single disc LPs sold

through normal retail channels, then it would immediately apply that royalty basis to [Mr. Crosby]." Not later than January 26, 1988, defendants breached their obligations by offering more favorable terms to other artists when calculating compact disc royalties than to plaintiffs. Defendants began paying other artists royalties based on the suggested retail price of the compact discs rather than the rate payable for black vinyl records. The breach of the duty to pay plaintiffs the same favorable terms offered to other artists was not discoverable until September 2001 after documents were produced during the early stages of this litigation.

According to the first amended complaint, plaintiffs and their predecessors had performed all of their obligations under the 1943, 1949, 1956, and 1986 contracts. As a direct result of defendants breaching the 1943, 1949, 1956, and 1986 contracts, plaintiffs suffered damages in excess of $16 million. Between January 1, 1994, and December 31, 1998, defendants understated the royalties due to plaintiffs by 221 percent.

3. Fraud (second cause of action)

In 1972, defendants devised a fraudulent scheme to reduce the amount of royalties payable to Mr. Crosby and plaintiffs. In 1985, representatives of HLC Properties inquired as to how defendants calculated Mr. Crosby's royalties. Defendants provided copies of several contracts but deliberately refused to reveal the existence of the 1943 contract. In 1998, HLC Properties decided to conduct a formal audit. This time, defendants provided the 1943 contract. Defendants asserted that royalties were not to be paid under the 1943 contract but pursuant to a 1948 agreement as modified by letter between the parties exchanged in June 1960. In a July 28, 1999 letter, Raymond J. Valentin, a royalty auditor for Universal Music Group, stated that the January 2, 1948 agreement superseded prior contracts and there had been a subsequent modification in June 1960 of the parties' understandings. In fact, there was no January 2, 1948 contract between Mr. Crosby and Decca. Further, nothing in the June 1960 correspondence

modified any of Mr. Crosby's contracts. Plaintiffs alleged defendants knew the true facts—there was no January 2, 1948 contract and the 1960's correspondence did not modify the 1943, 1949, and 1956 contracts. Plaintiffs alleged defendants were obligated to disclose that the 1943 contract was the operative agreement. Plaintiffs relied on defendants' representations that royalties were being paid in conformity with the operative contractual terms. On or about October 5, 1999, plaintiffs received an audit report and discovered defendants ignored provisions of the 1943 contract. As a result, plaintiffs had been damaged in excess of $16 million. The second cause of action contained a punitive damage allegation.

4. Fraud (third cause of action)

The third cause of action realleged all of the allegations in the first amended complaint except for the punitive damage claim in the second cause of action. Plaintiffs alleged that since 1972, defendants sent biannual written royalty statements to Mr. Crosby and his estate. Around 1999, defendant sent the royalty statements to plaintiffs. The royalty statements "grossly understated" the royalties due to plaintiffs. Defendants had no reasonable grounds for believing they were paying the correct amount of royalties and concealed the amounts due. The deceptive reporting and payments were made with the intent that plaintiffs would rely on them. On October 5, 1999, plaintiffs received an audit report and only then discovered defendants' deceit. Plaintiffs have been damaged in excess of $16 million. The third cause of action also contained a punitive damage allegation.

5. Fiduciary duty breach (fourth cause of action)

Plaintiffs realleged all of the allegations except the punitive damage allegation in the third cause of action. Defendants acted as Mr. Crosby's exclusive agent for:

recording his records; marketing the records using his name and likeness; keeping accurate accounts regarding the sales; and remitting the percentage of sales due under the 1943, 1949, and 1956 contracts. Under the 1949 and 1956 contracts, Mr. Crosby had the right to cancel them if they were breached by Decros and to prevent their assignment or transfer. Because Mr. Crosby was inexperienced in the marketing of records, he relied on Decca and Decros to act as his exclusive agents in these matters. Decca, Decros, and defendants held themselves out as experts in these matters. As a result, Mr. Crosby and his successors relied on Decca, Decros, and defendants to act with integrity and fidelity. Defendants breached their fiduciary obligations to plaintiffs causing damages in excess of $16 million. Finally, the fourth cause of action also contained a punitive damage allegation.

6. Implied covenant breach (fifth cause of action)

The fifth cause of action realleged all of the matters in the first four causes of action except the punitive damage allegation at the conclusion of the fourth cause of action. Based upon the previously stated facts, plaintiffs alleged defendants violated the fair dealing and implied good faith covenant. Finally, plaintiffs alleged they were damaged in excess of $16 million.

7. Rescission of contracts (sixth cause of action)

Plaintiffs realleged all of the prior allegations at the commencement of the sixth cause of action. All of defendants' conduct constituted a "material breach" of the 1943, 1949, 1956, and 1986 contracts. The sixth cause of action alleged, "Plaintiffs hereby elect to rescind the [1943, 1949, 1956, and 1986 contracts] based on material breach of contracts, fraud and breach of fiduciary or confidential relationship."

8. Cancellation of contracts (seventh cause of action)

At the commencement of the seventh cause of action, plaintiffs realleged all of the prior allegations in the first amended complaint. Under the terms of the 1949 and 1956 contracts, in the event of a breach, 30 days after providing notice of the violation of a contractual obligation, the defaulting party was entitled to terminate the agreement by written notice. In that case, all rights and obligations were to cease and terminate. On November 30, 1999, in a letter sent by certified mail, HLC Properties notified defendants they were in material breach of the 1943, 1949, 1956, and 1986 contracts. Plaintiffs sought a declaration that the 1949 and 1956 contracts were cancelled.

9. Constructive trust (eighth cause of action)

At the commencement of the eighth cause of action, plaintiffs realleged all of the prior allegations in the first amended complaint. Plaintiffs sought the imposition of a constructive trust on all of the masters recorded and royalties due under the 1943, 1949, 1956, and 1986 contracts. Finally, plaintiffs sought an injunction against defendants from engaging in "any transfer or encumbrance" of the master recordings or royalties.

10. Negligence (ninth cause of action)

The ninth cause of action realleged all of the prior allegations in the first amended complaint. According to the ninth cause of action, defendants owed a duty to exercise ordinary care with Mr. Crosby and his successors in interest. Defendants breached that duty of care and plaintiffs were damaged in an amount in excess of $16 million.

11. Accounting (tenth cause of action)

At the commencement of the tenth cause of action, plaintiffs realleged all of the prior allegations in the first amended complaint. Since defendants began collecting money generated by Mr. Crosby's recordings, they failed to remit the proper sums due. Since delivering the aforementioned 1999 audit report, defendants continued to fail to remit the full amount legally due. The accounting cause of action alleged: "Plaintiffs do not know and cannot determine by calculation the exact amount of money owed to them by [d]efendants. Since [d]efendants have exclusive control of all documents and information necessary to ascertain the exact amount owed to [p]laintiffs, they should be required to render a full and complete accounting."

12. Open book account (eleventh cause of action)

All of the prior allegations of the first amended complaint were realleged at the commencement of the eleventh cause of action. The 1943, 1949, and 1956 contracts required defendants to maintain accurate books of account and render periodic accountings of moneys due on Mr. Crosby's recordings. An open book account exists between defendants and plaintiffs. Defendants were indebted to plaintiffs in "the approximate sum of $16,336,931" plus interest.

13. Prayer for relief

The first amended complaint's prayer for relief sought the following. The first paragraph of the prayer for relief sought: compensatory damages on all of the causes of action for moneys due under the 1943, 1949, 1956, and 1986 contracts; "additional general, consequential, incidental, or special damages according to proof"; and interest.

The second paragraph sought punitive damages on the second, third, fourth, and eighth causes of action. The third paragraph sought as to the sixth cause of action for rescission of contracts a declaration: the 1943, 1949, 1956, and 1986 contracts were rescinded; the masters were held in trust as of the rescission date; defendants be required to deliver the masters recorded under the 1943, 1949, 1956, and 1986 contracts to plaintiffs; and all royalties generated after the rescission date be paid to plaintiffs. The fourth paragraph sought a declaration under the seventh cause of action that the 1949 and 1956 contracts were cancelled and all royalties collected and masters were to be held in trust. Also, plaintiffs sought an order that all royalties payable after the termination of the contracts and masters be delivered to plaintiffs. The fifth paragraph in the prayer for relief sought, as to the eighth cause of action, a declaration that defendants held the masters recorded under the 1943, 1949, and 1956 contracts and all royalties due thereunder in trust for plaintiffs. Additionally, the eighth cause of action sought an order that the masters be delivered along with all royalties to plaintiffs. Moreover, the eighth cause of action sought an order that defendants be enjoined from the transfer or creation of encumbrances upon the masters. The sixth paragraph of the prayer for relief sought as to the tenth cause of action an accounting of all moneys due to plaintiffs pursuant to the 1943, 1949, 1956, and 1986 contracts. Finally, plaintiffs sought interest and costs of suit including attorney fees.

14. Answer

Defendants filed a general denial. Defendants asserted as defenses: "the statute of limitations"; laches; federal copyright preemption; the right to a set-off; plaintiffs had ratified the royalty payments; waiver; estoppel; failure to mitigate damages; and the punitive damage claims were barred or limited by the Fifth and Fourteenth Amendment due process clauses.

B. Jury Trial

1. Procedural history of plaintiffs' jury trial demand

By the time of trial, the issues raised by the first amended complaint had materially changed. Suit was filed on July 31, 2000. On August 1, 2002, defendants' summary adjudication motion was granted to the extent that the statute of limitations limited plaintiffs' claims. The trial court ruled the following claims arising prior to July 31, 1996, were barred: contract breach (first cause of action); fiduciary duty breach (fourth cause of action); implied covenant breach (fifth cause of action); rescission of contract (sixth cause of action); cancellation of contracts (seventh cause of action); constructive trust (eighth cause of action); and accounting (tenth cause of action). Further, the trial court ruled that all claims for fraud in the third cause of action arising prior to July 31, 1997 were time barred by the statute of limitations. Finally, the trial court ruled that the statute of limitations barred all of plaintiffs' negligence claims arising prior to July 31, 1999.

After the first summary adjudication motion was granted, plaintiffs were permitted to file the first amended complaint, which primarily added allegations concerning the 1986 compact disc agreement. On May 9, 2003, the trial court granted defendants' second summary adjudication motion as to the second (fraud), third (fraud), and fourth (breach of fiduciary duty) causes of action, and in part as to the eleventh cause of action (open book account). The trial court also granted summary adjudication as to plaintiffs' punitive damage claims. The trial court concluded with respect to the second cause of action—alleging defendants fraudulently concealed the existence of the 1943 contract and then intentionally misrepresented the 1943 contract was superseded by a 1948 agreement—that: the cause of action was barred by the statute of limitations as to any acts prior to July 31, 1997; there was no evidence defendants justifiably relied on the

representation as to the 1948 agreement; nor could there be any resulting damages from any such reliance; and failure to disclose a material term—the existence of the 1943 agreement—was not actionable absent a fiduciary relationship, which did not exist. The trial court found the third cause of action—alleging defendants knowingly sent plaintiffs false biannual royalty statements—was barred by the statute of limitations as to royalty payments made prior to July 31, 1997; further, given that the claim was dependent on the second cause of action, and given the ruling on the second cause of action, this third cause of action was really one for breach of contract. As to the fourth cause of action, for fiduciary duty breach, there were no new allegations that overcame the trial court's prior ruling of no triable issue that defendants owed a fiduciary duty to plaintiffs. Additionally, the trial court ruled the relationship between the parties was not a joint venture. Finally, the trial court held plaintiffs' open book claims (eleventh cause of action) arising prior to July 31, 1997 were barred; and the motion was granted as to plaintiffs' punitive damage claims.

On March 25, 2003, defendants filed a bifurcation motion to try the sixth, seventh, eighth, and tenth causes of action without a jury before trying any remaining legal issues. On April 15, 2003, defendants' bifurcation motion was granted. On June 13, 2003, plaintiffs dismissed without prejudice their eighth and tenth causes of action in the first amended complaint for constructive trust and accounting. On August 13, 2003, plaintiffs filed a motion to empanel a jury to try their legal claims. Plaintiffs argued: as a result of the dismissal of the constructive trust and accounting causes of action, the gist of the remaining claims for contract and implied covenant breach, rescission, cancellation of contracts, negligence, and money due under an open book account was legal rather than equitable in nature; there is a jury trial right when the gist of a claim is legal; the gist of the rescission claim, which was based on contract breach and fraud, was legal rather than equitable; the key issues in the case involved questions of contract interpretation; and the witnesses will present conflicting testimony on the contract breaches at issue. On August 28, 2003, defendants filed their opposition to plaintiffs' motion to empanel a jury and

argued: when legal and equitable issues were present, the trial court could try the equity based questions first without a jury; the gist of plaintiffs' rescission claim was equitable; the gist of plaintiffs' contract breach claim was equitable because an accounting was required; and there was no absolute right to a jury trial. On September 4, 2003, the trial court denied plaintiffs' motion to empanel a jury and ruled: the case turned on a determination as to the amount of the royalties due to plaintiffs; "there can be no breach of contract or fraud if the [c]ourt determines that the amount of royalties paid has been proper"; any determination of the amount of royalties required an accounting; and plaintiffs' cited cases were inapposite. We summarily denied a writ petition challenging the trial court's order refusing to empanel a jury. (*HLC Properties, Ltd. v. Superior Court* (Nov. 6, 2003, B170493) [nonpub. order].)

2. Right to a jury trial

Article I, section 16 of the California Constitution guarantees a civil litigant the right to a jury trial on legal claims. (*Grafton Partners v. Superior Court* (2005) 36 Cal.4th 944, 951; Code Civ. Proc., § 631, subd. (a) ["The right to a trial by jury as declared by Section 16 of Article I of the California Constitution shall be preserved to the parties inviolate"].) But the civil jury trial guaranteed is that as it existed at common law when the California Constitution was first adopted. (*Corder v. Corder* (2007) 41 Cal.4th 644, 655, fn. 7; *Cornette v. Department of Transportation* (2001) 26 Cal.4th 63, 75-76.) Hence, the constitutional civil jury trial right does not apply to equitable actions. (*Corder v. Corder, supra*, 41 Cal.4th at p. 655, fn. 7; *Matter of Coburn* (1913) 165 Cal. 202, 219.) In resolving whether the causes of action in this case are legal or equitable in nature, we must determine the gist of plaintiffs' claims: "As we stated in *People v. One 1941 Chevrolet Coupe* [(1951)] 37 Cal.2d 283, '"If the action has to deal with ordinary common-law rights cognizable in courts of law, it is to that extent an action at law. In determining whether the action was one triable by a jury at common law, the court is not

bound by the form of the action but rather by the nature of the rights involved and the facts of the particular case - - the *gist* of the action. A jury trial must be granted where the *gist* of the action is legal, where the action is in reality cognizable at law.'" (P. 299, fn. omitted, italics added.)" (*C & K Engineering Contractors v. Amber Steel Co.* (1978) 23 Cal.3d 1, 9.) Normally, whether a claim is equitable or legal depends on the "mode of relief" the plaintiff seeks. (*C & K Engineering Contractors v. Amber Steel Co., supra*, 23 Cal.3d at p. 9; *Raedeke v. Gibraltar Sav. & Loan Assn*. (1974) 10 Cal.3d 665, 672.) The operative complaint's prayer for relief or the fact damages are sought may not be dispositive of whether the claim is equitable or legal. (*C & K Engineering Contractors v. Amber Steel Co., supra,* 23 Cal.3d at p. 9; *Southern Pac. Transportation Co. v. Superior Court* (1976) 58 Cal.App.3d 433, 436.) The fact that equitable principles may come into play during a trial does not abrogate the constitutional jury trial right. (*C & K Engineering Contractors v. Amber Steel Co., supra*, 23 Cal.3d at p. 10; *McCall v. Superior Court* (1934) 1 Cal.2d 527, 537.)

The extent of the constitutional civil jury trial right is set forth in Code of Civil Procedure, section 592, which provides in pertinent part, "In actions for the recovery of specific, real, or personal property, with or without damages, or for money claimed as due upon contract, or as damages for breach of contract, or for injuries, an issue of fact must be tried by a jury, unless a jury trial is waived . . . ." The scope of Code of Civil Procedure section 592 does not exceed the constitutional jury trial right. (*Corder v. Corder, supra*, 41 Cal.4th at p. 656; *Crouchman v. Superior Court* (1988) 45 Cal.3d 1167, 1174; see 7 Witkin, Cal. Procedure (4th ed. 1997) § 90, pp. 110-111.) The jury trial right extends to claims for: contract breach and implied covenant damage claims as alleged in the first and fifth causes of action (*Raedeke v. Gibraltar Sav. & Loan Assn., supra*, 10 Cal.3d at p. 671; *Davis v. Security-First Nat. Bank* (1934) 1 Cal.2d 541, 542); negligence as alleged in the ninth cause of action (*Ceriale v. Superior Court* (1996) 48 Cal.App.4th 1629, 1634-1635; *Morris v. Oney* (1963) 217 Cal.App.2d 864, 873-874); and an open book account based upon a contract as alleged in the eleventh cause of

action. (*Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1241; *Grossblatt v. Wright* (1951) 108 Cal.App.2d 475, 484-485.) There is no jury trial right on a contract cancellation cause of action when there is no claim for damages or restitution. (*Proctor v. Arakelian* (1929) 208 Cal.82, 99; *Porter v. Superior Court* (1977) 73 Cal.App.3d 793, 801.) As noted, in this case, the contract cancellation claim sought an award of damages.

The jury trial question is slightly more complex in terms of plaintiffs' rescission claim. Prior to 1961, there were two forms of rescission. First, there was an action to enforce a rescission which was a legal claim. Second, there was an action to obtain a judicial rescission which was an equitable claim. (*Runyan v. Pacific Air Industries, Inc.* (1970) 2 Cal.3d 304, 311-312; *Paularena v. Superior Court* (1965) 231 Cal.App.2d 906, 912-913.) In 1961, Civil Code section 1691 was adopted which creates an action for relief from a party against whom a rescission has been accomplished. (*Runyan v. Pacific Air Industries, Inc., supra*, 2 Cal.3d at p. 313; *Paularena v. Superior Court, supra*, 231 Cal.App.2d at p. 913.) Whether a rescission claim is equitable or legal depends on the nature of the substantive relief requested by the plaintiff. (*Runyan v. Pacific Air Industries, Inc., supra*, 2 Cal.3d at p. 313; *Lectrodryer v. SeoulBank* (2000) 77 Cal.App.4th 723, 728.) When the gist of the claim is for damages attendant to a rescission, the cause of action is legal in nature. (*Ibid.; Paularena v. Superior Court, supra*, 231 Cal.App.2d at p. 913.) Claims for return of personal property are likewise legal rather than equitable. (Code Civ. Proc., § 592; *Maldonado v. Superior Court* (1984) 162 Cal.App.3d 1259, 1268; 7 Witkin, *supra,* Cal. Procedure, op. cit., § 94, p. 114.)

3. The gist of plaintiffs' claims as pled when their jury trial motion was denied were legal

When plaintiffs' jury empanelment motion was denied, the following were the operative claims: contract breach; implied covenant breach; contracts rescission;

cancellation of contracts; negligence; and open book account. The gist of plaintiffs' claims were for damages and return of personal property; the masters of Mr. Crosby's recordings. After the dismissal of the equitable causes of action for imposition of a constructive trust and an accounting on June 13, 2003, the amended complaint contained causes of action arising out of alleged violations of the 1943, 1949, 1956, and 1986 contracts, all of which sought monetary damages—the classic scenario involving legal claims. (Code Civ. Proc., § 592; see Wegner, et al., Cal. Practice Guide: Civil Trials and Evidence (The Rutter Group 2007) ¶ 2:78 et seq., p. 2-48.1 (rev. #1, 2007).) Moreover, as to the rescission cause of action, plaintiffs sought to rescind the contracts based upon theories of: contract breach; fraud; and breach of fiduciary or confidential relationships. As to the contract breach and fraud claims, those theories are legal. (*Raedeke v. Gibraltar Sav. & Loan Assn., supra*, 10 Cal.3d at p. 671; *Fireman's Fund Ins. Companies v. Younesi* (1996) 48 Cal.App.4th 451, 458-459.) The issue is closer as to the fiduciary duty and confidential relationship theories. (Compare *Interactive Multimedia Artists v. Superior Court* (1998) 62 Cal.App.4th 1546, 1554-1555 with *Mortimer v. Loynes* (1946) 74 Cal.App.2d 160, 168.) However, by the time plaintiffs filed their jury empanelment motion, the issues of fraud, fiduciary duties, and confidential relationships were moot. These issues were moot because the trial court granted summary adjudication on plaintiffs' deceit and fiduciary relationship claims. In other words, the sole available theory to support plaintiffs' rescission cause of action was their contract breach claim. In any event, the gist of plaintiffs' rescission claim was defendants breached the 1943, 1949, 1956, and 1986 contracts. Also, the gist of the cancellation claim was that defendants breached the 1943, 1949, 1956, and 1986 contracts and plaintiff sought damages in addition to setting aside those agreements. Thus, based on the relief sought—money damages and recovery of personal property all arising from the alleged breaches of the 1943, 1949, 1956, and 1986 contracts—the gist of plaintiffs' claims was legal and they were entitled to a jury trial.

Finally, in terms of the substantive relief sought, the fact plaintiffs dismissed their constructive trust and accounting claims is irrelevant. In *Raedeke v. Gibraltar Sav. & Loan Assn., supra*, 10 Cal.3d at pages 668-672: the plaintiffs filed a complaint with both equitable and legal claims; the plaintiffs dismissed their equitable claims prior to trial; and proceeded to trial on two legal theories—conversion and breach of an oral promise to postpone a trustee's sale. Despite these procedural intrigues, which parallel those in our case, our Supreme Court held: "[W]hen the smoke created by plaintiffs' various maneuvers had finally cleared, plaintiffs were left with (1) a cause of action for damages for conversion, and (2) a cause of action for damages for breach of the oral promise to postpone the sale. As the relief sought in both causes of action was damages, and as the legal or equitable nature of a cause of action ordinarily is determined by the mode of relief to be afforded (*Philpott v. Superior Court* [(1934)]1 Cal.2d 512, 516; *Paularena v. Superior Court*, [*supra*,] 231 Cal.App.2d [at pp.] 911-912), plaintiffs were entitled to a jury trial as a matter of right." In terms of the pleadings, the same is true in this case. (*Raedeke v. Gibraltar Sav. & Loan Assn., supra*, 10 Cal.3d at pp. 671-672; Wegner et al, Cal. Practice Guide: Civil Trials and Evidence, *supra*, § 2:75, p. 2-13 (rev. #1, 2007).)

4. The gist of plaintiffs' claims at trial were legal

a. overview

As previously noted, our Supreme Court has emphasized that the state of the pleadings, specifically the prayer for relief, may not, depending on the circumstances, be dispositive of whether the gist of a lawsuit is legal or equitable. (*C & K Engineering Contractors v. Amber Steel Co., supra*, 23 Cal.3d at p. 9; see *DiPirro v. Bondo Corp.* (2007) 153 Cal.App.4th 150, 179.) Hence, our Supreme Court has also examined what occurred at trial in order to determine whether the constitutional jury trial right has been violated. (*C & K Engineering Contractors v. Amber Steel Co., supra*, 23 Cal.3d at p. 9.)

Courts of Appeal have done likewise. (*Nwosu v. Uba, supra*, 122 Cal.App.4th at pp. 1242-1244; *Lectrodryer v. SeoulBank, supra*, 77 Cal.App.4th at p. 728; *Piscitelli v. Friedenberg* (2001) 87 Cal.App.4th 953, 969-971; *Unilogic, Inc. v. Burroughs Corp.* (1992) 10 Cal.App.4th 612, 622-623.) Consideration of the issues raised during the trial demonstrate the gist of plaintiffs' claims were legal. We set forth the facts developed during the trial as they relate to whether the gist of plaintiffs' first amended complaint was a legal claim for damages based on violations of the 1943, 1949, 1956, and 1986 contracts. As will be noted, the trial involved plaintiffs' right to damages because of alleged breaches of the 1943, 1949, 1956, and 1986 contracts and the return of personal property.

b. the contracts

The March 29, 1943 contract provided: Decca would record for a seven year period Mr. Crosby's "commercial sound records"; Mr. Crosby was to be paid between 2.5 cents and 5.25 cents on double disc 10-inch records manufactured in the United States and Canada which sold for less that 75 cents and 15 percent of the established wholesale price where the price exceeded $1 less taxes; on double disc 12-inch records manufactured in the United States and Canada, Mr. Crosby was to receive 4.5 and 5.5 percent when the suggested retail price was 75 cents and $1 respectively and 15 percent of the wholesale price when the established wholesale price was more than $1 minus taxes; and on double disc records manufactured and sold outside the United States and Canada, Mr. Crosby was to receive 5.25 cents when the suggested retail price was less than $1 and, when the suggested retail was more than $1, he was to be paid 15 percent of the established wholesale price in the country of manufacture minus taxes. Mr. Crosby was to receive 50 percent of all money recovered from public performances or broadcasting. When the 1943 agreement was executed, all records sold to the public were made from shellac.

On January 3, 1949, Mr. Crosby formed Decros which was dedicated to producing and selling his records. The January 3, 1949 contract provided that Mr. Crosby granted Decros ownership rights to specified master records and the authority to record his commercial phonograph records for seven years. The term "commercial phonograph records" was defined thusly in the 1949 agreement: "Commercial phonograph records as used in this Agreement shall mean phonograph records, whether made in the form of discs, wire, or tape, or any devices which are now or hereafter used as a substitution for or a replacement of phonograph records as now known, and shall not include records intended exclusively for motion pictures, radio or television broadcasts." Mr. Crosby was to be paid $295,750 which was to be applied against royalties when the specified records were manufactured in the United States or Canada or anywhere by Decros. On specified records, Mr. Crosby was to receive on double disc 10-inch shellac records the following royalties: when the suggested retail list price was 35 cents, 2.5 cents; 3.5 cents when the suggested retail list price was 50 cents; and 5.25 cents when the suggested retail price was 75 cents. When the suggested retail list price was $1 or more, Mr. Crosby was to receive 7.5 cents less taxes. On double disc 12-inch shellac records manufactured in the United States or Canada or anywhere by Decros, Mr. Crosby was to receive: 4.5 cents when the suggested retail price was 75 cents; 5.5 cents when the suggested retail price was $1; and 7.5 cents when the suggested retail price was more than $1. But when a record was manufactured on vinylite in the United States or Canada or anywhere by Decros, 5.25 cents was to be paid to Mr. Crosby when the suggested retail price was less than $1 dollar. When the suggested retail price was $1 or more, Mr. Crosby was to receive the established retail price in the country of manufacture minus any taxes. Specified records listed on an exhibit to the 1949 agreement were to be paid at a rate of 2.5 cents on double disc shellac records. If the suggested retail price of the same records manufactured on vinylite was $1 or more, Mr. Crosby was to receive a royalty of 2.5 percent. When the wholesale price increased, Mr. Crosby's royalties were to increase by 10 percent. Mr. Crosby was to receive 50 percent of all moneys received by Decca for

public performances but had received no compensation. The obligation to make payments for public performances was transferred from Decca to Decros. For pubic performances in the United States, Decros was obligated to pay 25 percent of the net proceeds. All of the net proceeds for public performances outside the United States were payable to Mr. Crosby. There were other aspects of the 1949 contract which did not directly relate to the contractual duties owed by Decros to Mr. Crosby at issue in this lawsuit.

On May 10, 1956, Decros and Mr. Crosby entered into a second recording contract which had as its purpose, "The parties wish to arrange for the services of [Mr. Crosby] in the making of commercial phonograph records for the future." On double disc 10-inch 78 or 7-inch 45 revolutions per minute records manufactured in Canada or the United States or by Decros anywhere, Mr. Crosby was to receive the following royalties: when the suggested retail list price was 35 cents, a royalty of 2.5 cents; when the suggested retail list price was 50 cents, a royalty of 3.25 cents; and when the suggested retail list price was 75 cents, a royalty of 5.34 cents. For those records, when the price was over 75 cents and under $1, Mr. Crosby was to receive a 5.75 cent royalty. If the price was over $1, Mr. Crosby was to receive 7.5 percent of the suggested retail price less taxes imposed.

In paragraph 10, the May 10, 1956 contract provided a separate royalty rate for 78 revolutions per minute double disc 12-inch records manufactured in Canada or the United States or by Decros anywhere: 4.5 cents on a record with a suggested retail list price of 75 cents; 5.5 cents on a record with a suggested retail list price of $1; and 7.5 percent on a record with a suggested retail list price of $1 or more less taxes. On double disc extended play 45 or 33 and one third revolutions per minute records manufactured in Canada or the United States or by Decros anywhere, the royalty rate would be 7 percent of the suggested retail price where the price was $1 or more. If double disc records were manufactured by someone other than Decros outside the United States and Canada, if the suggested retail price in the United States was less than $1, the royalty would be 5.75

cents. If the retail price in the United States was $1 or more, the royalty rate was 7.5 percent minus taxes. The royalty rates in paragraph 10 could be reduced in enumerated amounts if another artist's work was on a record containing a recording by Mr. Crosby.

The 1986 compact disc contract modified all of Mr. Crosby's agreements. Dated April 2, 1986, the agreement provided: "The royalty payable on recordings in the form of compact discs shall be the same cent rate (or other currency) otherwise payable on single-disc top-line LPs (which is currently $8.98) for sales through normal retail channels (with proportionate reductions for non-retail sales). Commencing with the first full accounting period two years from the release date of a compact disc embodying Artist's performance, MCA and Artist, at Artist's written request, shall negotiate in good faith a new compact disc royalty based on the then current industry standards for artists of similar stature . . . through normal retail channels." Also, the 1986 contract contained what the parties refer to as a "most favored nations clause": "If during said two (2) year period or any time thereafter, MCA uses a different basis for determining royalties on compact discs and, as a result thereof, MCA agrees to pay any artist a royalty which exceeds that artist's cent rate for top-line single disc LPs sold through normal retail channels. . . ." (Rather than use the metaphor "most favored nations clause" which finds its basis in diplomacy and international treaties, we will use the more accurate phrase "equal preferential treatment clause.") The 1986 contract was signed by Roy Farrow, on behalf of Hillsborough Productions, the general partner of HLC Properties, and Susan Allen on behalf of defendants. The president and chief executive officer of Hillsborough Productions is Kathryn Crosby, Mr. Crosby's second wife.

c. the 1960's correspondence

The parties disagreed as to the impact of what they refer to as the 1960's correspondence. The 1960's correspondence, an exchange of letters, consisted of a: June 8, 1960 letter between Basil Grillo, who ran Mr. Crosby's Beverly Hills business office,

and an accountant which indicated that understandings had been reached concerning royalty rates; a June 8, 1960 letter from Mr. Grillo to Mr. Crosby explaining that an effort would be made to settle a dispute with Decca; a June 22, 1960 letter from Mr. Grillo acknowledging that the 94 cent rate was acceptable; a June 28, 1960 letter from Mr. Cohen to Mr. Grillo explaining the calculation on the 94 cent rate; Mr. Grillo's telegram agreeing with Mr. Cohen's analysis in the June 28, 1960 letter; and Mr. Grillo's March 11, 1960 letter to Louis A. Buchner of Decca agreeing to a settlement of a dispute. According to defendants, the 1960 correspondence allowed them to pay a 7 percent royalty on Mr. Crosby's recordings.

There was conflicting testimony as to the effect of the 1960's correspondence. Plaintiffs called David Berman, an experienced recording industry lawyer, who testified that the 1960's correspondence did not modify the 1943, 1949, and 1956 contracts other than to provide for a new royalty rate on a 94 cent single. Gary Cohen, who prepared an audit report dated October 5, 1999, which asserted that plaintiffs were entitled to substantial damages, testified the 1960's correspondence did not affect the moneys due under the 1943, 1949, and 1956 contracts. According to Mr. Berman, the parties' course of conduct over the years was such they only used specific documents executed by them including personally by Mr. Crosby when he was alive. There was no evidence Mr. Crosby ever personally approved any changes in the 1943, 1949, and 1956 contracts. Further, some of the language in the 1960's correspondence is cryptic compared to the express agreements reflected in the 1943, 1949, and 1956 contracts.

By contrast, defendants presented evidence the 1960's correspondence reflected a change in the royalty rate apart from the 94 cent single. Walter Dean, an experienced recording industry lawyer, testified that 1960's correspondence reflected the typical settlement of a royalty dispute. Moreover, a June 8, 1960 letter states, "On EP's and LP's, the rate will be 7% of the retail price, less excise taxes and the prices heretofore established for packaging." There was testimony the 7 percent rate was consistent with what internal Decca rate cards show was being paid on albums. The same is true of

Decros albums. In addition to Mr. Dean's testimony, there was evidence that after the 1960's correspondence, Decca began paying a 7 percent retail royalty rate minus excise taxes and packaging costs on long playing vinyl records and later on cassettes and compact discs. Also, Roy Farrow, an officer of Hillsborough Productions and an attorney, conceded that he was aware in April 1986, that plaintiffs were being paid at a "7 percent royalty" rate. Also, on June 23, 1987, Mr. Farrow was advised that a 7 percent of retail royalty was being paid. Mr. Berman believed that Mr. Farrow's failure to object upon being notified of the 7 percent royalty rate in 1987 was deficient representation of plaintiffs' interests. But Mr. Berman, testifying on behalf of plaintiffs, conceded Mr. Farrow's failure to raise the issue "might" change the legal situation.

In reducing the contract rate of 15 percent to 7 percent, Mr. Dean testified Decca was struggling to decide what portion of the 1943 contract "made the most sense in light of" changing technologies: "And the conclusion they came to . . . was looking at the fact that a single record was going to bear 5-1/4 cent royalty on a 75 cent double-sided record in shellac, and basically interpolated that into, well if you have the typical long playing record which basically has ten cuts on it instead of two, that the 5-1/4 cents on 75 cents really equated to a 7 percent of retail royalty. [¶] And they applied that 7 percent retail royalty to the new configuration, and each succeeding new configuration they did exactly the same thing." There were Decca internal documents that confirmed the efforts to calculate royalties as record technologies evolved. Marjorie Fieldman, the senior vice president for Universal Music Group, testified, based upon rate cards and other documents, that Decca paid at the 7 percent royalty rate except in the case of budget records.

d. less well selling recordings

The parties presented conflicting evidence as to the alleged existence of a reduced royalty rate on less well selling recordings referred to as "midline" or "budget" products.

Ms. Fieldman described the purpose of such marketing: "[T[he purpose of a midline record is to sell a higher volume at a lower margin. So the record companies were requesting that the artist take a lower royalty rate, which would then be compensated by the increased volume. [¶] . . . The purpose is to stimulate catalog activity because the people are no longer willing to buy the records at top price. So in order to continue to sell the product, you have to reduce the price to make it attractive to the customer." Plaintiffs acknowledge Mr. Crosby's estate agreed in January 1978 in writing to a reduced royalty rate as to two recordings, "Shillelaghs & Shamrocks" and "When Irish Eyes Are Smiling." There was evidence that any other requests for reduced rates must be personally approved by Mr. Grillo. However, since the January 1978 agreement, the reduced royalty rate was paid on all of the so-called midline products. Mr. Cohen testified there was no contractual basis for paying a reduced royalty on the midline or budget recordings. Mr. Cohen testified that Mr. Crosby only agreed to the reduced royalty rate on only the aforementioned two recordings. And there was testimony until Mr. Cohen's 1999 audit report, plaintiffs never raised the issue of reduced royalties on midline releases.

e. 1986 compact disc preferential treatment clause

The parties presented conflicting testimony as to when the equal preferential treatment clause in the 1986 compact disc agreement was triggered. When the 1986 compact disc amendment was executed, Mr. Farrow, on behalf of plaintiffs, was told that the royalty for Mr. Crosby's recordings would be the same as that payable on a vinyl record. Because of the uncertainty as to the production costs of compact discs and whether they would be profitable, it was an industry-wide practice for the artist to be paid at the same rate payable on vinyl records. There was testimony and documentary evidence plaintiffs were paid on what was characterized as "black vinyl rate" (that payable under the 1943, 1949, and 1956 contracts for a vinyl record) which was a lower

rate than the "constructed retail basis" later paid to other artists in violation of the equal preferential treatment clause in the 1986 compact disc agreement. Ms. Fieldman described the concept of a "constructed retail price" as follows, "Constructing a wholesale price from a retail price." Later, Ms. Fieldman described the concept, "That would be applying an uplift to a wholesale price and varying with packaging and percentage of units paid or other results - - units that would in calculations that would be made other then black vinyl."

According to Ms. Fieldman, if the use of the constructed retail price resulted in higher royalties than those paid utilizing the black vinyl rate, the equal preferential treatment clause in the 1986 compact disc agreement would be triggered. Mr. Cohen testified the equal preferential treatment clause was triggered when other artists, the Ink Spots, Burl Ives, the Andrews Sisters and Fred Astaire, received a more generous constructed retail basis rate. As early as 1987, other artists were paid on the so-called constructed retail basis which yielded more lucrative royalties than those paid to plaintiffs. Mr. Valentin, a former MCA employee, testified that the Fontaine Sisters, Peggy Lee, Frances Craig, Dooley Wilson, Pearl Bailey, and Fred Waring were paid at a more favorable rate on compact discs than plaintiffs. In 2003, Ms. Fieldman testified MCA discontinued using the black vinyl rate and this triggered the equal preferential treatment clause in the 1986 compact disc agreement. Also, other artists were not charged for compact disc packaging. Thus, according to defendants, only commencing January 1, 2003, were plaintiffs entitled to more generous royalties. Ms. Fieldman only became aware the defendants were underpaying plaintiffs under the 1986 compact disc agreement two weeks before testifying. During his opening statement, defense counsel admitted that there had been errors in the computation of moneys due to plaintiffs for compact discs containing Mr. Crosby's recordings.

An MCA Records employee, Nancy Allen, admitted she could not recall if her employer had a method for keeping track of when an equal preferential treatment clause in an artists compact disc agreement would be triggered. Lawrence Kenswil, a lawyer

with Universal Music Group and now the president of "e-labs," a division developing and launching new businesses , when asked whether there was a method to detect when an equal preferential treatment clause was triggered in 1986 through 1990, testified: "Generally, I don't remember precisely. And it could be that it changed from year to year." Mr. Kenswil indicated there were very few equal preferential treatment clauses and it would be the obligation of lawyers and paralegals using lists to notice that the artist were entitled to more lucrative royalty payments. Mr. Kenswil could not recall if there was a formal procedure for notifying artists that their equal preferential treatment clause had been triggered.

f. packaging costs

Plaintiffs asserted that defendants breached the 1943, 1949, 1956, and 1986 contracts by deducting packaging and container costs. Mr. Berman testified that under the 1943, 1949, and 1956 contracts, no packaging deduction could be taken form the royalties. As to the packaging costs deducted from plaintiffs' royalties, Mr. Dean testified that record companies made a standard deduction of 10 percent from royalties for packaging. Mr. Dean testified, "[E]verybody was subject to the same 10 percent packaging deduction except in very, very rare instances . . . ." Ms. Fieldman testified as to internal Decca documents which implied a packaging deduction was being taken. Mr. Kenswil conceded that if an underlying contract did not provide for a packaging deduction, then none could be deducted from a compact disc royalty. By contrast, defendants presented evidence that during an audit of Decca and Decros in the later 1950's, Mr. Grillo, Mr. Crosby's business manger, stated that the royalties should not include packaging costs; i.e., the record companies were entitled to deduct for packaging. Moreover, in February 1962, Mr. Crosby personally approved a packaging deduction for sales occurring during the month of March 1962. On June 23, 1987, Mr. Kenswil notified Mr. Farrow that packaging deductions were being taken.

g. overseas public performances

It was undisputed that plaintiffs were never paid by defendants for overseas public performances prior to 2001. Ms. Fieldman, the senior vice president for Universal Music Group, admitted that prior to 2001, defendants did not pay any public performance royalties to plaintiffs. Mr. Cohen corroborated Ms. Fieldman's admission concerning the failure to pay for overseas public performances. But there was evidence Decca had paid foreign royalties to Mr. Crosby in the late 1950's.

h. 10 percent enhancement on increased wholesale prices

Plaintiffs and defendants disagreed as to whether there was an entitlement to a 10 percent enhancement on royalties because of increases in the wholesale prices of Mr. Crosby's recordings. Mr. Cohen originally estimated plaintiffs were contractually entitled to $883,154 in additional royalties based upon the increase in wholesale prices. Wayne Coleman, a certified public accountant employed by The Royalty Compliance Organization who testified for defendants, calculated that if plaintiffs were entitled to the 10 percent increase in royalties, the damage amount would be $736,587 for that item. After reviewing Mr. Coleman's calculations for the time period of 1996 through 2002, Mr. Cohen agreed that the correct damage figure for the failure to pay plaintiffs the 10 percent figure for increases in the wholesale price was $736,587. Mr. Coleman "assumed" that plaintiffs had no right to payment for the increased wholesale price of recordings subject to the 1943 contract.

i. additional damage calculations

Plaintiffs presented a specific damage figure for losses sustained through 2002. Mr. Cohen reviewed the royalty statements and the underlying agreements. Mr. Cohen concluded the royalties paid to plaintiffs were not in accordance with the underlying agreements. In 1999, Mr. Cohen prepared a report setting forth plaintiffs' theory that they were entitled to total contract breach damages in the sum of $16,336,931. Mr. Cohen's damage analysis had to be modified in light of the trial court's summary adjudication rulings which found most of plaintiffs' claims were untimely and thus barred by the applicable statute of limitations. For trial in late 2005, after the summary adjudication motions were granted in part, Mr. Cohen reviewed Mr. Coleman's May 12, 2003 report. Mr. Cohen agreed with Mr. Coleman's analysis which reduced the amount of royalties assuming a 15 percent royalty rate to $706,527. In fact, Mr. Cohen materially reduced his damage assessment based upon Mr. Coleman's financial analysis. Mr. Cohen acknowledged that he had abandoned some of the opinions he held concerning plaintiffs' damages earlier on in the litigation. Mr. Cohen disagreed with Mr. Coleman's assessments as to pricing in several respects. Mr. Cohen testified plaintiffs were damaged in the sum of $3,918,000 assuming the 1960's correspondence did not modify the 1943, 1949, and 1956 contracts. Plaintiffs' post-trial brief requested damages in the sum of $3.9 million plus interest and return of the masters. Plaintiffs did not ask for anything else.

Defendants agreed that they had breached their contractual obligations to a limited extent but presented evidence they were entitled to offsets totaling $3,480,000 which included interest which potentially may have been compounded. Without consideration of the offsets, Mr. Coleman testified defendants owed plaintiffs $76,284. Mr. Coleman utilized assumptions provided to him by defendants. Under those assumptions, defendants indicated they failed to pay the following sums to plaintiffs, none of which

included a calculation of interest: $11,336 for failing to correctly report domestic royalties (the figure was based on Mr. Cohen's deposition testimony that there were discrepancies between sales documents and royalty sales); $10,803 for failing to pay for employee sales albeit it a only a 7 percent royalty rate; $59,290 for unpaid public performances; and $4,093 for charging for "sessions costs" which was could not be recouped under the 1943 contract. By contrast, Mr. Coleman, utilizing assumptions provided to him by MCA and his review of accounting documents, concluded that defendants were entitled to a set-off of $3,480,000, consisting of the following overpayments: master use licenses; record club royalties; and cassettes. Mr. Coleman made no independent assessment of the contractual language in the 1943, 1949, and 1956 contracts and the 1986 compact disc amendment.

There were certain damage claims that plaintiffs failed to support with admissible evidence. For example, plaintiffs argued that if the 1960's correspondence modified the prior contracts, then they were entitled to a 7 percent royalty of the retail price of compact discs. But plaintiffs presented no evidence as to their losses if the royalty rate was 7 percent of retail. Also, plaintiffs argued that even if the 1960's correspondence amended the 1943, 1949, and 1956 contracts, they were entitled to a 14 percent wholesale royalty rate. The damage amounts if the 14 percent rate applied were not specified.

Mr. Coleman's report states that the damages due to plaintiffs depend in large part upon how the trial court resolves the contract dispute. If Mr. Cohen's contract interpretation assumptions were correct (something defendants vigorously dispute), Mr. Coleman believed plaintiffs would be entitled to $3.48 million in damages. But, as noted, in his report, Mr. Coleman asserted that, depending on the trial court's assessments, defendants were entitled to a set-off for overpayments.

j. the trial court's statement of decision

The trial court awarded plaintiffs $210,762.53 in damages. The trial court ruled that: Mr. Crosby had agreed to a 7 percent of retail royalty; the 15 percent of wholesale royalty applied only to the shellac records; in the 1960's correspondence, Mr. Grillo modified the 1943, 1949, and 1956 contracts; the parties agreed to a reduced royalty for all midline releases; and the equal preferential treatment clause was not triggered until 2003. The trial court found, "Complicated though this dispute is, it boils down [to] a straightforward question. How to apply royalty contracts entered in the early days of the recording industry to future recording configurations? First, the Court relies on the plain language of the contracts. Too, the conduct of the parties must be given great weight. In reliance on the words in contracts and informed by substantial evidence of the parties' conduct, the Court's contract interpretation task leads to a clear answer. With one exception, MCA has not underpaid its royalties to [HLC Properties]." In terms of plaintiffs' contract breach claims, the trial court found: "This is [HLC Properties'] foundational claim. The other causes of action depend entirely, or in part, on the determination whether MCA breached a contract with [HLC Properties]."

k. the gist of the action as tried was for contract breach and hence was a legal claim that should have been presented to a jury

We agree with plaintiffs that the issues presented by the evidence and found by the trial court were matters for a jury to decide. The issues posited by the parties to which they were constitutionally entitled to a jury trial were: whether Mr. Grillo and Mr. Crosby assented as part of the 1960's correspondence to modify the 1943, 1949, and 1956 contracts (see *Wade v. Diamond A Cattle Co.* (1975) 44 Cal.App.3d 453, 457); whether plaintiffs waived the right to challenge royalty underpayments (*Gill v. Rich*

(2005) 128 Cal.App.4th 1254, 1264, fn. 9); the effect of parol evidence (*Horsemen's Benevolent & Protective Assn. v. Valley Racing Assn*. (1992) 4 Cal.App.4th 1538, 1560); the amount of damages (*Bertero v. National General Corp*. (1974) 13 Cal.3d 43, 65, fn. 12); and the right to return of the masters. (Code Civ. Proc., § 592.) The gist of plaintiffs' claims involve what moneys they are entitled to under the 1943, 1949, 1956, and 1986 contracts; not accounting methodologies or even the accuracy of defendants' financial records. Only a small portion of the trial involved issues of damage calculations—the bulk of the testimony involved whether the 1943, 1949, 1956, and 1986 contracts were breached, not the amount of damages. As the trial court frankly and accurately acknowledged in its final statement of decision, the foundational claim, upon which all other causes of action depended, was whether defendants breached the 1943, 1949, 1956, and 1986 contracts.

We respectfully disagree with defendants' contention that the gist of the action was for an equitable accounting. An accounting is available only when there is a fiduciary relationship or there is no adequate remedy at law. As noted, the trial court found at the summary adjudication stage no fiduciary relationship existed. As an equitable remedy, it is inapplicable if there is an adequate remedy at law. (*Finney v. Gomez* (2003) 111 Cal.App.4th 527, 543; *Batt v. City and County of San Francisco* (2007) 155 Cal.App.4th 65, 82.) Further, if the amounts due can be determined without an accounting, there is no right to an accounting. (*Ely v. Gray* (1990) 224 Cal.App.3d 1257, 1261-1262; *St. James Church of Christ Holiness v. Superior Court* (1955) 135 Cal.App.2d 352, 359.) Further, if the plaintiff seeks a sum certain, the equitable accounting remedy does not apply. (*Kinley v. Thelen* (1910) 158 Cal. 175, 182; *St. James Church of Christ Holiness v. Superior Court, supra*, 135 Cal.App.2d at p. 359.) Moreover, an accounting is available when there is a dispute as to the accuracy of the defendant's books or where the amount sought is "unliquidated and unascertained." (*Ely v. Gray, supra*, 224 Cal.App.3d at p. 1262; *Heber v. Yaeger* (1967) 251 Cal.App.2d 258, 265.) Further, an accounting may be ordered where the accounts are so complicated as to

render a legal action impracticable. (*San Pedro Lumber Co. v. Reynolds* (1896) 111 Cal. 588, 596; *Civic Western Corp. v. Zila Industries, Inc.* (1977) 66 Cal.App.3d 1, 14.)

At the trial, based upon Mr. Cohen's audit, plaintiffs sought a specific sum; $3,918,000 assuming the 1960's correspondence did not modify the 1943, 1949, and 1956 contracts and other related damages. There were two audits the parties relied upon, the ones conducted by Mr. Cohen and Mr. Coleman. Their audits summarized their reviews of defendants' books and records. There was no need for an accounting and contract breach damages constituted an adequate remedy at law. Thus, for this additional reason, the gist of the action was for contract breach.

Further, there is no merit to defendants' arguments the presence of equitable estoppel and laches issues prevented the empanelment of a jury. The equitable estoppel defense is a legal matter triable before a jury. (*Frahm v. Briggs* (1970) 12 Cal.App.3d 441,444-446 & fn. 2; *Hudson v. Morgan & Peacock Properties Co*. (1959) 170 Cal.App.2d 328, 330.) Finally, laches was not the gist of the trial—contract breach was. Because the denial of the jury empanelment motion is reversible error per se, the judgment is reversed. (*People v. One 1941 Chevrolet Coupe, supra*, 37 Cal.2d at p. 300; *Collins Development Co. v. D. J. Plastering, Inc*. (2000) 81 Cal.App.4th 771, 778.) We need not address the parties' remaining contentions given that the gist of the lawsuit was alleged contract breaches by defendants.

III. SUMMARY ADJUDICATION ISSUES

A. Standard of Review

Code of Civil Procedure section 437c, subdivision (f)(1) provides: "A party may move for summary adjudication as to one or more causes of action within an action . . . if that party contends that the cause of action has no merit . . . ." Pursuant to subdivision (f)(2) of section 437c, "[A] motion for summary adjudication . . . shall proceed in all

procedural respects as a motion for summary judgment." We independently review the trial court's summary adjudication orders. (*Colgan v. Leatherman Tool Group, Inc.* (2006) 135 Cal.App.4th 663, 678; *Greenfield v. Superior Court* (2003) 106 Cal.App.4th 743, 747.)

B. Fiduciary Duty Breach

1. Background

In the fourth cause of action of the original and first amended complaints, plaintiffs alleged defendants breached a fiduciary duty. As noted above, defendants' summary adjudication motion as to the fiduciary duty breach cause of action in the first amended complaint was granted.[1] First, the trial court ruled as a matter of law a typical distribution contract, negotiated at arm's length, does not create a fiduciary relationship between the owner of a product and the distributor. Second, the trial court ruled there was no evidence establishing a triable issue of material fact that defendants owed a fiduciary duty to plaintiffs.

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1 Defendants' first summary adjudication motion, on statute of limitations and laches grounds, was filed on January 10, 2002, and was directed at the original complaint. The trial court ruled there was no fiduciary duty.. Plaintiffs filed their first amended complaint on October 10, 2002. Defendants' second summary adjudication motion, filed on December 31, 2002, specifically sought an adjudication of the fiduciary duty breach claim. The parties agreed that the nonexistence of such duty had been litigated in connection with defendants' first summary adjudication motion.

2. As A General Rule, There Is No Fiduciary Relationship Between An Artist And A Record Company

The California Supreme Court has defined a fiduciary relationship as follows: "Confidential and fiduciary relationships are, in law, synonymous, and may be said to exist whenever trust and confidence is reposed by one person in the integrity and fidelity of another. The very existence of such a relation precludes the party in whom the trust and confidence is reposed from participating in profit or advantage resulting from the dealings of the parties to the relation. [Citations.]" (*Estate of Cover* (1922) 188 Cal. 133, 143; see also *Herbert v. Lankershim* (1937) 9 Cal.2d 409, 483.) The Court of Appeal has more recently explained, "A fiduciary relationship is created where a person reposes trust and confidence in another and the person in whom such confidence is reposed obtains control over the other person's affairs. [Citation.]" (*Lynch v. Cruttenden & Co.* (1993) 18 Cal.App.4th 802, 809; see *City of Hope Nat. Medical Center v. Genentech, Inc.* (Apr. 24, 2008, S129463) __ Cal.4th ___, ___ [2008 LEXIS 4135].) A fiduciary must typically subordinate its interests to that of another. (*Ibid.*; *Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 222.)

As a general rule, it is a question of fact whether a fiduciary duty founded upon a contract exists. (*GAB Business Services, Inc. v. Lindsey & Newsom Claim Services, Inc*. (2000) 83 Cal.App.4th 409, 417, disapproved on another point in *Reeves v. Hanlon* (2004) 33 Cal.4th 1140, 1154; *Barbara A. v. John G.* (1983) 145 Cal.App.3d 369, 383.) Federal and state courts applying New York law have consistently held, however, that as a matter of law, an ordinary contract governing royalties entered into between a record company and a recording artist does not give rise to a fiduciary relationship. (*Cafferty v. Scotti Bros. Records, Inc*. (S.D.N.Y. 1997) 969 F.Supp. 193, 205-206 [no fiduciary relationship between composer and music distributor]; *Carter v. Goodman Group Music Pub.* (S.D.N.Y. 1994) 848 F.Supp. 438, 445 ["In the absence of special circumstances, no

fiduciary relationship exists between a music publisher and composer as a matter of law"]; *Mellencamp v. Riva Music Ltd.* (S.D.N.Y. 1988) 698 F.Supp. 1154, 1159-1160 [express and implied obligations assumed by contract are not fiduciary duties]; *Rodgers v. Roulette Records, Inc.* (S.D.N.Y. 1988) 677 F.Supp. 731, 738-739 [where defendant record company collected royalties on recording artist's behalf, relationship was contractual, not fiduciary]; *Savage Records Group v. Jones* (N.Y.App.Div. 1998) 667 N.Y.S.2d 906, 906 [247 A.D.2d 274, 274-275] [musician failed to state cause of action for breach of fiduciary duty against BMG Music independent of breach of contract claim]; *Silvester v. Time Warner, Inc*. (N.Y.Sup.Ct. 2003) 763 N.Y.S.2d 912, 918 ["an artist's assignment of rights to a record company in exchange for royalties is contractual and does not create a fiduciary relationship or duty"]; accord, *Cusano v. Klein* (C.D.Ca. 2003) 280 F.Supp.2d 1035, 1040-1041 [under New York law, consistent with California law, contractual duty to collect royalties, account for them, and pass them on to artists does not create fiduciary relationship]; see also, e.g., *Arnold Productions, Inc. v. Favorite Films Corp*. (2d Cir. 1962) 298 F.2d 540, 542 [under New York law, relationship between parties to movie distribution agreement was one of simple contract; there was no fiduciary relationship].)

California law is in accord with the foregoing decisional authority. In *Wolf v. Superior Court* (2003) 107 Cal.App.4th 25, 29-36, the plaintiffs entered into an agreement with a studio, Walt Disney Pictures and Television. The plaintiffs assigned their rights to a novel and its characters to the studio. In exchange, the studio was to pay, among other things, contingent compensation based on merchandising and other exploitation of the characters. (*Id.* at pp. 27-28.) The plaintiffs subsequently sued the studio alleging contract and fiduciary duty breach based upon underreported revenue. The Court of Appeal explained, "Wolf claims that Disney is a fiduciary because Disney enjoyed 'exclusive control over the books, records and information concerning the exploitation [of the Roger Rabbit characters] and the revenue and Gross Receipts Royalties derived therefrom.'" (*Id.* at p. 28.) The trial court sustained the studio's

demurrer to the fiduciary duty breach claim. (*Id.* at pp. 28-29.) Division Seven of the Court of Appeal for this appellate district agreed with the trial court's analysis.

First, the Court of Appeal rejected the plaintiffs' assertion, "[I]ts contingent entitlement to future compensation in the form of a percentage of revenues from Disney's exploitation of the Roger Rabbit characters, together with Disney's exclusive control over the information pertaining to such revenues, necessarily creates a fiduciary relationship." (*Id.* at p. 29.) The Court of Appeal explained: "[T]he contractual right to contingent compensation in the control of another has never, by itself, been sufficient to create a fiduciary relationship where one would not otherwise exist. [Citations.]" (*Id.* at pp. 30-31.) Second, the Court of Appeal rejected the theory that a fiduciary relationship existed because plaintiffs reposed trust and confidence in the studio to perform its contractual obligation to account for and pay contingent compensation. The Court of Appeal held that the implied covenant of good faith and fair dealing, which exists in every contract, does not create a fiduciary relationship. The Court of Appeal explained, "Every contract requires one party to repose an element of trust and confidence in the other to perform." (*Id.* at p. 31.)

Third, the Court of Appeal held an agreement to share profit or revenue is not inherently fiduciary in nature. The Court of Appeal noted, "[E]ven distribution agreements, negotiated at arm's length, do not create a fiduciary relationship between the product's owner and the distributor even through both parties stand to benefit from the distributor's sales of the product." (*Id*. at p. 34.) Finally, the Court of Appeal concluded the plaintiffs' contractual right to an accounting did not make its relationship with the studio a fiduciary one: "[T]he parties do not dispute that the contract itself calls for an accounting. That contractual right, however, does not itself convert an arm's length transaction into a fiduciary relationship." (*Id.* at p. 35.) To summarize, under *Wolf*, none of the following creates a fiduciary relationship between an artist and a record producer: contingent entitlement to future compensation in the form of a percentage of revenues; that the artist reposes trust and confidence in the record producer, who has exclusive

access to relevant financial information; an agreement to share profit or revenue; and the contractual right to an accounting. (*Id.* at pp. 29-36; see also *Recorded Pictures Company v. Nelson Entertainment, Inc.* (1997) 53 Cal.App.4th 350, 370 ["the typical distribution contract, negotiated at arm's length, does not create a fiduciary relationship between the owner of a product and the distributor"].)

3. Exceptions To The General Rule

There are, however, some circumstances in which courts have held, primarily at the pleading stage, that an agreement between an artist and a record company might be elevated to a fiduciary relationship. As discussed below, those circumstances include: a record producer's specific agreement to hold and invest—as advised by an investment advisor—previously earned royalties for the benefit of an individual band member; an extracontractual relationship between recording artists and a record producer lasting more than 20 years (*Apple Records, Inc. v. Capitol Records, Inc* (N.Y.App.Div. 1988) 529 N.Y.S.2d 279, 283); an extracontractual business relationship between two individuals—a defendant record distributor's president and the creative head and part owner of the plaintiff music publishing companies; and an oral management agreement between two music managers and an artist who was "'particularly vulnerable,'" "'unsophisticated in business,'" and "'often intoxicated'" (*Parsons v. Tickner* (1995) 31 Cal.App.4th 1513, 1520). No similar circumstances exist in the present case.

In *CBS, Inc. v. Ahern* (S.D.N.Y. 1985) 108 F.R.D. 14, 24-26, a record producing and distributing company, CBS, Inc., sued the rock group Boston for alleged breach of a recording contract. One of the band's members, Donald Thomas Scholz, counterclaimed for, among other things, breach of fiduciary duty with respect to deferred royalties. (*Id.* at p. 17.) Mr. Scholz specifically alleged, "[T]he agreements for deferral of royalties expressly provided that [CBS, Inc.] was to hold previously earned royalties of [Mr. Scholz's] in 'special accounts'; that they were to be 'invested and reinvested from time to

time' in securities selected by an investment advisor; that the amounts were to be held separately 'for the benefit of' [Mr. Scholz]; and that the amounts due were not subject to any 'setoff or counterclaim' against [Mr.] Scholz." (*Id.* at pp. 24-25.) CBS, Inc. moved to dismiss the fiduciary duty breach cause of action for failure to state a claim. (*Id.* at p. 17.) The United States District Court for the Southern District of New York denied the motion. The district court held: "[Mr.] Scholz here has alleged a duty on the part of plaintiff to hold monies belonging to [him] in a special account for his benefit. These allegations adequately support the imposition of fiduciary duties with respect to the monies. [Citations.]" (*Id.* at p. 25.)

In *Apple Records, Inc. v. Capitol Records, Inc*., *supra,* 529 N.Y.S.2d at page 283, the Appellate Division of the New York Supreme Court considered a contract between the Beatles' New York Corporation, Apple Records, Inc. (Apple), and Capitol Records. Apple sued Capitol Records alleging, inter alia, fiduciary duty breach and fraud. The trial court denied a motion to dismiss the fiduciary duty breach cause of action. On Apple's appeal as to other claims, the Appellate Division of the New York Supreme Court noted in dictum: "In upholding the sixth cause of action for breach of fiduciary duties, the motion court acknowledged that while the contract did not establish a formal fiduciary relationship, the pleadings were sufficient to raise an issue as to the existence of an informal one. A fiduciary relationship, whether formal or informal, 'is one founded upon trust or confidence reposed by one person in the integrity and fidelity of another . . . [and] might be found to exist, in appropriate circumstances, between close friends (see *Cody v. Gallow* [(1961)] 28 Misc.2d 373, 214 N.Y.S.2d 127) or even where confidence is based upon prior business dealings (see *Levine v. Chussid* [(1961)] 31 Misc.2d 412, 221 N.Y.S.2d 311).' *Penato v. George* [(1976)] 52 A.D.2d 939, 942, 383 N.Y.S.2d 900, *appeal dismissed* 42 N.Y.2d 908." (*Apple Records, Inc. v. Capitol Records, Inc., supra,* 529 N.Y.S.2d at p. 283.)

Applying New York law, the appellate division ruled: "The business dealings between Capitol Records and the Beatles date back to 1962, when the still unacclaimed

Beatles entrusted their musical talents to defendant Capitol Records. It is alleged that this relationship proved so profitable to defendant that at one point the Beatles constituted 25 to 30 [percent] of its business. Even after the Beatles attained their remarkable degree of popularity and success, they still continued to rely on Capitol Records for the manufacture and distributing of their recordings. It can be said that from such a long enduring relationship was born a special relationship of trust and confidence, one which existed independent of the contractual duties, and one which plaintiffs argue was betrayed by fraud in secretly selling records claimed as scrapped and in diluting the market and exploiting the Beatles' popularity with excessive distribution of promotional copies to benefit other aspects of defendants' business. Plaintiffs' allegations, then, are sufficient to support their claim that an injury separate and distinct from the breach of contract has been committed and is actionable as a tort." (*Apple Records, Inc. v. Capitol Records, Inc.*, *supra*, 529 N.Y.S.2d at p. 283.)

Licette Music Corp. v. A.A. Records, Inc. (N.Y.App.Div. 1993) 601 N.Y.S.2d 297, is a brief opinion on appeal from a judgment for plaintiff music publishing companies after a non-jury trial. The Appellate Division of the New York Supreme Court held: "The trial record demonstrates that plaintiff music publishing companies, who are the owners of the rights to hundreds of children's songs, are entitled to recover compensatory damages from defendant A.A. Records, Inc., distributor of children's records and the distributor's president Abraham I. Massler, for tortious conduct separate and apart from their claims for breach of contract arising from the concealment and denial of royalty payments due pursuant to a mechanical license agreement. The earlier business dealings between defendant Massler and Arthur Shimkin, the creative head and part owner of the plaintiff companies, created a relationship of trust and confidence, which existed independent of the contractual duties and which was violated by numerous deceptive business practices later devised by Massler to camouflage actual sales of songs and records for which no payments were made (*Apple Records, Inc. v. Capitol Records*, 137

A.D.2d 50, 529 N.Y.S.2d 279).” (*Licette Music Corp. v. A.A. Records, Inc., supra*, 601 N.Y.S.2d 297.)

And in *Parsons v. Tickner*, *supra*, 31 Cal.App.4th at pages 1520, 1529, the plaintiff brought an action against two music managers alleging they wrongfully appropriated her deceased father’s copyrighted songs. The plaintiff asserted the defendants entered into an oral management agreement with her father, thereby creating a fiduciary relationship. (*Id.* at pp. 1518-1520.) The plaintiff alleged her father “was ‘particularly vulnerable,’” “‘unsophisticated in business,’” and “‘often intoxicated.’” (*Id.* at p. 1520.) Further, it was alleged the defendants breached their fiduciary duties by actively concealing the true facts of the father’s business affairs from him. (*Ibid.*) The trial court entered a judgment of dismissal after sustaining the defendants’ demurrer without leave to amend and the plaintiff appealed. (*Id.* at p. 1518.) Division Four of the Court of Appeal for this appellate district concluded the delayed discovery rule was applicable with respect to the statute of limitations in part because, “[T]he fact-specific allegations of the complaint suggest [the defendants owed a duty of disclosure to the plaintiff] . . . as fiduciaries of [her father] . . . .” (*Id.* at p. 1529.)

4. There Is No Triable Issue Of Material Fact As To Plaintiffs’ Fiduciary Duty Breach Cause Of Action

Plaintiffs argue there was substantial evidence a fiduciary relationship existed between the parties. First, plaintiffs assert Mr. Crosby and Mr. Kapp had an intimate professional relationship, which spawned Decros, a joint venture between Mr. Crosby and Mr. Kapp’s record company, Decca. Further, plaintiffs contend, the Crosby-Kapp/Decros relationship was “handed down to later generations,” including defendants. Plaintiffs argue the relationship between Mr. Crosby and Mr. Kapp devolved to defendants because: MCA took over Decca; in 1966, Decca was treated as a separate division until 1972; and Mr. Crosby’s surviving spouse noticed no changes when MCA

took over Decca. Plaintiffs contend there was a triable issue of material fact whether, "[T]he special relationship first formed by [Mr.] Crosby and [Mr.] Kapp/Decca persisted." We assume for purposes of argument that the relationship between Mr. Crosby and Mr. Kapp or Decca was a fiduciary one. We respectfully disagree, however, with plaintiffs' assertion that a fiduciary relationship continues to this day.

The central facts are undisputed. Mr. Crosby's relationship with Mr. Kapp began in the 1930s. Decca was formed in 1934. Mr. Crosby entered into a recording contract with Decca in 1943. Mr. Kapp died in 1949. Also in 1949, Mr. Crosby and Decca formed Decros. Mr. Crosby entered into recording contracts with Decros in 1949 and 1956. In 1960, Mr. Crosby sold his controlling interest in Decros to Decca. Six years later, in 1966, MCA acquired Decca. MCA ran Decca as a separate division until 1972. Mr. Crosby died in 1977. Hence, defendants' relationship with Mr. Crosby, which did not involve Mr. Kapp, began more than 40 years ago, in 1966. This was 17 years after Mr. Kapp's death, and 6 years after Mr. Crosby sold his interest in Decros to Decca. Plaintiffs have not cited any authority for the proposition the "intimate professional relationship" Mr. Crosby had with Mr. Kapp in the 1930s and 1940s could be "handed down" to defendants. We conclude no reasonable juror could find the relationship existing between Mr. Crosby and Mr. Knapp continued in existence to the present time and governed plaintiffs' affiliation with defendants. (See *Ahern v. Scholz* (1st Cir. 1996) 85 F.3d 774, 794.) Plaintiffs have not cited any evidence from which a reasonable trier of fact could find the relationship between defendants and Mr. Crosby was anything other than an arm's-length arrangement between a record company and a recording artist.

Plaintiffs' citations to *Ahern v. Scholz*, *supra*, 85 F.3d at page 794, and *Apple Records, Inc. v. Capitol Records, Inc.*, *supra*, 529 N.Y.S.2d at pages 280, 283, are unavailing. Each of those cases involved a long and enduring relationship between the artist and the defendant. Here, the fiduciary duty plaintiffs seek to impose on defendants arose out of the relationship between Mr. Crosby and Mr. Kapp. The relationship did not arise from Mr. Crosby's relationship with defendants. *Ahern* involved a long history of

business dealings between an individual artist and his manager. The Court of Appeals for the First Circuit, applying New York law, held the business manager owed the artist a fiduciary duty at least until 1981, when he ceased to act in that capacity. The federal court also held, however, that a reasonable juror could find the fiduciary relationship remained in 1996 as regarded the manager's contractual duty to pay the artist royalties. (*Ahern v. Scholz, supra,* 85 F.3d at p. 794.) We need not consider whether *Ahern* was correctly decided. *Ahern* is distinguishable. The question before the federal court was not merely whether a fiduciary duty existed between an individual artist and a manager. Rather, the issue was whether the fiduciary duty continued after the manager stopped acting in that role. Here, the question is whether a fiduciary relationship between an artist and a producer could be "handed down" through a succession of arrangements culminating in defendants' relationship with Mr. Crosby and his successors. *Apple Records, Inc*. involved a more than 20-year relationship between Capitol Records and the Beatles. (*Apple Records, Inc. v. Capitol Records, Inc., supra,* 529 N.Y.S.2d at pp. 280, 283.) There was no claim in *Apple Records* that the fiduciary nature of that relationship was handed down to a successor.

Second, plaintiffs argue Mr. Crosby had unique contract rights that gave rise to a fiduciary relationship: the agreements between Mr. Crosby and his record companies envisioned close cooperation to create records; profits were mutual; the record companies were obligated to use their best efforts profitably to exploit the records; Mr. Crosby had the right to veto songs and collaborators; Mr. Crosby could control who released his albums in that the record companies could not assign their obligations without his written permission; Decros could not release a two-sided record with recordings by anyone other than Mr. Crosby on both sides; and Mr. Crosby had the contractual right to regular accountings. Even if all of the foregoing facts are accurate—which defendants correctly dispute —no fiduciary relationship arose. All of the cited factors exist by contract. These contractual rights do not convert the contractual arrangement between the parties to a fiduciary relationship. (*Wolf v. Superior Court*,

supra, 107 Cal.App.4th at pp. 30-35; *Celador International Ltd. v. The Walt Disney Co*. (C.D.Ca. 2004) 347 F.Supp.2d 846, 854.)

Plaintiffs' citation to *Celador International Ltd. v. The Walt Disney Co., supra*, 347 F.Supp.2d at page 854 is likewise unavailing. In *Celador*, the parties entered into an alleged agreement for the joint creation and production of a television game show. The parties were to be equal partners with respect to production, distribution, and exploitation of the series. And the plaintiffs retained: approval rights; rights to merchandising; and certain reversionary rights in the series. (*Id.* at p. 850.) The federal court found the allegations were sufficient, if proven, to raise a fact question whether a joint venture existed. (*Id.* at p. 854.) Plaintiffs here have not cited evidence of a similar relationship with defendants. There is no claim Mr. Crosby and defendants were partners, equal or otherwise, with respect to the production, distribution, or exploitation of the records. Nor was there evidence Mr. Crosby retained merchandising or similar rights.

Nor is this case like *CBS, Inc. v. Ahern*, *supra*, 108 F.R.D. at pages 24-26, which plaintiffs also cite. In *Ahern*, as discussed above, it was alleged the record producer agreed to hold earned royalties in a special account and to invest them, as professionally advised, for the benefit of an individual member of a rock group. The federal court held the facts alleged were sufficient to impose a fiduciary duty on the record producer with respect to the funds in the special account. Plaintiffs here have not alleged defendants agreed to act in a similar manner.

Finally, plaintiffs contend, "at the very least," there was a triable issue of material fact as to whether defendants owed limited fiduciary duties to "provide honest accountings" and "to pay royalties under the [equal preferential treatment] clause, especially given that, "[A]ll [the] information about the events triggering the [equal

preferential treatment] clause was *exclusively* within [defendants'] control."[2] These arguments were specifically rejected in *Wolf v. Superior Court*, *supra*, 107 Cal.App.4th at page 30 which is controlling in this regard. In *Wolf,* the Court of Appeal rejected a claim

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2 As noted above, the equal preferential treatment clause was included in the April 2, 1986 compact disc agreement. The compact disc agreement stated in part: "The royalty payable on recordings in the form of compact discs shall be the same cent rate (or other currency) otherwise payable on single-disc top-line LPs . . . for sales through normal retail channels . . . . Commencing with the first full accounting period two years from the release date of a compact disc embodying Artist's performance, MCA and Artist, at Artist's written request, shall negotiate in good faith regarding a new compact disc royalty based on the then current industry standards for artists of similar stature, for sales of compact discs through normal retail channels. *If, during said two (2) year period or ay time thereafter, MCA uses a different basis for determining royalties on compact discs and, as a result thereof, MCA agrees to pay any artist a royalty which exceeds that artist's cent rate for top-line single-disc LPs sold through normal retail channels, MCA shall immediately commence paying Artist royalties determined in accordance with the use of such different basis to the extent its use would result in larger royalties being paid to Artist.*" (Italics added.)

that, "Because Wolf's contractual right to contingent compensation necessarily required Wolf to repose 'trust and confidence' in Disney to account for the revenues received, and because such revenues and their sources are in the exclusive knowledge and control of Disney, . . . the relationship is 'confidential' in nature and necessarily imposes a fiduciary duty upon Disney, at least with respect to accounting to Wolf for the gross revenues received." (*Ibid.*) The Court of Appeal held: "[T]he contractual right to contingent compensation in the control of another has never, by itself, been sufficient to create a fiduciary relationship where one would not otherwise exist . . . . [¶] . . . Every contract requires one party to repose an element of trust and confidence in the other to perform." (*Id.* at pp. 30-31.) That plaintiffs must rely on defendants to track its payment of royalties to other artists does not make defendants' obligation to them a fiduciary one. *Wolf* also rejected the argument, which plaintiffs assert here, that under *Waverly v. Productions, Inc. v. RKO General, Inc.* (1963) 217 Cal.App.2d 721, 730, 734, a limited fiduciary duty arises as to the obligation to render honest accountings. In *Wolf*, the Court of Appeal held that, notwithstanding a parenthetical comment in *Waverly*, the contractual right to an accounting did not convert the relationship to a fiduciary one. (*Wolf v. Superior Court, supra*, 107 Cal.App.4th at pp. 33-35.)

C. Delayed Discovery

Plaintiffs contend they are entitled, as a matter of law, to the benefit of the delayed discovery rule in connection with pre-1996 or 1997 claims brought under the 1986 compact disc agreement's equal preferential treatment clause, or a trier or fact should determine the tolling issue. Plaintiffs further assert a triable issue remains whether the delayed discovery rule applies to claims brought under the 1943 agreement. The Supreme Court has held: "Under the discovery rule, the statute of limitations begins to run when the plaintiff suspects or should suspect that her injury was caused by wrongdoing, that someone has done something wrong to her. . . . [T]he limitations

period begins once the plaintiff "''has notice or information of circumstances to put a reasonable person on inquiry . . . .'''' [Citation.]" (*Jolly v. Eli Lily & Co.* (1988) 44 Cal.3d 1103, 1110-1111, fn. omitted; accord, *Norgart v. UpJohn Co.* (1999) 21 Cal.4th 383, 397-398.)

Plaintiffs have not addressed or disputed the trial court's explicit finding they were aware or on inquiry notice as early as 1986, and had in fact resolved to audit MCA by late 1995 or early 1996, but failed to act until 1999. In ruling on statute of limitations issues, the trial court explicitly found: "MCA's undisputed facts establish that [plaintiffs] either were aware of MCA's alleged wrongdoing prior to the limitations period or had information about MCA's alleged wrongdoing which would put a reasonable person on inquiry. Key among those facts are that: [¶] A limited audit of MCA's royalty computations performed in 1986 for HLC reported numerous problems and concerns regarding those computations. The report noted many discrepancies, one of which was 'significant' and another for which MCA could not offer an explanation, a lack of [contractual] support for certain accounting activities, the use of a 7 [percent] royalty rate rather than the contract rate for certain recordings, that foreign sales royalties remained at 7 [percent] even though a 7 ½ [percent] rate was applicable and other problems. Trust trustee Thomas E. O'Sullivan began to inquire whether MCA was underpaying royalties for the entire Bing Crosby catalog in 1994 after Gary Crosby, a son of Bing Crosby and a beneficiary of Trust, told him that both HLC and Trust might not be receiving from MCA all the royalty payments to which each was entitled. In late 1995 and early 1996, representatives of HLC and Trust discussed on several occasions whether to audit MCA for errors or discrepancies in royalty payments to HLC and Trust and reached a consensus that 'probably' they should [¶] . . . [¶] . . .[T]he plaintiffs surely could have discovered substantial evidence of [defendants'] alleged wrongdoing simply by following up on the undisputed preliminary findings of 'discrepancies' in the 1986 audit or following through with the audit discussed in 1995 and 1996. [Plaintiffs], however,

failed to exercise such reasonable diligence..” The foregoing findings dispose of plaintiffs’ delayed discovery claims.

D. Fraud

Plaintiffs argue in rather conclusory fashion that the trial court’s summary adjudication of their fraud claims was erroneous because: delayed discovery should have applied to toll the statute of limitations; defendants failed to disclose the existence of the 1943 agreement; and there was substantial evidence of a fiduciary duty. The foregoing discussion concerning the statute of limitations disposes of those arguments.

IV. DISPOSITION

The summary adjudication orders are affirmed. The judgment is reversed. Plaintiffs, HLC Properties, Ltd. and Thomas E. O’Sullivan, as Trustee of the Wilma Wyatt Crosby Trust, are to recover their costs on appeal from defendants, MCA Records, Inc., GRP Records, Inc., UMG Recordings, Inc., MCA, Inc., and Universal Studios, Inc.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

TURNER, P. J.

I concur:

ARMSTRONG, J.

MOSK, J., Concurring and Dissenting

I respectfully dissent from the court's decision that the trial court violated plaintiffs' right to a jury trial. I concur in the judgment insofar as it affirms the summary adjudications against plaintiffs and reverses the cost award to defendants as prevailing parties.

This action concerns the alleged underpayment of artist royalties on sales of sound recordings (masters) embodying performances by popular 20th Century performer, Bing Crosby (Crosby), pursuant to various recording agreements dating back to 1943. Plaintiffs and appellants are Crosby's successors-in-interest, HLC Properties, Ltd. (HLC) and Thomas E. O'Sullivan, in his capacity as trustee for the Wilma Wyatt Crosby Trust (the Trust) (collectively, plaintiffs). Defendants and respondents are MCA Records, Inc.; UMG Recordings, Inc.; UMG Records, Inc.; Universal Studios, Inc.; and GRP Records, Inc. (referred to collectively and in the singular as MCA), the successors to Decca Records, Inc. (Decca).

Plaintiffs alleged that MCA had underpaid royalties by more than $16 million. After a bench trial, the trial court awarded plaintiffs only $210,762.53, plus interest. Plaintiffs contend on appeal that the trial court erred by (1) denying plaintiffs' request for a jury trial on the ground that the gist of their claim was equitable; (2) granting summary adjudication in favor of MCA on plaintiffs' claims for breach of fiduciary duty and fraud, and, on statute of limitations grounds, all of plaintiffs' other claims predating 1996 or 1997; and (3) awarding costs to MCA as the prevailing party pursuant to Code of Civil Procedure, section 1032.

This case presents a difficult question of whether plaintiffs had a right to a jury trial of their claims. The test for determining whether the jury trial right attaches—that is, whether the "gist" of the action is legal or equitable—is amorphous and difficult to apply in royalty cases such as this, in which issues traditionally labeled equitable and

legal are inextricably intertwined. The cases applying that test in other contexts do not give trial courts sufficient guidance. In a state so heavily dependent on intellectual property industries and which provides a forum for so many royalty disputes, clearer guidance for determining when the jury trial right attaches is required.[1] This case also presents the issue of whether or to what extent a jury trial right persists when a plaintiff joins claims that are legal and claims that are undisputably equitable in the same action, and those claims require resolution of identical or overlapping factual issues.

I agree with the trial court's conclusion that the gist of this action was equitable, not legal. Although plaintiffs went to considerable lengths to dress their claims in breach-of-contract clothing, underneath it all, this is an action for a complicated royalty accounting—an equitable claim. Furthermore, plaintiffs' claim for rescission is undeniably equitable. Under California law, the trial court had discretion to bifurcate the trial and to try the equitable issues first, even if the trial court's determination of the equitable issues also resolved the legal and factual issues presented by plaintiffs' breach of contract claim. Furthermore, I agree that the trial court properly granted summary adjudication against plaintiffs on their fraud and breach of fiduciary duty claims because the trial court's findings of fact on plaintiffs' other claims necessarily disposed of the fraud and breach of fiduciary claims. I would therefore affirm the judgment of the trial court awarding plaintiffs $210,762.53, plus interest. Because plaintiffs obtained a net monetary recovery, however, I believe the trial court erred by awarding costs to MCA as the prevailing party. I would reverse only the cost award. (Code Civ. Proc., § 1032.)

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1 In view of the uncertain status of the law, this case warrants publication. (California Rules of Court, rule 8.1105 (3), (6), (8), and (9).)

BACKGROUND

I set forth the facts in detail to demonstrate the complexity of the historical financial transactions. Only by appreciating this complexity can one determine the gist of the cause of action under authorities defining the nature of an equitable claim.

A. Factual Background

1. The 1943 Agreement

Decca, founded in the United Kingdom, launched its United States operations in 1934 in partnership with record producer and former Brunswick Records executive Jack Kapp (Kapp). Crosby was the first artist Kapp signed to Decca.

In 1943, Decca and Crosby entered a recording agreement (the 1943 Agreement) that superseded all prior recording agreements between Decca and Crosby. At the time, the predominant configurations for the sale of commercial records were 10-inch and 12-inch double-sided shellac discs played at 78 revolutions per minute (rpm), containing one song per side. For Decca, the most common configuration was the double-sided, 10-inch shellac disc with a retail price of 75 cents.

In the 1943 Agreement, Crosby agreed to provide his exclusive personal services to Decca for the purpose of "recording commercial sound records." Decca was to own all right, title and interest in the masters, and had the exclusive right to manufacture and distribute records embodying the masters, or to license third parties to do so, throughout the world. Decca agreed to pay Crosby royalties on records sold by Decca or its licensees. On "double disc ten inch records," the royalty rates were 2 1/2 cents on records with a suggested retail list price (SRLP) of 35 cents; 3 1/4 cents for records with

an SRLP of 50 cents; and 5 1/4 cents on records with an SRLP of 75 cents.[2] For 10-inch records with an SRLP of $1.00 or more, the royalty was 15% of the wholesale price. The parties set forth a similar royalty schedule with respect to 12-inch records. The royalty provision further provided that, if the wholesale price of a record was "more than the present price," the royalty would increase by 10% of the increased wholesale price (the "10% bonus royalty").

2. *The 1949 Agreement*

In January 1949, Decca and Crosby formed Decros Corporation (Decros) to produce and sell Crosby's records. Simultaneously, Crosby entered a recording agreement with Decros (the 1949 Agreement).

By 1949, although shellac discs remained the predominant configuration for commercial records, records made of polyvinyl chloride (vinyl) were becoming more common. In 1948, the vinyl "long play" record (LP) was introduced, which played at 33 1/3 rpm (the "LP") and could hold up to 30 minutes of music per side. Shortly thereafter, the vinyl seven-inch record was introduced, which played at 45 rpm and was typically pressed with one song per side (the "single"). In addition, because the vinyl seven-inch disc could hold up to eight minutes of music per side, they could also be used for "extended play" records (the "EP"), which included two or more songs per side.

The 1949 Agreement defined records to include "phonograph records, whether made in the form of discs, wire, or tape, or any devices which are now or hereafter used as a substitution for or a replacement of phonograph records as now known . . . ." For

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[2] Royalties expressed in terms of a fixed amount of money payable per record sold—as distinguished from royalties expressed as a percentage of a record's wholesale or retail price, which may vary over time—are commonly referred to as "penny rate" or "cent rate" royalties.

masters recorded under the 1949 Agreement and released on "double disc ten-inch shellac records" and "double disc twelve-inch shellac records," Decca would pay Crosby the same penny rate royalties set forth in the 1943 Agreement, except that the royalty basis for records with an SRLP of $1.00 or more was changed from 15% of the wholesale price to 7 1/2% of the SRLP, less taxes.[3] There was no specific provision regarding packaging costs.

In addition, the 1949 Agreement specified that "on records made of vinylite or similar material" the royalty would be 5 1/4% of the SRLP, provided the SRLP was $1.00 or more. Decca subsequently construed this provision to apply "only to 78 recordings on this material"—that is, to vinyl records played at 78 rpm.

Royalties were to be increased "by 10% of any increase in the wholesale price . . . ." Decros reserved the right, however, to deem the royalty provisions "not applicable in the event that technical changes in . . . the nature of the phonograph records now commonly sold (e.g., by the so-called long-playing record) result in materially different costs or price levels . . . ." In that case, the royalty would be "recalculated by the parties . . . so as to be consistent with the scale of royalties here established . . . ."

Decros also agreed to pay Crosby "25% of the net proceeds received by Decros" from other exploitations of Crosby's masters, including domestic public performance[4] of

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[3] In 1949, record companies typically set the SRLP of a record at double the wholesale price. As a result, the retail royalty of 7 1/2% on records priced at $1.00 or more in the 1949 Agreement would, in most cases, equate to the 15% wholesale royalty on such records in the 1943 Agreement.

[4] "Public performances" of sound recordings include, for example, radio broadcasts, transmission of the recording as "hold" music on telephone systems, and playing the record on a juke box in a public establishment. Federal copyright law does not and has never protected domestic sound recordings made prior to 1972, nor does federal copyright law grant a public-performance right with respect to sound recordings (as distinct from the musical composition embodied in the sound recording), except for digital audio transmissions (e.g., webcasts or digital radio).

the recordings, and "all of the net proceeds received by Decros from records hereafter made for public performance rights outside the United States . . . ."

3. Emergence of the LP and the 1956 Agreement

By 1954, the vinyl configurations—the LP, EP and single—were emerging as the predominant configurations for commercial records. Decca was thus faced with the question of how to pay royalties on masters recorded by Crosby under the 1943 and 1949 Agreements that were subsequently released by Decca on vinyl LP or EP records. Decca ultimately decided to account for such records on an "equivalent records" basis—that is, as if the masters had been released and sold as double-sided singles. Decca's biggest seller in the shellac configurations had been the 10-inch double disc priced at 75 cents, for which the penny rate was 5 1/4 cents, or 7% of SRLP. Decca thus settled on an equivalent 7% retail royalty for LPs. As was common in the record industry, Decca deducted the cost of packaging from the royalty base.

On May 10, 1956, Crosby entered another recording agreement with Decros (the 1956 Agreement). The 1956 Agreement defined "records" the same as the 1949 Agreement, and, for masters recorded under the 1956 Agreement, included the same penny-rate royalty schedules as the 1943 and 1949 Agreements for shellac, 78 rpm records. The royalty schedule also specifically provided for the vinyl configurations. Singles were to earn royalties at the same penny rates as 10-inch shellac discs. The royalties on LPs and EPs were to be 7% of the SRLP when the SRLP was $1.00 or more.

4. The 1958 Audit and the 1960 Correspondence

In 1958 and 1959, Crosby hired an accounting firm to audit his artist royalty accounts with Decca and Decros and his equity participation in Decros. The audit reports no longer exist. In connection with the audit, Crosby claimed, among other things, that

the packaging deductions were improper, and that Decros and Decca should be paying royalties on LPs and EPs at 7 1/2% of SRLP or 15% of wholesale.

In an effort to resolve issues raised by the audits, Decca and Crosby's business manager, Basil Grillo (Grillo), exchanged a series of correspondence in 1960 (the 1960 correspondence). In a letter dated March 11, 1960, Grillo proposed that Decca buy Crosby's interest in Decros for $200,000 and release Crosby from re-recording restrictions contained in the 1943 Agreement "in full settlement of all claims through December 31, 1959." In August 1960, Decca purchased Crosby's interest in Decros. With respect to royalties going forward, Henry Cohen, an attorney for Decca, wrote Grillo on June 8, 1960 to confirm "the understandings" between Grillo and Decca "concerning royalty rates . . . ." Cohen stated that "[o]n EP's and LP's, the rate will be 7% of the retail price, less excise taxes and the prices heretofore established for packaging." On June 22, 1960, Grillo responded that this was "agreeable to us . . . ." Crosby accepted royalties on that basis from Decca without objection, on sales of both vinyl LPs and cassette tapes, for the remainder of his life. There was no other formal written contract memorializing an agreement in connection with this correspondence.

5. Midline Records[5]

MCA acquired Decca in the 1960s, and Crosby died in October 1977. In late 1977, to stimulate sales of Crosby's "old catalog product," MCA proposed "to convert such product to a mid-line price series . . . ." To make the midline price series

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5 Record companies frequently classify releases as top line, midline or economy. Top-line releases are typically new product or catalog product that continues to perform well, for which the record company charges full price. Midline releases are discounted off the top-line price, and are typically catalog product that can no longer command top-line prices. Economy releases are, as the name suggests, bargain-bin records that are steeply discounted from the top-line price.

economically feasible, MCA asked the executor of Crosby's estate to agree to a reduced royalty rate of 5%. Although the proposal referred to a "series" of midline releases, the proposal identified two specific Crosby albums, "Shillelaghs & Shamrocks" and "When Irish Eyes Are Smiling." Crosby's executor agreed to the reduced royalty. MCA paid Crosby's estate 5% on all midline releases thereafter.

6. The CD Amendment

The digital audio compact disc (CD) was introduced in the early 1980s. In 1986, HLC and MCA entered an amendment (the CD Amendment) to all of Crosby's recording agreements pertaining to royalties on CD sales. MCA agreed to pay royalties on CD sales at "the same cent rate . . . otherwise payable on single-disc top-line LPs . . . ." Because it equated CD royalties with those payable on vinyl LPs, this was known as the "black-vinyl" method. The CD Amendment also contained a "most favored nations" (MFN) clause, which provided in relevant part, "If . . . MCA uses a different method for determining royalties on compact discs and, as a result thereof, MCA agrees to pay any artist a royalty which exceeds that artist's cent rate for top-line single-disc LPs . . . [then] MCA shall immediately commence paying [Crosby] royalties determined in accordance with the use of such different basis to the extent its use would result in larger royalties being paid to [Crosby]."

MCA calculated CD royalties for some of its other recording artists using the constructed-retail method, which paid royalties for CDs based on a fictional SRLP of 130% of the wholesale price, and then applied certain deductions, such as a packaging deduction. At trial, plaintiffs argued that the constructed-retail method would have been more favorable for Crosby as early as 1988; MCA argued that the black-vinyl method was more favorable to Crosby until 2003 (two and a half years after this lawsuit was filed), when MCA eliminated the packaging deduction for certain artists. MCA did not pay Crosby's royalties on the more favorable basis.

7. The 1985-1986 Royalty "Review"

In 1985, HLC engaged an accounting firm to audit Crosby's royalty accounts "to determine in what fashion MCA was computing royalties . . . ." The auditors issued a "preliminary" report in November 1986. The report identified "significant discrepancies" between MCA's sales reports and royalty reports, and found "no contractual support" for certain of MCA's royalty accounting practices. HLC did not ask the auditors to take any further action.

8. The 1999 Audit

A dispute arose between HLC and the Trust; in 1996, the Trust sued HLC, claiming that HLC had underpaid the Trust's share of Crosby's royalties. HLC and the Trust settled their dispute. In 1998, they engaged auditor Gary Cohen to audit MCA. Cohen reported that MCA had underpaid royalties since at least 1972, and that the underpayments of royalties and other items totaled in excess of $16 million.

B. Procedural History

Plaintiffs commenced this action in July 2000. In their original complaint, plaintiffs alleged claims for breach of contract, fraud, breach of fiduciary duty, breach of the implied covenant of good faith and fair dealing, rescission, cancellation of contract, constructive trust, negligence, accounting, and open book account. Specifically, plaintiffs alleged that MCA had breached the Agreements by (a) failing to pay royalties at the agreed upon rates; (b) releasing songs recorded under the 1943 Agreement on cassette and compact disc, and by improperly calculating the royalties on those configurations; (c) improperly reducing the royalty base on discs and cassettes by 10% and 20% respectively; (d) improperly calculating royalties without regard to increased

wholesale prices; (e) failing to remit royalties on all sales; (f) taking unauthorized deductions from the royalty base; (g) recouping recording costs from royalties; and (h) failing to account and pay for public performance and broadcasting income.

1. The 2002 Summary Adjudication—Statute of Limitations

In July 2002, the trial court granted MCA's motion for summary adjudication, ruling that plaintiffs' claims were barred to the extent that they accrued prior to the applicable limitations period. The trial court ruled that each royalty payment was a separate installment contract, so that the limitations period for each improper payment began when the payment was made. As a result, plaintiffs' claims for underpayments prior to applicable limitations periods were barred.

2. The 2003 Summary Adjudication—Fraud and Fiduciary Duty

Plaintiffs filed a first amended complaint in October 2002, adding an allegation that MCA had breached the MFN clause in the 1986 CD Amendment. In May 2003, the trial court granted summary adjudication in favor of MCA on plaintiffs' fraud and breach of fiduciary duty claims. The trial court concluded that plaintiffs had failed to produce evidence of any fraudulent conduct within the limitations period, and rejected plaintiffs' claim of delayed discovery. The trial court also concluded that MCA's duty to account for royalties did not give rise to a fiduciary relationship between MCA and Crosby or his heirs.

3. HLC's Motion for a Jury Trial

MCA moved the trial court pursuant to Code of Civil Procedure, section 598 to bifurcate plaintiffs' equitable claims (rescission, cancellation of contract, constructive

trust and accounting) and MCA's equitable affirmative defenses (set off, estoppel and laches), and try those issues first, without a jury. The trial court granted the motion, concluding that the action was "primarily" based on plaintiff's demand for an accounting.

In response to the trial court's ruling, plaintiffs dismissed without prejudice their causes of action for a constructive trust and an accounting. Plaintiffs moved the trial court to vacate its prior order and empanel a jury to try the case. Plaintiffs argued that, after the dismissal of the accounting and constructive trust claims, their legal claims constituted "the heart of this case." Plaintiffs also argued that their rescission claim was "legal in nature" and should be tried to a jury because it sought "the recovery of specific personal property"—that is, "all masters recorded under the CONTRACTS" and "all royalties generated after the effective date of rescission." MCA countered that, in effect, nothing had changed—plaintiffs continued to assert an equitable claim for rescission, and whether MCA had breached the recording agreements would still require (1) a royalty accounting, and (2) resolution of MCA's equitable defenses of estoppel, set-off and laches. The trial court denied plaintiffs' motion, concluding that "this case still appears primarily to turn on a determination of the amount of royalties due" because "there can be no breach of contract or fraud if the Court determines that the amount of royalties paid has been proper." The trial court also stated that plaintiffs' had cited no authority that their rescission claim "may or must be considered legal in nature."

4. The Trial

The trial court conducted a bench trial of the equitable issues, issuing a lengthy statement of decision on April 4, 2006. Basing its findings on the "plain language of the contracts" and "substantial evidence of the parties' conduct," the trial court found:

- In the 1943 Agreement, the parties "agreed to a basic 7% royalty," which was reiterated in both the 1949 and 1956 Agreements.

- In the 1960 Correspondence, Grillo confirmed on Crosby's behalf the 7% retail royalty for LPs, and the parties' subsequent conduct confirmed their mutual understanding that Decca was to pay a basic 7% retail royalty and was permitted to deduct packaging costs.
- Crosby agreed to a 5% retail royalty on midline records, and a royalty equal to 50% of Decca's net receipts on records produced by third-party licensees.
- The MFN clause in the 1986 CD Amendment was triggered as of January 1, 2003 when MCA eliminated packaging deductions on CD royalties for other MCA artists, resulting in an underpayment of CD royalties to plaintiffs of $134,475.53.
- The 10% bonus royalty in the 1943 Agreement applied only to the shellac configurations in existence at the time of the 1943 Agreement.
- Rescission of the 1986 CD Amendment—the only contract MCA had breached—was not warranted because MCA had rendered substantial performance, plaintiffs had retained the benefits of that performance, and plaintiffs could be compensated adequately through money damages.
- Plaintiffs were awarded $210,762.53 in damages, including the underpayments under the 1986 CD Amendment and certain other underpayments conceded by MCA. MCA was denied any set off for alleged overpayments.

The trial court concluded that its resolution of the equitable issues substantially in MCA's favor also disposed of plaintiffs' remaining claims. The trial court awarded costs to MCA as the prevailing party "because it prevailed on every issue except one and therefore recovered a greater relief in the action than did HLC."

DISCUSSION

I. Right to Jury Trial

Plaintiffs argue that the "gist" of their action against MCA was a legal claim for breach of contract rather than an equitable claim for an accounting or rescission, and that the trial court therefore improperly denied them the right to a jury trial guaranteed by Article I, section 16 of the California Constitution. Plaintiffs argue in the alternative that, even if equitable issues predominated, the trial court was required to try the legal issues first to a jury. I disagree with both contentions.

A. The Right to a Jury Trial in Civil Actions in California

This court reviews de novo whether the trial court violated plaintiffs' constitutional right to a jury trial by determining the factual issues presented by the case without a jury. (*DiPirro v. Bondo Corp.* (2007) 153 Cal.App.4th 150, 179; *Caira v. Offner* (2005) 126 Cal.App.4th 12, 23-24.) Article I, section 16 of the California Constitution provides in relevant part, "Trial by jury is an inviolate right and shall be secured to all, but in a civil cause three-fourths of the jury may render a verdict." Although this language appears absolute, it is not. "[T]he right so guaranteed . . . is the right as it existed at common law in 1850, when the Constitution was first adopted, 'and what that right is, is a purely historical question, a fact which is to be ascertained like any other social, political or legal fact.' [Citations.]" (*C & K Engineering Contractors v. Amber Steel Co.* (1978) 23 Cal.3d 1, 8 (*C & K Engineering*).) "As a general proposition, '[T]he jury trial is a matter of right in a civil action at law, but not in equity.' [Citation.]" (*Ibid.*) "'If the action is essentially one in equity and the relief sought depends upon the application of equitable doctrines, the parties are not entitled to a jury trial.' [Citations.]" (*DiPirro v. Bondo Corp., supra,* 153 Cal.App.4th at pp. 178-179.)

The California Supreme Court explained the difference between actions at law and those in equity thus: """If the action has to deal with ordinary common-law rights cognizable in courts of law, it is to that extent an action at law. In determining whether the action was one triable by a jury at common law, the court is not bound by the form of the action but rather by the nature of the rights involved and the facts of the particular case—the *gist* of the action. A jury trial must be granted where the *gist* of the action is legal, where the action is in reality cognizable at law."' [Citation.] On the other hand, if the action is essentially one in equity and the relief sought 'depends upon the application of equitable doctrines,' the parties are not entitled to a jury trial. [Citations.] Although we have said that 'the legal or equitable nature of a cause of action ordinarily is determined by the mode of relief to be afforded' [citation], the prayer for relief in a particular case is not conclusive [citations]. Thus, 'The fact that damages is one of a full range of possible remedies does not guarantee . . . the right to a jury . . . .' [Citation.]" (*C & K Engineering, supra,* 23 Cal.3d at p. 9; accord, *DePirro v. Bondo Corp., supra,* 153 Cal.App.4th at p. 179; *NMSBPCSLDHB v. County of Fresno* (2007) 152 Cal.App.4th 954, 958-959 (*NMS*); *Caira v. Offner, supra,* 126 Cal.App.4th at p. 23; *Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1237-1238.)

An action to recover damages for breach of contract is generally considered "an action at law in which the right to jury trial ordinarily exists." (*Raedeke v. Gibraltar Sav. & Loan Assn.* (1974) 10 Cal.3d 665, 671; see Code Civ. Proc., § 592.) An action styled as one for breach of contract nevertheless may be equitable when "the complaint seeks relief which was available only in equity . . . ." (*C & K Engineering, supra,* 23 Cal.3d at p. 9.) An action for an accounting "is an equitable proceeding to which no right to jury trial attaches." (*De Guere v. Universal City Studios, Inc.* (1997) 56 Cal.App.4th 482, 507 (*De Guere*); *Van De Kamp v. Bank of America* (1988) 204 Cal.App.3d 819, 864.) If "the only way in which the remedy of damages [for breach of contract] could be afforded was by the application of equitable principles, i.e., an accounting," then the "action is one in equity, not at law . . . ." (*Id.* at p. 865.)

An "[a]ccounting usually is striking a balance between debits and credits showing a balance due, if any." (*Peoples Finance & Thrift Co. of Visalia v. Bowman* (1943) 58 Cal.App.2d 729, 734.) "An action for an accounting . . . is a proceeding in equity for the purpose of obtaining a judicial settlement of the accounts of the parties in which proceeding the court will adjudicate the amount due, administer full relief and render complete justice [citation]." *(Verdier v. Superior Court* (1948) 88 Cal.App.2d 527, 530.) "The action for an accounting is equitable in nature. It may be brought to compel the defendant to account to the plaintiff for money or property, (1) where a fiduciary relationship exists between the parties, or (2) where, though no fiduciary relationship exists, the accounts are so complicated that an ordinary legal action demanding a fixed sum is impracticable." (5 Witkin, Cal. Procedure (4th ed. 1997) Pleading, § 775 at p. 233.) "If an action is for an amount which is unliquidated and unascertained and which cannot be determined without an accounting, it is a suit in equity. [Citations.] If a complaint sets forth all the facts necessary for the calculation of an account between the parties, recovery may be had in an action at law. [Citations.] A suit for an accounting will not lie where it appears from the complaint that none is necessary or that there is an adequate remedy at law. [Citations.] An accounting will not be accorded with respect to a sum that a plaintiff seeks to recover and alleges in his complaint to be a sum certain. [Citation.]" (*St. James Church of Christ Holiness v. Superior Court* (1955) 135 Cal.App.2d 352, 359; accord, *Civic Western Corp. v. Zila Industries, Inc.* (1977) 66 Cal.App.3d 1, 14.) "A right to an accounting is derivative; it must be based on other claims." (*Janis v. California State Lottery Com.* (1998) 68 Cal.App.4th 824, 833-834.)

An accounting is a common remedy in disputes concerning the payment of royalties. "[A]n accounting to determine the amount of royalties due is an appropriate and recognized remedy in a case such as this." (*Cafferty v. Scotti Bros. Records, Inc.* (S.D.N.Y. 1997) 969 F.Supp. 193, 204 [recording artist suing record company for royalties on sale of soundtrack albums]); see *Fred Ahlert Music Corp. v. Warner/Chappell Music, Inc.* (2d Cir. 1998) 155 F.3d 17, 25 [affirming order for royalty

accounting as remedy for music publisher's unauthorized licensing of composition]; *In re Brown* (Bankr. E.D. Pa. 1998) 219 B.R. 373, 376 [royalty accounting in recording artist's bankruptcy proceeding]; *Nolan v. Williamson Music, Inc.* (D.C.N.Y. 1969) 300 F. Supp. 1311, 1320-1321 [ordering accounting in suit by composer against music publisher for royalties], affirmed sub nom. *Nolan v. Sam Fox Pub. Co.* (2d Cir. 1974) 499 F.2d 1394; see also Bazis, *Remedies and Roadblocks in the Recovery of Unpaid Music Royalties* (Winter 2000) 17 Entertainment and Sports Lawyer 18, 20.)

An action to enforce a rescission[6] may be either legal or equitable, depending on the relief sought. (*NMS, supra,* 152 Cal.App.4th at p. 963.) "'Rescission' means to 'restore the parties to their former position.' [Citations.] . . . 'The consequence of rescission is not only the termination of further liability, but also the restoration of the parties to their former positions by requiring each to return whatever consideration has been received.' [Citations.]" (*Id.* at pp. 959-960.) When the action seeks return of the precise consideration given—usually money or other tangible property—the action is "considered to be one at law brought on the implied promise on the part of the nonrescinding party to repay or return the consideration received." (*Runyan v. Pacific Air Industries, Inc., supra,* 2 Cal.3d at p. 313; see *Philpott v. Superior Court* (1934) 1 Cal.2d 512, 526; *Paularena v. Superior Court* (1965) 231 Cal.App.2d 906, 914.) A claim for rescission is equitable, however, when the rescinding party seeks to recover something other than the precise consideration given (*NMS, supra,* 152 Cal.App.4th at p. 963), usually because it would be "'impracticable to decree a restoration and return of the property.'" (*Id.* at p. 960, quoting *Swan v. Talbot* (1907) 152 Cal. 142, 146.) In such cases, the trial court must "'state and settle an account between the parties'" to

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[6] See Civil Code sections 1689, 1691-1692. The action to obtain judicial rescission was abolished by the Legislature in 1961. (*Runyan v. Pacific Air Industries, Inc.* (1970) 2 Cal.3d 304, 313; *NMS, supra,* 152 Cal.App.4th at p. 962.)

approximate the parties' status quo ante. (*NMS, supra,* 152 Cal.App.4th at p. 960, quoting *Swan v. Talbot, supra,* 152 Cal. at p. 146.)

B. The Gist of Plaintiffs' Action Was Equitable

At its core, plaintiffs' claim for breach of contract was an action for a complicated royalty accounting. Furthermore, plaintiffs' claim for rescission, if successful, sought to unwind several personal services contracts under which the parties and their predecessors had performed for more than 60 years, during which time the music industry experienced fundamental changes. To restore the parties to their former position—if doing so would have been possible at all—the trial court would have been required to conduct an equitable balancing. Accordingly, the gist of plaintiffs' action was equitable.

1. Calculation of Damages on Plaintiffs' Breach of Contract Claim Required a Royalty Accounting

Plaintiffs argue that, because they dismissed their causes of action for an accounting and a constructive trust, the gravamen of their claim was at law for breach of contract, because the determination of nearly all of the issues in the case depended upon whether MCA had breached its contracts with Crosby and because they sought relief in the form of money damages. They assert that the issues were not whether MCA had improperly accounted for the royalties, but whether MCA had "breached its agreements" by "disregard[ing]" the applicable royalty provisions.

Plaintiffs' argument is little more than an exercise in semantics. Whether denominated as an action for an accounting or for breach of contract, the essence of plaintiffs' claim was that MCA had underpaid royalties on Crosby's catalog over a period of decades. As noted above, the right to an accounting is always derivative of another claim. In cases involving the underpayment of artist royalties, that claim typically will be

one for breach of contract. In essence, plaintiffs' accounting claim alleged that an accounting was necessary and appropriate to determine the relief to which they were entitled *for MCA's breach of contract*. That plaintiffs subsequently dismissed the cause of action entitled "accounting" did nothing to change the essential nature of either their claim or the relief they requested.

Plaintiffs' breach of contract claim was similar to the breach of contract claim asserted in *De Guere, supra,* 56 Cal.App.4th 482. In that case, the plaintiff was the creator of a television series contractually entitled to a share of the net profits generated by the series. (*Id.* at pp. 487-488.) The television studio's distribution statements over a number of years showed that the series had generated a deficit rather than a net profit. (*Id.* at p. 488.) A certified public accountant audited the studio's distribution statements for plaintiff, and concluded that the studio had overstated production and distribution costs and understated revenue, that the show had generated nearly $110 million in net profits, and that plaintiff's share of the net profits was nearly $43 million. (*Id.* at p. 489.)

The plaintiff sued the studio for breach of contract, declaratory relief and an accounting, alleging that the studio's failure to pay net profits "was the product of numerous improper accounting practices employed by" the studio. (*De Guere, supra,* 56 Cal.App.4th at p. 488.) Over the plaintiff's objection, the trial court appointed a referee to conduct an accounting. (*Ibid.*) The referee concluded that the studio's accounting practices with respect to four specific issues were, contrary to the plaintiff's assertion, consistent with industry custom and practice. (*Id.* at pp. 491-492.) If those four issues were eliminated from the plaintiff's claim, then the series would show a net loss even if the plaintiff prevailed on his remaining claims. (*Id.* at p. 493.) As a result, the referee concluded that "an accounting was not required because a net profit would not be shown." (*Ibid.*)

On appeal, the plaintiff argued, among other things, the trial court had violated his right to a jury trial on his breach of contract claim. (*De Guere, supra,* 56 Cal.App.4th at pp. 506, 507.) The court of appeal rejected that argument. Each of the claims alleged by

the plaintiff, the court reasoned, "relate[d] to the accounting practices employed by [the studio]." (*Id.* at p. 507.) His breach of contract claim "list[ed] 26 accounting practices by [the studio] which he claim[ed] were improper, and which deprived him of his right to net profits." (*Id.* at pp. 507-508.) Those practices included whether charges for cost items were proper; whether certain items were properly charged as costs of production rather than as expenses of distribution; and "various improper practices related to distribution fees and expenses." (*Id.* at p. 508.) "In light of these allegations," the court concluded, "we are satisfied that the gist of the action is for an accounting, and that there was no right to a jury trial." (*Ibid.*) The Court of Appeal noted that the plaintiff had also alleged that the studio had breached the contract by accepting below-market syndication fees in the New York market, and that this would "involv[e] extrinsic facts beyond accounting practices." (*Ibid.*) This, however, did not change the court's conclusion. "While the resolution of this issue may depend on extrinsic, contested facts, that circumstance does not alter the nature of the action. The overwhelming gist of the action is equitable, relating to the accounting practices employed by [the studio]." (*Ibid.*)

In this case, determining whether MCA had underpaid royalties would require examining the propriety of MCA's accounting practices and methodologies, including its selection and application of the royalty rates for particular configurations of product, and determining whether MCA had paid plaintiffs in a manner consistent with whatever accounting practices and methodologies the trial court found to be appropriate under the Agreements. This is clear from the allegations in the first amended complaint. All but one[7] of the numerous breaches of contract alleged by plaintiffs related to MCA's failure properly to calculate and pay royalties. Plaintiffs alleged that MCA had (1) "[f]ail[ed] to pay royalties at the agreed upon rate;" (2) improperly calculated royalties on cassettes

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[7] Plaintiffs also alleged, with respect to the 1949 and 1956 Agreements, that MCA had "assign[ed] or transferr[ed] the agreement[s] to third parties" without Crosby's consent. That claim was not presented at trial.

and compact discs; (3) "reduc[ed] the royalty base upon which royalties are computed" on cassettes and compact discs; (4) "[c]omputed royalties without regard to" the 10% bonus royalty provision; (5) "fail[ed] to remit royalties on all sales;" (6) took "unauthorized deductions from the base upon which royalties are computed;" (7) "fail[ed] to account for and pay any income derived from public performances or broadcasting;" (8) improperly "[r]ecoup[ed] session costs from royalties;" and (9) breached the MFN "by affording another of its artists a more favorable method for calculating royalties on CD sales."

Further, the damages claimed by plaintiffs in their prayer for breach of contract consist primarily of royalty underpayments totaling "in excess" of $16 million "subject to proof at trial." In addition to their breach of contract claim, plaintiffs asserted and proceeded to trial on a claim for an open book account, alleging that "Defendants have become indebted to Plaintiffs for services rendered by CROSBY in the approximate sum of $16,336,931." This amount, too, primarily reflects the alleged underpayment of royalties. Plaintiffs' damages allegations were, of course, vigorously contested by MCA, which contended that they had *overpaid* Crosby by more than $3 million, primarily with respect to cassette royalties and payments for master use licensing. As the trial court correctly recognized, to calculate plaintiffs' "damages" accurately, an accounting would be required. "The fact that the amount of a defendant's liability to the plaintiff will be established by an accounting indicates that the action is equitable rather than legal." (*De Guere, supra,* 56 Cal.App.4th at p. 507; accord, *Van de Kamp v. Bank of America, supra,* 204 Cal.App.3d at p. 865.)

The evidence presented at trial supports this conclusion. With the exception of Crosby's wife Kathryn, essentially *all* of the testimony at trial concerned (a) identifying the proper royalty rate to apply to various configurations of product; (b) the methodologies and accuracy of MCA's royalty accounting practices and its practices with respect to artist audits; (c) determining the basis used by MCA to account for CD royalties to various artists for purposes of determining when the MFN was triggered; and

(d) calculating the amount of any underpayment or overpayment of royalties. Each side presented expert testimony from a royalty accountant. Furthermore, contrary to plaintiffs' suggestion, the accounting issues went far beyond merely determining whether a 7% retail royalty or 15% wholesale royalty should have been paid on LPs or when the MFN clause was triggered, and calculating the resulting underpayments. Plaintiffs asserted underpayments relating to application of the 10% bonus royalty; payment of synchronization license fees; payment of license fees for third-party compilations; payment of royalties on foreign sales; packaging deductions in various configurations; royalty rates on midline releases; payment for video sales; the propriety of MCA's practice of crediting retailers 1% for defective or damaged goods; deductions for standard free goods and special free goods in both domestic and foreign markets; royalties for record club sales; royalties on discounted sales to MCA employees; payment of foreign public performance income; treatment of foreign tax credits; and the propriety of recouping recording session costs.

Although both sides presented testimony from expert royalty accountants who had reviewed MCA's books and records, that did not obviate the need for an accounting. This was not a so-called "baseball arbitration," in which the trier of fact is bound to award total damages in the amount advocated by one of the two parties. This was a trial in which the trier of fact was bound to determine the propriety of and examine the evidence concerning *each element* of the damages claimed. Whether MCA breached the Agreements and plaintiffs' remedy for those alleged breaches could have been resolved adequately only by way of an accounting. As noted above, whether an action is legal or equitable in nature is determined primarily by "'the mode of relief to be afforded' [citation] . . . ." (*C & K Engineering, supra,* 23 Cal.3d at p. 9.) If "the only way in which the remedy of damages [for breach of contract] could be afforded was by the application of equitable principles, i.e., an accounting," then the "action is one in equity, not at law . . . ." (*Van de Kamp v. Bank of America, supra,* 204 Cal.App.3d at p. 865.) In

essence, plaintiffs' claim for breach of contract sought the same relief as a claim for a royalty accounting. The gist of the claim was, therefore, equitable.

Plaintiffs argue that the case should have been tried to a jury because there were issues of fact regarding "which of the numerous putative contracts governed" and "whether MCA had performed its contractual obligations." But, as noted above, most royalty accounting cases are derivative of an alleged breach of contract. It is the nature of the *relief*, not the nature of the *wrong*, that is the principal consideration in determining whether the action is legal or equitable. (*C & K Engineering, supra,* 23 Cal.3d at p. 9.) As the court in *De Guere* observed, "[w]hile the resolution of this issue may depend on extrinsic, contested facts, that circumstance does not alter the nature of the action." (*Du Guere, supra,* 56 Cal.App.4th at p. 508.) In this case, determining which royalty provisions governed the royalty rates and deductions applicable to each configuration of product were, to be sure, issues for the trier of fact—but in an action at equity, the trier of fact is the trial judge, not a jury. That the trial judge may have to determine certain issues of fact does not eliminate the need for an accounting, which remedy makes the claim equitable. Rather, the resolution of factual issues relating to the parties' agreements is a necessary *part* of the royalty accounting process. This point is illustrated by the testimony of plaintiffs' own accounting expert, who explained that the first step in any royalty accounting is to determine which contractual provisions govern the royalty calculations relating to each configuration of product:

"Q. [PLAINTIFF'S COUNSEL] In the course of doing an audit for royalties for artists, what is that you have to determine first about the contract?

"A. [PLAINTIFF'S EXPERT] I have to determine which contracts are applicable to the royalty relationship between the artist and the recording company.

"Q. Do you have to know that in order to do the fundamental parts of the audit in terms of the calculation?

"A. Well, sure. In order to see whether the record company has paid royalties in accordance with the contracts, I have to be able to know which contracts are applicable and read them.

"Q. In the several hundred royalty audits you've done for artists, did you have to make an additional determination first to see which contract is applicable to each one?

"A. In each one.

"Q. Is it possible to do a royalty audit without first knowing what contracts apply?

"A. Without knowing what contractual relationship there is between the artist and the record company, you can't really do the audit."

Finally, plaintiffs argue, in essence, that the gist of the action was not for an accounting because no accounting would be necessary unless a the trier of fact concluded that MCA had breached the Agreements.[8] Plaintiffs sought, however, relief that could only be afforded through an accounting. That plaintiffs ultimately failed at trial to demonstrate that they were entitled to that relief does not change the nature of the relief they claimed.

The conceptual difficulty in this and other similar cases is that one party's failure to pay royalties due under an agreement for the exploitation of intellectual property inevitably constitutes a breach of contract. A breach of contract action typically engenders the right to a jury trial. Yet, determining whether a breach has occurred and

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8 In their Reply Brief, plaintiffs support this contention by quoting from this Division's decision in *Union Bank v. Superior Court* (1995) 31 Cal.App.4th 573. Plaintiffs, however, take our language out of context. *Union Bank* did not address the right to a jury trial or whether the accounting claim at issue was legal or equitable. Rather, the court in that case determined that a defendant who was entitled to summary judgment on the plaintiff's claims for fraud and breach of fiduciary duty was also entitled to summary judgment on the plaintiff's accounting claim because "defendant ha[d] proven it engaged in no misconduct and, as a result, plaintiffs ha[d] no right to an accounting." (*Id.* at pp. 593-594.)

fashioning the appropriate relief in such cases frequently requires an accounting. As discussed, under existing authorities, if an accounting is necessary, the action is equitable, and no jury trial is required. An action is not only equitable when the accounting arises from some tort or non-contractual claim. As I have discussed, a claim for breach of a royalty payment contract can be equitable if an accounting is necessary.

2. Rescission

Plaintiffs' claim for rescission was also equitable in nature. As stated above, when the rescinding party seeks relief other than return of the precise consideration given, rescission is an equitable remedy. (*NMS, supra,* 152 Cal.App.4th at p. 963.) The plaintiffs' rescission claim sought "the return of all masters recorded under the Agreements to Plaintiffs, and the payment to Plaintiffs of all royalties collected by Defendants after the effective date of cancellation." Plaintiffs characterize this as "only a legal remedy—the return of the consideration Crosby gave for his contracts with MCA. . . ." Plaintiffs are incorrect. The consideration Crosby gave for the Agreements did not consist of the master recordings themselves, but rather his *personal services* "for the purpose of recording commercial sound records . . . ." (See *Motown Record Corp. v. Brockert* (1984) 160 Cal.App.3d 123, 128-129; *MCA Records, Inc. v. Newton-John* (1979) 90 Cal.App.3d 18, 22-23; *Foxx v. Williams* (1966) 244 Cal.App.2d 223, 242.) As in *Foxx v. Williams,* Crosby, "by himself, produced nothing. His skill and artistry were essential ingredients, but no recording would have resulted without the application of the capital, management and technical work supplied by [Decca]." (*Id.* at p. 242.) Rather, Crosby's "performance, combined with the managerial, artistic and technical skills of [Decca's] employees, resulted in an intangible product, recorded sound, which [Decca] used in the production of salable merchandise." (*Ibid.*; see also *Bucciarelli-Tieger v. Victory Records, Inc.* (N.D. Ill. 2007) 488 F.Supp.2d 702, 712-713 ["it would be

impossible for [plaintiffs] to 'unrecord' their albums and impossible for defendants to 'unsell' them"].)

Plaintiffs therefore sought through rescission not to recover the precise consideration given by Crosby (his personal services as a singer), but rather something *else*—that is, the masters he recorded in collaboration with Decca—as an equitable adjustment to return the parties to the status quo ante. Their claim for rescission was therefore equitable in nature. Combined with the essentially equitable character of plaintiffs' contract claim, the gist of plaintiffs' action was equitable.

C. No Constitutional Bar to Trying Equitable Issues First

Plaintiffs argue that, even if their case presented mixed legal and equitable claims, their constitutional jury trial right mandated that the trial court try the legal issues first to a jury. I disagree.

First, plaintiffs have failed to identify any severable legal issues. Plaintiffs assert that the contract issues were legal and should have been tried first to a jury, but I have already concluded that, because the essential relief sought by plaintiffs for breach of contract was in the nature of an accounting, the gist of that claim was equitable. Furthermore, the contract issues were inextricably bound up in plaintiffs' equitable rescission claim, which was grounded primarily on the allegation that MCA had materially breached the Agreements.

Second, the California Constitution does not require that a trial court try legal issues first to a jury. As the California Supreme Court stated in *Raedeke v. Gibraltar Sav. & Loan Assn., supra,* 10 Cal.3d at page 671, "It is well-established that, in a case involving both legal and equitable issues, the trial court may proceed to try the equitable issues first, without a jury . . . , and that if the court's determination of those issues is also dispositive of the legal issues, nothing further remains to be tried by a jury." Indeed, not only *may* a trial court determine the equitable issues first, that procedure is generally

preferred because it promotes judicial economy. The cases so stating are legion, and date back at least as far as 1861. (See, e.g., *ibid.*; *Connell v. Bowes* (1942) 19 Cal.2d 870, 872; *Thomson v. Thomson* (1936) 7 Cal.2d 671, 683 (*Thomson*); *Angus v. Craven* (1901) 132 Cal. 691, 699 [conc. op. of Henshaw, J.] (*Angus*); *Fish v. Benson* (1886) 71 Cal. 428, 434; *Schieffery v. Tapia* (1885) 68 Cal. 184, 188; *Martin v. Zellerbach* (1869) 38 Cal. 300, 320; *Lestrade v. Barth* (1862) 19 Cal. 660, 671; *Weber v. Marshall* (1861) 19 Cal. 447, 457; *Nwosu v. Uba, supra,* 122 Cal.App.4th at p. 1238; *Walton v. Walton* (1995) 31 Cal.App.4th 277, 293; *Golden West Baseball Co. v. City of Anaheim* (1994) 25 Cal.App.4th 11, 50; *Strauss v. Summerhays* (1984) 157 Cal.App.3d 806, 813; *Bate v. Marsteller* (1965) 232 Cal.App.2d 605, 617; *Moss v. Bluemm* (1964) 229 Cal.App.2d 70, 73; *National Elec. Supply Co. v. Mt. Diablo Unified School Dist.* (1960) 187 Cal.App.2d 418, 422; *Richard v. Degen & Brody, Inc.* (1960) 181 Cal.App.2d 289, 295, disapproved on another ground in *Kendall v. Ernest Pestana, Inc.* (1985) 40 Cal.3d 488, 498; *Dills v. Delira Corp.* (1956) 145 Cal.App.2d 124, 129; *Peterson v. Peterson* (1946) 74 Cal.App.2d 312, 321; *Bixby v. Hotchkis* (1943) 58 Cal.App.2d 445, 454; *Asamen v. Thompson* (1942) 55 Cal.App.2d 661, 672; see Wagner et al., California Practice Guide: Civil Trials and Evidence (The Rutter Group 2007) ¶ 2:162, pp. 2-30 to 2-31 ["In actions involving both legal and equitable issues, most courts will try the equitable issues first without a jury . . . because this *may obviate the necessity* for jury trial of the legal issues"]; 7 Witkin, Calif. Procedure (4th ed. 1997) Trial, § 163, p. 191 ["If there are legal and equitable issues, the equitable issues should be tried first"].)

Against this plethora of authority, plaintiffs cite three California Supreme Court decisions from the late 1800s which, plaintiffs contend, *hold* that legal issues must be tried first to a jury. All subsequent authority to the contrary, plaintiffs assert, is mere dicta. Plaintiffs urge that we are bound by the Supreme Court's Nineteenth Century holdings, and must disregard the consistent contrary authority from the Twentieth and Twenty-First Centuries. I disagree with plaintiffs' statement of the law.

First, the three cases relied upon by plaintiff do *not* hold that legal issues must be tried first to a jury in cases presenting both legal and equitable issues. In *Hughes v. Dunlap* (1891) 91 Cal. 385, 389-390, the court held that a defendant could not be deprived of his right to have a jury calculate damages in the plaintiff's action at law for trespass merely because plaintiff had joined an equitable claim for an injunction. (*Id.* at p. 388.) The court expressly declined to resolve whether a jury trial right attached to other issues, such as those pertaining to liability. (*Id.* at pp. 388-389.) The order of trial was not discussed.

Both *Donahue v. Meister* (1891) 88 Cal. 121 (*Donahue*) and *Curtis v. Sutter* (1860) 15 Cal. 259 (*Curtis*), upon which plaintiffs also rely, were statutory actions to quiet title, which the defendant answered by claiming adverse title to and possession of the land. (*Donahue, supra,* 88 Cal. at p. 123; *Curtis, supra,* 15 Cal. at p. 261-262.) Neither case addressed the order of trial in a case presenting both legal and equitable issues. The significance of *Donahue* and *Curtis* was described by the Supreme Court in its 1901 decision in *Angus, supra,* 132 Cal 691, thus: "The purpose of the section [then-Code of Civil Procedure section 738, creating an action to quiet title] is evidently to afford a remedy similar in character to that of the old bill of peace, but extending it to cases which the latter remedy did not reach. See *Curtis v. Sutter*, 15 Cal. 259. Courts, however, in guarding the constitutional rights to a jury trial, have repeatedly held that where the suit should have been, and in substance is, an action for the recovery of the possession of land, the right of a defendant to a jury cannot be defeated by the mere device of bringing the action in an equitable form. *And so it has been held that the right to a jury is not defeated, where at the commencement of the action, the defendant, and not the plaintiff, was in the actual possession of the premises involved; and it has also been held that where the defendant had been for a long time in the actual possession, and the plaintiff had ousted him, the plaintiff, by first bringing his action to quiet title, could not, by such inversion of parties, avoid the defendant's right to a jury, but that the action should be treated as substantially an action to recover possession.* But this is as far as

this court has gone in *Donahue v. Meister*, 88 Cal. 121; *Newman v. Duane*, 89 Cal. 597; *Gillespie v. Gouly*, 120 Cal. 515; *Moore v. Copp*, 119 Cal. 434; and kindred cases. As was substantially said in *Donahue v. Meister, supra,* the decision of *the question whether, in an action brought under section 738, either party is entitled to a jury, must depend greatly upon the facts in that particular case*." (*Angus, supra,* 132 Cal. at pp. 696-697, italics added.) Put into modern parlance, the courts in *Donahue* and *Curtis* held that the "gist" of those actions was legal. This is consistent with the modern standard for determining whether a jury trial right attaches (see Discussion, Part I.A, *supra*), and has nothing to do with the order of trial.[9]

Second, plaintiffs are incorrect in their assertion that all of the post-1891 judicial discussion of the order-of-trial issue is dicta. To the contrary, the Supreme Court addressed the issue directly in 1936 in *Thomson, supra,* 7 Cal.2d 671. In that case—as in *Angus, supra,* 132 Cal. 691; *Donohue, supra,* 88 Cal. 121; and *Curtis, supra,* 15 Cal. 259—the plaintiff brought an action to quiet title, which sounded in equity, and the defendant filed a cross-complaint stating an action for ejectment, an action at law. (*Thomson,* 7 Cal.2d at p. 682.) The defendant demanded a jury trial on his cross-complaint. The trial court denied the jury demand, tried the case without a jury, and rendered judgment in favor of the plaintiff. The defendant appealed, the sole issue being

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9 In his concurring opinion in *Angus, supra,* 132 Cal. at pp. 699-700 [conc. op. of Henshaw, J.], Justice Henshaw articulated for the first time the rule that the Supreme Court would expressly adopt in *Thomson, supra,* 7 Cal.2d 671: "Under our system, equitable and legal rights are determined in the same forum. *It is within the discretion of the court to control the order of proof upon the issues joined.* In the natural order, before defendant was entitled to a hearing upon the legal issues tendered, she must defeat plaintiffs upon the equitable issues presented by them. This was the view of the trial court, and in pursuance of it, it took to itself, as was proper, the determination of these equitable matters. The result was, that it found defendant's deeds to have been forgeries. Had it reached the opposite conclusion, then defendant might with right have insisted that the remaining issues of law be tried before a jury. But that time never arrived . . . ." (Italics added.)

whether the trial court had erred in denying the defendant a jury trial. (*Id.* at pp. 673-674.) Relying on *Angus, Donohue, Curtis* and other cases, the court concluded that the defendant's cross-complaint stated an action at law, to which a jury trial right attached. (*Id.* at p. 682.) Nevertheless, the Supreme Court affirmed. When a trial court has "for trial in the same action both equitable and legal issues," the court held, the "procedure to be followed" was that set forth by Justice Henshaw in his concurring opinion in *Angus* (see footnote 9, *supra*). "This procedure," the Supreme Court concluded, ". . . was followed substantially by the trial court in the present action. It first passed upon the equitable issues presented by plaintiff's complaint to quiet title and defendant's answer thereto. Having determined these issues in favor of the plaintiff—that is, having found that the plaintiff was the owner of said real property and that defendant had no interest therein, there was nothing further for the court to consider." (*Thomson, supra,* 7 Cal.2d at p. 683.) All of the Supreme Court authority on the order-of-trial issue subsequent to *Thomson* has held the same. (See *Raedeke v. Gibraltar Sav. & Loan Assn., supra,* 10 Cal.3d at page 671 [rule is "well-established"].)

Plaintiffs also rely on two more recent court of appeal decisions, *Brockey v. Moore* (2003) 107 Cal.App.4th 86 and *Arciero Ranches v. Meza* (1993) 17 Cal.App.4th 114. Neither case assists plaintiffs because we are bound by the Supreme Court's holding in *Thomson, supra,* 7 Cal.2d 671. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) In any event, neither of those cases is on point. Neither the jury trial right nor the order of trial was at issue in *Brockey v. Moore*. The court's observation in that case that it "is generally proper for a trial court to await a jury's verdict before ruling on overlapping issues being tried to the court" (*Brockey v. Moore, supra,* 107 Cal.App.4th at p. 96), upon which plaintiffs rely, was obiter dictum. *Arciero Ranches v. Meza, supra,* 17 Cal.App.4th 114, also did not concern the order of trial. That case concerned whether the "gist" of the action—in which both parties sought both damages and injunctive relief—was legal or equitable. (*Id.* at pp. 123-126.) Because the parties' prayers for injunctive relief were ancillary to their legal claims, the court concluded that

the gist of the action was legal. (*Id.* at p. 126.) In so holding, the court explicitly acknowledged the rule that, "[o]rdinarily, 'the equitable issues are [to be] tried first and then, if any legal issues remain, a jury may be called.' [Citations.]" (*Id.* at p. 124.)

Finally, plaintiffs rely on federal authorities applying the Seventh Amendment to the United States Constitution. The Seventh Amendment is not binding on California state courts. (*Jehl v. Southern Pac. Co.* (1967) 66 Cal.2d 821, 827.) "'Therefore, we confine our analysis to the California Constitution.'" (*De Guere, supra,* 56 Cal.App.4th at p. 506, quoting *Hung v. Wang* (1992) 8 Cal.App.4th 908, 927; accord, *Viola v. Department of Managed Health Care* (2005) 133 Cal.App.4th 299, 310.) As described above, the rule under the California Constitution is that stated by the California Supreme Court in *Thomson, supra,* 7 Cal.2d at page 683 and *Raedeke v. Gibraltar Sav. & Loan Ass'n, supra,* 10 Cal.3d at page 671.

In sum, there is no rule of California constitutional law that required the trial court to try legal issues first to a jury. To the contrary, the trial court had discretion to try the equitable issues first, and then to empanel a jury to try the legal issues if any remained. In this case, none remained. Plaintiffs do not argue that the trial court otherwise abused its discretion in bifurcating the trial,[10] nor do they assert any trial error.[11]

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10 Although plaintiffs argue that the trial court was required as a matter of constitutional law to try legal issues to a jury before resolving the equitable issues, they make no separate argument and cite no authority that the trial court abused its discretion by bifurcating the issues and trying the equitable issues first, if doing so was not a violation of their constitutional rights. (See Code Civ. Proc., § 1048, subd. (b); *Regents of University of California v. Sheily* (2004) 122 Cal.App.4th 824, 833 ["the decision to bifurcate is discretionary with the trial court"].)

11 In a footnote, plaintiffs assert that the trial court erred in excluding the testimony of a former MCA employee, Laura Scalise. Because plaintiffs fail to provide citation to authority or legal argument to support that contention, plaintiffs forfeit that contention. (*Sabbah v. Sabbah* (2007) 151 Cal.App.4th 818, 822, fn. 6; *McComber v. Wells* (1999) 72 Cal.App.4th 512, 522.)

II. Summary Adjudication

I agree that the summary adjudications entered against plaintiffs on their fraud and breach of fiduciary duty claims and on statute-of-limitations grounds should be affirmed. The trial court's findings of fact after trial necessarily resolved those claims adverse to plaintiffs. As a result, any error in granting summary adjudication was harmless. (Cal. Const., Art. VI, § 13; see *Curtis v. 20th Century-Fox Film Corp.* (1956) 140 Cal.App.2d 461, 464-465 [when two claims were based on the same factual allegations, the plaintiff was not prejudiced by erroneous ruling sustaining a demurrer to one claim when the second claim was resolved against plaintiff after trial]; *Grell v. Laci Le Beau Corp.* (1999) 73 Cal.App.4th 1300, 1307 [error harmless when subsequent summary judgment on statute-of-limitations grounds would have disposed of claims erroneously dismissed on demurrer]; see also *Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 800 ["'[A] "miscarriage of justice" should be declared only when the court, "after an examination of the entire cause, including the evidence," is of the "opinion" that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error"'"].)

III. Cost Award

Because I would affirm the judgment for defendants, I address briefly the propriety of the cost award. Plaintiffs argue that the trial court erred by finding that MCA was the prevailing party because, although plaintiffs obtained much less relief than they sought, they nevertheless obtained a "net monetary recovery" within the meaning of

Code of Civl Procedure section 1032, subdivision (a)(4).[12] Because the award of costs to a party receiving a net monetary recovery is mandatory, this court reviews the trial court's determination de novo. (*Wakefield v. Bohlin* (2006) 145 Cal.App.4th 963, 978.)

Section 1032, subdivision (b) provides, "Except as otherwise expressly provided by statute, a prevailing party is entitled as a matter of right to recover costs in any action or proceeding." The term "prevailing party" is defined in section 1032, subdivision (a)(4), which provides in relevant part, "'Prevailing party' includes the party with a net monetary recovery, a defendant in whose favor a dismissal is entered, a defendant where neither plaintiff nor defendant obtains any relief, and a defendant as against those plaintiffs who do not recover any relief against that defendant." Whether a party has obtained a "net monetary recovery" for purposes of section 1032 "is determined by comparing the competing damage claims on both sides of the litigation. If both sides have claims, whichever party obtains the most money from the other prevails. If only one party has damage claims, any success in pressing those claims against the losing party results in a net award." (*Wakefield v. Bohlin, supra,* 145 Cal.App.4th at p. 981.) Accordingly, a plaintiff who obtains only partial relief will nevertheless be the prevailing party when the defendant seeks no damages in a cross-complaint. (*Michell v. Olick* (1996) 49 Cal.App.4th 1194, 1199.)

In this case, plaintiffs obtained a judgment of $210,762.53, plus interest. MCA made no claim for affirmative relief, and did not prevail on its claim for a set off. Plaintiffs thus obtained a net monetary recovery within the meaning of section 1032, subdivision (a)(4). "A litigant with a straightforward net monetary recovery falls squarely within the first statutory definition and thus qualifies categorically as a prevailing party. 'It is clear from the statutory language that when there is a party with a "net monetary recovery" (one of the four categories of prevailing party), that party is

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[12] All references to section 1032 are to the Code of Civil Procedure.

entitled to costs as a matter of right [. . .].' [Citation.]" (*Wakefield v. Bohlin, supra,* 145 Cal.App.4th at p. 976; see also *Reveles v. Toyota by the Bay* (1997) 57 Cal.App.4th 1139, 1151, disapproved on other grounds in *Gavaldon v. DaimlerChrysler Corp.* (2004) 32 Cal.4th 1246, 1261 and *Snukal v. Flightways Manufacturing, Inc.* (2000) 23 Cal.4th 754, 775, fn. 6.) The trial court therefore erred in finding that MCA was the prevailing party.

I would affirm the judgment, except as to costs.

MOSK, J.