2d Civil No. B191608

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION 5

HLC PROPERTIES, LTD. and THOMAS E. O'SULLIVAN as TRUSTEE for the WILMA WYATT CROSBY TRUST,

Plaintiffs and Appellants,

vs.

MCA RECORDS, INC., MCA, INC., UMG RECORDINGS, INC., UMG RECORDS, INC., UNIVERSAL STUDIOS, INC., and GRP RECORDS, INC.,

Defendants and Respondents.

Appeal from the Superior Court of Los Angeles
Superior Court Case No. SC062601
Honorable Terry Friedman, Judge

APPELLANTS' REPLY BRIEF

LAW OFFICES OF MARK A. BRODKA
Mark A. Brodka, State Bar No. 105516
12100 Wilshire Boulevard, Suite 700
Los Angeles, California 90025
Telephone: (310) 820-4597

GREINES, MARTIN, STEIN & RICHLAND LLP
Kent L. Richland, State Bar No. 51413
Cynthia E. Tobisman, State Bar No. 197983
5700 Wilshire Blvd., Suite 375
Los Angeles, California 90036
Telephone: (310) 859-7811

Attorneys for Plaintiffs and Appellants
HLC PROPERTIES, LTD. and THOMAS E. O'SULLIVAN AS TRUSTEE FOR THE WILMA WYATT CROSBY TRUST

TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

TABLE OF CONTENTS
(continued)

TABLE OF CONTENTS
(continued)

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES
(continued)

TABLE OF AUTHORITIES
(continued)

TABLE OF AUTHORITIES
(continued)

TABLE OF AUTHORITIES
(continued)

TABLE OF AUTHORITIES
(continued)

English Cases

TABLE OF AUTHORITIES
(continued)

Page

State Statutes

Other Authority

INTRODUCTION

For over two decades, Bing Crosby's heirs enjoyed what they believed was the continuation of the uniquely close professional relationship that Bing had forged with the record companies that released his music. Then, in 1999, an audit revealed that MCA had been secretly underpaying millions in royalties. The Crosby heirs sued MCA to rectify this mistreatment.

From the outset, the Crosby heirs wanted a *jury* to determine whether their auditor's revelations had merit. They vigorously opposed MCA's attempts to obtain a bench trial. And when the trial court indicated that the accounting cause of action rendered the case equitable in nature, the Crosby heirs responded by *dismissing that claim* and again requesting a jury trial.

Yet the Crosby heirs never received the jury trial to which they were entitled. Instead, the trial court gutted the case in a series of summary adjudication orders and then conducted a bench trial of the surviving claims, ruling in MCA's favor on every disputed issue except those that MCA conceded.

This denial of the fundamental right to a jury trial is reversible error. MCA offers no meaningful response to the Crosby heirs' explanation that contract questions were at the root of every claim and carried with them an absolute right to a jury trial. MCA offers no response at all to the constitutional ramifications of the trial court's refusal even to permit a jury to decide the factually-overlapping legal issues first. This Court should reverse the judgement with directions that the trial court empanel a jury.

Moreover, the case that the jury hears on remand should include the claims erroneously dismissed via summary adjudication. For example, it is undisputed that the triggering of the 1986 CD Amendment's "most favored

nations" clause depended entirely upon the contents of contracts that MCA signed with other artists—information the Crosby heirs had no way of learning even when they audited MCA. Thus, the Crosby heirs could not possibly have been dilatory in the pursuit of their CD Amendment claims. This Court should reverse the trial court's order barring the Crosby heirs from establishing breaches of the CD Amendment that predate the statute of limitations period.

This Court should also reverse the order dismissing the Crosby heirs' fiduciary duty claims. Special circumstances like those present here—including the longstanding and important relationship between Bing Crosby, his heirs and the record companies—give rise to fiduciary obligations. At the very least, MCA owed limited fiduciary duties to track the CD Amendment's "most favored nations" clause and to render honest accountings. Indeed, MCA offers no response to either the Supreme Court precedent recognizing the existence of *limited* fiduciary duties, or to the policy reasons why such limited fiduciary duties must exist here.

Finally, MCA offers only the most half-hearted defense of its costs award. Under governing law, the Crosby heirs are entitled to an award of costs because they recovered a net monetary judgment and MCA took nothing. Thus, at a minimum, the judgment must be reversed so that Crosby's heirs may recover *their* costs.

ARGUMENT

I. DENIAL OF THE CROSBY HEIRS' CONSTITUTIONAL RIGHT TO A JURY TRIAL OF LEGAL ISSUES WAS *PER SE* REVERSIBLE ERROR.

A. Jury Trial Was Required Because The "Gist" Of The Case Was Legal: Every Claim Hinged On Disputed Contract Questions.

A jury trial is available as a matter of right where the "gist" of a case is legal in nature—that is, where the entitlement to a remedy depends upon an issue that was triable in a court of law in 1850, when the California Constitution was adopted. (AOB 21.) The instant case was essentially a contract dispute because, as the trial court recognized, "[t]he other causes of action depend entirely, or in part, on the determination whether MCA breached a contract with HLC." (42 CT 10274 [court identifies breach of contract as the "foundational claim"]; see also AOB 21-27.) Since breach of contract is a legal matter, the gist of the case was legal and the Crosby heirs had an absolute right to a jury trial. (AOB 21-32.)[1/]

In response, MCA does not dispute either that this case turned on contract questions or that there is usually a right to a jury trial of such issues. Instead, MCA argues that equitable claims that the Crosby heirs never took to trial (i.e., the *dismissed* accounting claim) or equitable defenses (i.e., equitable estoppel and laches) justify denial of a jury trial. (RB 24.) MCA also argues that the foundational contract issues could be decided by the court via the Crosby heirs' rescission claim. (*Id.* at p. 21.)

None of these arguments has merit.

[1/] By its silence, MCA implicitly concedes that denial of the right to jury trial requires reversal without a separate showing of prejudice. (See AOB 20.)

1. The "gist" of this action is breach of contract, not an accounting.

The trial court denied a jury trial because it concluded the case was essentially for an accounting since it "appears primarily to turn on a determination of the amount of royalties due." (35 CT 8531.) But the Crosby heirs abandoned their accounting claim. Nor was an accounting necessary. Resolution of every claim hinged on *contract* issues, such as the formation, interpretation, modification and performance of the parties' recording contracts. (AOB 25-27.) And, as in most breach of contract cases, a jury could determine the damages plaintiffs suffered. (*Id.* at p. 30.)

In response, MCA argues an accounting can be used not only to determine the amount paid, but also "whether the amount paid was proper." (RB 25.) MCA relies on *De Guere v. Universal City Studios, Inc.* (1997) 56 Cal.App.4th 482 (*De Guere*). *De Guere* is inapposite. In that case, the plaintiff *actually pled* a claim for an accounting. (*De Guere,* at pp. 487, 507.) Here, the Crosby heirs *dismissed* their accounting claim before trial. More important, every claim in *De Guere*—including the cause of action labeled "breach of contract"— depended upon accounting issues, such as "the classification of items as costs of production, rather than as expenses of distribution" and "improper practices related to distribution fees and expenses." (*Id.* at pp. 507-508.) *De Guere* provides no support for depriving the plaintiffs of a jury trial in the instant case, where classic contract issues drove the resolution of every claim.

The trial court had no basis to recast this case as an accounting, and no right to usurp the jury's fact-finding role under the aegis of conducting that accounting.

2. Even if accounting issues were presented, the predicate contract questions rendered the "gist" of this case legal.

Even if this case presented accounting issues, the trial court was incorrect in reasoning that the case was primarily an accounting since performing an accounting would resolve the contract issues. (35 CT 8531.) It was the resolution of the *contract questions* that dictated whether an accounting was necessary, not the other way around.

"There is no right to an accounting where none is necessary." (*Union Bank v. Superior Court* (1995) 31 Cal.App.4th 573, 594.) In other words, the facts and claims must demonstrate a need to examine the relevant books. (*See id.* at pp. 593-594 ["Since defendant owes no money to plaintiffs and did not deprive them of any moneys or the lawful use of the scanner, as a matter of law, the accounting cause of action must be dismissed"].)

Here, depending upon how the trier of fact resolved the contract issues, no examination of MCA's books may have been necessary. For example, the trial court believed MCA's evidence that the 15% of wholesale royalty stated in the 1943 Agreement was only intended to apply to shellacs. Accordingly, it never needed either to review MCA's books or to recalculate the royalties that MCA owed to Crosby on LPs and CDs. Because resolution of the contract issues was a necessary predicate to any accounting, the "gist" of the case was plainly contract. (Cf. *Arciero Ranches v. Meza* (1993) 17 Cal.App.4th 114, 124-125 (*Arciero*) [gist of case legal where necessary predicate to any relief at all, including equitable relief, was establishment of prescriptive easement—a legal issue].)

In any event, even if the "gist" of the case could somehow be considered an accounting and therefore equitable, any accounting should

have been conducted only *after* a *jury* resolved the predicate, entirely legal contract questions. (AOB 28-32; see also § I.B., *infra.*) That was what *De Guere* held: After concluding the "gist" of the action was an accounting, the court directed that a jury was required to decide the contract issues *first.* (See AOB 30-32.) Although MCA relies heavily on *De Guere* for propositions that do not apply here, it ignores the holding that plainly *does* apply—i.e., that even if the gist of the action is equitable, the legal issues have to be tried first *to a jury.* (See *De Guere*, *supra*, 56 Cal.App.4th at pp. 505-506.)

3. The rescission claim did not transform this fundamentally legal action into an equitable one.

MCA also argues that the Crosby heirs' rescission claim rendered the "gist" of the case equitable. (RB 21-24.) Not so. Even if the rescission claim were equitable, its presence had no affect on the fundamentally *legal* nature of this case.

The rescission claim was never, as MCA characterizes it, the Crosby heirs' "central" claim. (RB 21.) It couldn't be. Its resolution, like the resolution of every claim in this case, was entirely dependent upon the predicate determination of the core contract issues—issues that are indisputably legal in character. (See AOB 22-27 [citing authorities establishing that contract questions are legal, not equitable]; see also *Horsemen's Benévolent & Protective Assn. v. Valley Racing Assn.* (1992) 4 Cal.App.4th 1538, 1559-1560 [resolution of factual disputes regarding meaning of contract terms is a jury function]; *Collins Development Co. v. D.J. Plastering, Inc.* (2000) 81 Cal.App.4th 771, 777 [party entitled to jury trial of "claim . . . on a contract"]; *Escamilla v. California Ins. Guarantee Assn.* (1983) 150 Cal.App.3d 53, 57-58 [action hinging on dispute regarding meaning of contract terms was legal].)

As MCA admits, the Crosby heirs' "rescission claim was based entirely on their claim that MCA had materially breached the parties' contracts." (RB 21.) Exactly right. But the factually-overlapping contract issues—such as what were the contract terms and were they breached—are properly tried at law, not in equity. (See § I.B., *infra*; see also AOB 22-25, 29-30.) The mere presence of an equitable claim does not justify abrogation of this rule. (See *California Cas. Indem. Exchange v. Frerichs* (1999) 74 Cal.App.4th 1446, 1450 ["Notwithstanding that an action for declaratory relief is characterized as an action in equity, there is a right to a jury trial of material triable issues of fact concerning an inchoate breach of contract claim. . . . For example, if an insurance policy is ambiguous, and the resolution of the ambiguity turns on disputed extrinsic evidence, the dispute must be resolved by a jury upon demand"]; see also *Hughes v. Dunlap* (1891) 91 Cal. 385, 389-390 [mere fact that plaintiff has joined legal and equitable claims in single action cannot deprive him of constitutional right to jury trial of factually-overlapping legal issues]; § I.B., *infra*.)

Indeed, "[t]he right to a trial by jury is a right to have the jury try and determine *issues of fact*." (7 Witkin, Cal. Procedure (4th ed. 2005) Trial, § 91, p. 111, emphasis in original; see also *Koppikus v. State Capitol Commissioners* (1860) 16 Cal. 248, 254 [jury trial guaranteed where "an issue of fact is made by the pleadings"].) Where, as here, a court decides the factually-overlapping equitable issues, it necessarily decides the facts underlying the legal claims—thereby depriving a party of the constitutionally-required jury trial of those claims.

4. MCA's so-called equitable defenses had no affect on the legal "gist" of this action.

MCA is wrong that its laches and equitable estoppel defenses transformed the legal "gist" of this case. (RB 25-26.) MCA's defenses

were sideshows to the contract disputes that drove the resolution of the case. As such, their presence was irrelevant to the "gist" analysis.

a. The laches and equitable estoppel defenses provided no basis for the trial court to decide every disputed contract issue in this case—including issues that had nothing to do with MCA's defenses.

Even if the trial court had bifurcated for the purpose of deciding MCA's laches and equitable estoppel defenses (see RB 25-26), the judgment still would be indefensible because the trial court did far more than determine whether the Crosby heirs had been dilatory or were estopped from asserting the statute of frauds as a defense to MCA's claim that the 1943 Agreement had been amended in 1960. Rather, the trial court decided *the entire case*, including which contracts were operative, what their ambiguous terms meant, and whether (and when) they had been breached. The laches and equitable estoppel defenses did not give the trial court carte blanche to decide such issues—issues that had nothing to do with MCA's defenses.

b. Equitable estoppel is triable to a jury.

In any event, the presence of an equitable estoppel defense could not affect the legal "gist" of this case—because that defense is itself triable to a jury. Equitable estoppel arises "[w]henever a party has, by his own statement or conduct, intentionally and deliberately led another to believe a particular thing true and to act upon such belief." (Evid. Code, § 623.) Although called "equitable" because it originated in courts of equity, "it is not meant by this that [equitable estoppels] are not available in courts of law, or are cognizable only in courts of equity. Such estoppels were early

recognized in courts of law . . . ." (*Anglo-American Land, Mortgage & Agency Co. v. Lombard* (8th Cir. 1904) 132 Fed. 721, 733.)

By 1850, English common law courts were regularly adjudicating equitable estoppels. (See, e.g., *Pickard v. Sears* (1837) 112 Eng.Rep. 179; *Freeman v. Cooke* (1848) 154 Eng.Rep. 652; *Gregg v. Wells* (1839) 113 Eng.Rep. 35.) American law courts did the same. (See, e.g., *Hatch v. Kimball* (1839) 16 Me. 146, 1839 WL 714; *Platt v. Squire* (1850) 59 Mass. 551, 557; *Marshall v. Pierce* (1841) 12 N.H. 127, 1841 WL 1913 *5.)

California courts thus have long recognized that equitable estoppel is triable to a jury. (See, e.g., *Frahm v. Briggs* (1970) 12 Cal.App.3d 441, 444-446 & fn. 2 [held: jury trial of equitable estoppel improperly denied]; *Hudson v. Morgan & Peacock Properties* Co. (1959) 170 Cal.App.2d 328, 329-330 [same]; *Gunn v. Bates* (1856) 6 Cal. 263, 272 [equitable estoppel in action at law presents "facts for the jury and not matters of legal construction for the Courts"].)

MCA suggests that the Crosby heirs conceded that the trial court could sever and try the equitable estoppel defense without a jury. (RB 26, citing 2 RT H-13.) But the Trust's attorney never conceded that the trial court could decide, as it did, every disputed factual issue in the case under the aegis of the narrow equitable estoppel question. (See § I.B.3., *infra*.) In any event, since the quoted statement was made only by the Trust's attorney, it could have no impact on HLC's appellate rights.

* * * * *

The "gist" of the instant action was legal because the availability of any remedy at all (legal or equitable) depended upon the resolution of the predicate contract issues. Neither the presence of equitable defenses nor the supposed necessity of an accounting changes this fact. Accordingly, the

trial court erred in denying the Crosby heirs' persistent requests for a jury trial.

B. Even Assuming This Case Presented Both Legal And Equitable Issues, Any Common Factual Issues Had To Be Tried To A Jury *First*, Before A Bench Trial Of The Remaining Equitable Issues.

As explained in our opening brief, even if this case presented some equitable issues, the trial court erred by failing to permit a jury to try the factually-overlapping legal questions first. (AOB 28-32.) In response, MCA argues that trial courts have discretion to determine the order of trial where a case presents a mix of both legal and equitable issues. (RB 18.) This may be true in appropriate cases—i.e., where there is no factual overlap between the equitable and legal claims. But as both the federal courts and the better-reasoned California cases make clear, trial courts cannot exercise discretion to try equitable issues first if their resolution will deprive a party of his right to a jury trial of the factually-overlapping legal issues. (AOB 29-32.)

Put differently, a trial court abuses its discretion *as a matter of law* by ordering trial to proceed in a manner that deprives a party of its constitutional right to a jury trial. (See, e.g., *Martin v. County of Los Angeles* (1996) 51 Cal.App.4th 688, 698 ["The denial of the right to jury trial is reversible error per se"]; cf. *Whitney's at the Beach v. Superior Court* (1970) 3 Cal.App.3d 258, 271 ["Since under the circumstances the discretion of the court could be exercised legally in only one way it was an abuse of discretion to deny the motion and make the order which it did"].)

That's what happened here. All of the Crosby heirs' claims required resolution of the core contract questions, and those questions should have been decided by a jury in the first instance.

1. Although there is a split in California authority regarding the proper order of trial where a case presents factually-overlapping legal and equitable issues, the better-reasoned cases require the legal issues to be tried to a jury first.

California authority is split as to the proper order of trial when a case involves factually-overlapping legal and equitable issue; it is not true, as MCA insists (RB 19), that all California decisions endorse the equitable-first procedure. As we now discuss, the California Constitution requires that where there is a factual overlap, the legal issues must be tried to a jury first. MCA does not cite a single case suggesting that the opposite approach passes constitutional muster—with good reason, since none exists.

a. The California Supreme Court has held that jury trial of legal issues must precede bench trial of factually-overlapping equitable claims.

The California Supreme Court has held on a number of occasions that where an action presents both legal and equitable issues, the California Constitution requires the legal issues to be tried first to a jury. (See AOB 29.) These cases remain prevailing law until they are overruled by the California Supreme Court. (E.g. *People v. Haynes* (1998) 61 Cal.App.4th 1282, 1298 [“‘the doctrine of stare decisis compels lower court tribunals to follow the Supreme Court whatever reason the intermediate tribunals might have for not wishing to do so. . . . There is no exception for Supreme Court cases of ancient vintage’”].)

MCA tries to minimize these holdings, while at the same time placing great reliance on *dicta* in *Raedeke v. Gibralter Sav. & Loan Assn.* (1974) 10 Cal.3d 665 (see AOB 30 fn. 11). MCA claims that none of these cases stand for the proposition that legal claims must be tried first to a jury.

(RB 19.) But the *holdings* of those cases require that legal issues be tried first. Indeed, the equitable-first approach used by the trial courts in *Hughes v. Dunlap* (1891) 91 Cal. 385 (*Hughes*) and *Donahue v. Meister* (1891) 88 Cal. 121 (*Donahue*) would have required affirmance if it were constitutionally permissible:

1. In *Hughes*, the plaintiff sought damages for trespass (a legal claim) and an injunction against future trespass (an equitable claim). (*Id.* at p. 387.) A jury made factual findings in the defendant's favor, but the trial court rejected those findings and awarded damages and an injunction for the plaintiff. (*Id.* at p. 388.) The Supreme Court reversed. It held that although legal and equitable remedies may be sought in the same action, no deprivation of rights could flow from such a joinder. Thus, because an action for damages for past trespasses is "clearly . . . legal," a party "cannot be deprived of a jury trial" in such an action. (*Ibid.*) The Court explained:

> In the case at bar, if the plaintiff had merely asked for damages caused by the alleged acts of the defendant, the action would have been the common action of trespass, in which defendant, of course, would have been entitled to a jury; does the fact that he also prayed for an injunction take away from him the right to have the *real issues* of fact tried by a jury? Of course, it is always for the judge sitting as a chancellor to determine whether, when certain rights are established, he will grant an equitable remedy prayed for, or compel a party to be satisfied with his legal remedy; but when the asserted rights upon which *any* remedy must rest are legal rights, and cognizable in a court of law, must not those rights be determined according to the methods of a common-law court? And in such a case can a party be deprived of his

constitutional privilege of a jury? (*Id.* at p. 389, original emphasis.)

The *Hughes* court answered "no." It stated that "'when the parties are in dispute concerning their legal rights,'" equitable relief will not be granted "'*until* the right is established *at law.*'" (*Ibid.*, emphasis added.) The *Hughes* court went on to state that if the right to an equitable remedy "'depend[s]'" on or is "'based upon'" issues of fact commonly triable at law, these issues must be determined by the jury. (*Id.* at pp. 389-390.) The court noted that the jury must determine these issues *before* the court can "'shape the decree.'" (*Id.* at p. 390.)

MCA is wrong in stating that the *Hughes* court failed to address whether a party can be deprived of a jury trial of legal issues when a case involves both legal and equitable claims. (RB 19.) In fact, the *Hughes* court explicitly stated:

> It has long since been held that under our system a legal and equitable remedy may be sought in the same action; but each remedy must be governed by the same law that would apply to it if the other remedy had not also been asked for. An action to recover damages for past trespasses is as clearly a legal remedy as any that could be named; and it is an action in which a party cannot be deprived of a jury trial. For this reason, therefore, the judgment and order must be reversed. (*Hughes, supra,* 91 Cal. at p. 388.)

It is difficult to imagine a more explicit holding that a court cannot usurp a jury's decision-making in a mixed legal/equitable case.

2. In *Donahue*, the plaintiff filed an equitable action to quiet title to real property, and the defendant filed a legal counterclaim for ejectment. (*Donahue, supra,* 88 Cal. at p. 123.) The defendant sought a jury trial of

the common factual question of entitlement to possession, but the trial court refused and found for the plaintiff. (*Id.* at pp. 123-124.) Again, the Supreme Court reversed. It reasoned that even though the plaintiff had sought an equitable remedy for an equitable claim, the defendant had raised a question regarding the title to the land—an historically legal question, triable to a jury. (*Id.* at pp. 124-127.) Accordingly, the defendant had a right to a jury trial of the question of title. (*Id.* at pp. 124, 126-127.)

MCA argues that *Donahue* held only that the Legislature could not defeat a litigant's historic right to a jury by creating new proceedings in equity. (RB 19.) But that conclusion goes straight to the heart of the order-of-trial issue. The *Donahue* court made clear that even where a case is brought in equity and will yield equitable remedies, a party has a right to a jury trial of the legal issues first. And it explained what courts should do in such a case: "[I]f in such a suit"—that is, one in which the plaintiff is seeking "the equitable interposition of the court"—"issues arise which are clearly legal and cognizable in a court of law, the code does not take away the right to have such issues tried by a jury." (*Donahue, supra,* 88 Cal. at p. 124.) As to the order-of-trial issue, *Donahue* concluded that "*[u]pon* the verdict of the jury" the "court will *then* act" to determine the equitable issues, if any remain. (*Id.* at p. 126, emphasis added.)

3. In *Curtis v. Sutter* (1860) 15 Cal. 259, the plaintiff brought an equitable action to quiet title and the defendant brought a legal claim challenging the validity of the plaintiff's title. The Supreme Court stated that "questions purely of a legal character in relation to the title" are triable to a jury, indicating that those issues would be tried "*before*" adjudication of the plaintiff's claim to an injunction. (*Id.* at pp. 262-263, emphasis added.)

MCA argues that *Curtis* only involved the dissolution of a preliminary injunction—not the right to a jury trial. (RB 19.) But the Supreme Court affirmed on the ground that before the injunction could issue, the question of title should be determined *by a jury*. (*Curtis v. Sutter, supra,* 15 Cal. at p. 263.) The Supreme Court explained that although the statutory quiet title action was equitable in nature, that fact may not deprive a party of the right to a jury trial of legal issues:

> It does not follow from the fact that the suit is brought in equity, that the determination of questions purely of a legal character in relation to the title, will necessarily be withdrawn from the ordinary cognizance of a Court of law. The Court sitting in equity may direct, whenever in its judgment it may become proper, an issue to be framed upon the pleadings and submitted to the jury. Upon the verdict of the jury, if a new trial be not granted, the Court will then act, by either dismissing the bill, or by adjudging the adverse estate or interest claimed to be invalid, and of no effect, and awarding a perpetual injunction against its assertion to the property in question. There is no difficulty in so conducting a suit, under the statute, *as to fully protect the legal rights of the parties*, and at the same time to secure the beneficial result afforded by a Court of equity. . . . " (*Ibid.*, emphasis added.)

In other words, where a case presents both legal and equitable issues, the proper procedure is to "fully protect the legal rights of the parties" by first trying the legal issues to a jury.

b. The better-reasoned decisions by the courts of appeal require jury trial of legal issues first.

There is a split among the decisions of the courts of appeal on whether a trial court may lawfully conduct a bench trial of equitable issues before a jury trial of legal issues where the factual predicate of the issues overlaps. However, the better-reasoned cases hold that factually-overlapping legal issues must be tried to a jury first, explaining that to do otherwise would violate a party's constitutional right to trial by jury. The cases permitting a bench trial first never even confront the constitutional issue.

In *Arciero*, *supra*, 17 Cal.App.4th 114, the plaintiff sought damages for trespass (legal) and an injunction to prevent future trespass (equitable), and defendants cross-claimed to quiet title (equitable). (*Id.* at p. 123.) The Court of Appeal held that the order bifurcating the equitable issues and setting them for bench trial before trial of legal issues erroneously denied defendants right to jury trial of overlapping legal claims. The *Arciero* court noted that "'[w]here legal and equitable issues are joined in the same action the parties are entitled to a jury trial on the legal issues.'" (*Ibid.*) Thus, the *Arciero* court reasoned that the establishment of a prescriptive easement was a condition precedent to the granting of *any* relief (including equitable relief), and that such a determination as to the existence of a prescriptive easement was historically an issue of law that carried with it a right to a jury trial. (17 Cal.App.4th at pp. 124-125.) The court concluded that although both an equitable and legal remedy were available to protect the appellants' property interest, "in either event, appellants would have been relegated to an action at law to *establish* their right to a prescriptive easement in the farm road. The right to trial by jury existed in actions at law in 1850 and

thus continues to be guaranteed by our Constitution today." (*Id.* at p. 125, original emphasis.)

MCA claims *Arciero* is distinguishable because it (1) "recognizes" that equitable issues are tried first, and (2) held that a jury trial was required because the case presented only legal issues. (RB 20 & fn. 6.)
This is sophistry. Although the *Arciero* court noted the existence of the equitable-first cases, it did not follow them. (*Arciero*, *supra*, 17 Cal.App.4th at pp. 123, 125.) *Arciero* held that although "[t]he case currently before us presents both equitable and legal issues," the predicate legal issue of entitlement to an easement had to be first tried by a jury. (*Id.* at pp. 123-125 [reversing because "appellants were deprived of their constitutional right to have a jury decide whether they had obtained a prescriptive easement"].)

Other courts of appeal employ similar reasoning. In *Selby Constructors v. McCarthy* (1979) 91 Cal.App.3d 517, the plaintiff sued for breach of a construction contract (legal) and to enforce a mechanic's lien (equitable). (*Id.* at p. 520.) Over defendants' objection, the case was tried to the court. (*Id.* at pp. 522-524.) The Court of Appeal reversed, holding that "'[i]t is settled in this state that where legal and equitable issues are joined in the same action the parties are entitled to a jury trial on the legal issues.'" (*Id.* at p. 526.) Thus, notwithstanding the equitable mechanic's lien claim, a jury trial was required because "[t]he quality of plaintiff's contractual performance could only be adjudicated with reference to the provisions of the contract—whether the result related to the relief sought of a money judgment or enforcement of the lien." (*Ibid.*) In other words, "[t]he validity of the underlying claim was a legal issue which defendants were entitled to have resolved by a jury." (*Id.* at p. 527; see also *Farrell v. City of Ontario* (1919) 39 Cal.App. 351, 356 ["where, as under our

procedure, parties are permitted to submit both their legal rights and their equitable rights to the same tribunal for adjudication at the same time, the right to a jury trial with respect to the former, which was adequately safeguarded under the old system, should be equally respected under the new. That would seem to be the effect of our constitutional guaranty"].)

Unlike the cases described above, MCA's decisions endorsing the equitable-first approach make no attempt to explain why the equitable-first procedure does not result in deprivation of the constitutional right to a jury trial on legal issues. (See, e.g., *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.) Indeed, none of the cases even identifies the issue.

In short, MCA's cases offer no constitutionally tenable response to the point that the equity-first approach denies the right to jury trial. (See RB 19-20.) As we next discuss, the constitutional concerns that drove the better-reasoned California decisions are echoed in the federal courts, which uniformly and categorically reject the equitable-first procedure.

2. Uniform federal case law is persuasive authority that legal issues must be tried first to a jury.

The federal cases are unanimous: Legal issues must be tried by a jury before equitable issues are tried to the court. (See AOB 29-30.) MCA does not dispute this. Instead, MCA argues the federal cases should be ignored. (RB 20.) But the California Supreme Court regularly cites federal cases as persuasive authority when interpreting California's jury trial right. (See, e.g., *People v. Collins* (2001) 26 Cal.4th 297, 304-312 [relying extensively on federal case law to determine whether involuntary waiver of right to jury trial violated California Constitution and constituted "a 'structural defect in the proceedings' requiring that the judgment of conviction be set aside without the necessity of a determination of

prejudice"]; see also *Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159, 1187, citing *Johansen v. Combustion Eng'g, Inc.* (11th Cir. 1999) 170 F.3d 1320, 1331; *Webster v. Superior Court* (1988) 46 Cal.3d 338, 354, quoting *Foust v. Munson S.S. Lines* (1936) 299 U.S. 77, 84.)

That the federal courts have categorically rejected the equitable-first approach as violating the federal Constitution's Seventh Amendment right to jury trial has significant persuasive value here. Contrary to MCA's argument, the federal and California jury trial rights are cognate: Applicability of each is determined by an historical inquiry into whether a right to jury trial existed under English common law at the time the respective right was adopted—1850 in California, and 1791 in the United States. (*Compare C & K Engineering Contractors v. Amber Steel Co.* (1978) 23 Cal.3d 1, 8 [right to jury trial is "the right as it existed at common law in 1850, when the Constitution was first adopted"] with *City of Monterey v. Del Monte Dunes, Ltd.* (1999) 526 U.S. 687, 708 [in determining right to jury trial, "historical analysis" is required "'to preserve the substance of the common-law right as it existed in 1791'"].)

Since the issue presented here does not depend upon the date the historical right to jury trial arose, the federal cases are strong authority for the proposition that the right to jury trial should apply here. Indeed, California courts frequently rely on federal authority to determine whether there is a right to jury trial under the California Constitution, with the recognition that the relevant date is different, but the analysis is otherwise the same. (See, e.g., *Wisden v. Superior Court* (2004) 124 Cal.App.4th 750, 755-757.)

The cases MCA relies upon not only do not indicate otherwise, they affirmatively establish that it is appropriate for California courts to consult federal case law in construing the parallel jury trial right that arises under

the California Constitution. Specifically, in *Jehl v. Southern Pac. Co.* (1967) 66 Cal.2d 821 (cited at RB 20), the California Supreme Court overruled its earlier decision in *Dorsey v. Barba* (1952) 38 Cal.2d 350, which had held that the additur procedure violated the right to a jury trial. In so doing, *Jehl* referred extensively to federal case law construing the right to a jury trial. (See, e.g., *Jehl, supra,* 66 Cal.2d at p. 831 & fns. 12, 13.) *Jehl* further recognized that *Dorsey* had also "relied in large part" on United States Supreme Court precedent. (*Id.* at pp. 827-828 [citing *Dimick v. Schiedt* (1935) 293 U.S. 474].) Notably, *Jehl* overruled *Dorsey* not because *Dorsey* had relied on federal authority, but because *Jehl* disagreed on the merits with the United States Supreme Court's historical analysis of the treatment of new trials at common law. (*Id.* at pp. 828-833.)

MCA's other cited case—*County of El Dorado v. Schneider* (1987) 191 Cal.App.3d 1263, 1271—is utterly inapposite. (See RB 20.) There, a plaintiff in a state case claimed a violation of his federal right to a jury trial. The Court of Appeal held only that "in this state court action, defendant has no right to a jury trial under the Seventh Amendment." (*El Dorado,* at p. 1272.)

In sum, the uniform federal case law is compelling authority that the jury-first rule should apply under the California Constitution.

3. The Crosby heirs never conceded that the trial court could properly exercise its discretion to deny a jury trial on the disputed contract issues.

MCA argues that the Crosby heirs conceded that the trial court had discretion to sever the equitable issues and to try those issues first without a jury. (RB 15.) But MCA relies on statements made by the Trust's attorney at a hearing that took place before the Crosby heirs dismissed their equitable claims for accounting and constructive trust—a time when the

case had more of an equitable cast to it. (See RB 15, 26, citing 2 RT H-5, 8, 13.)[2/] In any event, although the Trust's attorney noted the trial court's discretion to try equitable issues first, he unequivocally argued that the gist of the case was legal (i.e., a contract dispute) and that the legal issues had to be tried first to a jury before any bench trial of the remaining equitable issues. (See 2 RT H-3-5, 8-9, 13.)

At most, the Trust's attorney conceded that the trial court could properly try the equitable estoppel question first. (2 RT H-13.) But as discussed above, the trial court did far more than that; it tried the entire case. (See § I.A.4.a., *supra*.) The Trust's attorney never conceded the trial court could properly do that, and he certainly never conceded that doing so would be anything other than an abuse of discretion.

Construing the Trust attorney's general statements regarding the trial court's discretion as a waiver of the Trust's right to a jury trial of the core legal issues that underlay all of the claims in this case would run afoul of both Code of Civil Procedure section 631 and the Supreme Court's recent decision in *Grafton Partners L.P. v. Superior Court* (2005) 36 Cal.4th 944. As the *Grafton* court explained, because the right to a jury trial is "fundamental," it may be waived "*only* as provided in [section 631]." (*Grafton,* at p. 951; see also *id.* at p. 956 [section 631 provides "strict and exclusive requirements for waiver"].) Although section 631 permits a waiver by "oral consent," that principle has been applied only where waiver was clear and unequivocal—far different from what occurred here.[3/]

[2/] Of course, statements made by the Trust's attorney can have no affect on HLC's appellate rights.

[3/] See, e.g., *Greenstone v. Claretian Theol. Seminary* (1958) 158 Cal.App.2d 493, 499 ["the fact of waiver not only appears from the

(continued...)

The offhand statements by the Trust's attorney don't come close to the statute's formal requirements. Even as he acknowledged the trial court's discretion, the Trust's attorney urged the trial court to empanel a jury to try the contract issues first. After the trial court bifurcated the equitable issues, the Trust (along with HLC) dismissed the accounting and constructive trust claims and moved for a jury trial. (AOB 17, 28 fn. 10.) When the trial court denied that motion, the Crosby heirs filed a petition for writ of mandate. (*Id.* at p. 18 fn. 6.) There was no waiver of jury trial here. (See *Grafton, supra*, 36 Cal.4th at pp. 956, 959 [courts must "resolve doubts in interpreting the waiver provisions of section 631 in favor of a litigant's right to jury trial"].)

II. THE SUMMARY ADJUDICATION ORDERS WERE ERRONEOUS.

A. MCA Applies The Wrong Standard Of Review.

MCA repeatedly argues that if the Crosby heirs contend the trial court's summary adjudication orders were erroneous, they should be challenging the "factual findings" that the trial court made in support of those orders. (See, e.g., RB 28, 30, 31, 34.) These arguments betray a fundamental misunderstanding of appellate review of summary adjudication.

[3/] (...continued)
reporter's transcript of the oral proceedings referred to but the findings expressly recite that 'all counsel stipulated that there was no longer any right to a jury, and the jury thereafter remained in an advisory capacity only'"]; *Ford v. Palisades Corp.* (1950), 101 Cal.App.2d 491, 499 [trial court's "findings specifically recite what took place, and state that plaintiff 'consented to the discharge of said jury.' We think this was sufficient compliance with the statute. Further, the reporter's transcript shows precisely that plaintiff waived a trial by jury by oral consent. . . . The purpose of the statute was served"].

"[T]he trial court's role in deciding a motion for summary judgment involves no findings of fact. The court's role is limited to determining whether there is a triable issue of fact." (*Soto v. State of California* (1997) 56 Cal.App.4th 196, 199.) Because review of that determination is a question of law, the reviewing court is "not bound by the trial court's stated reasons." (*Ibid.*; see also *Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 67-68 [no deference should be given to findings supporting summary judgment order].) Thus, there is no reason for the Crosby heirs to challenge the trial court's summary adjudication "findings."

The question for this Court is whether, viewed in the light most favorable to the Crosby heirs, "the evidence and inferences would allow a reasonable trier of fact to find the underlying fact in favor of a plaintiff." (*Alexander v. Codemasters Group Limited* (2002) 104 Cal.App.4th 129, 139.) Put differently, "the evidence must be incapable of supporting a judgment for the losing party." (*Binder v. Aetna Life Ins. Co.* (1999) 75 Cal.App.4th 832, 838.) The moving party's burden is "'akin to the burden of an appellant in proving there is no substantial evidence in support of a judgment.'" (*Rio Linda Unified School Dist. v. Superior Court* (1997) 52 Cal.App.4th 732, 739.)

MCA compounds its erroneous approach: Despite the presence of conflicting evidence, MCA incorrectly summarizes that evidence in the light most favorable to it, rather than to the Crosby heirs. (Compare RB 9 ["[s]ince the CD Amendment was executed, MCA used only two methods for calculating royalties on CDs"] with AOB 12-13 [describing evidence of additional methods of CD royalty computation used by MCA].) Because the standard of review requires the prevailing party below to demonstrate "that there is no evidence to support an element of the opponent's case," on appeal, that party must "set forth all the material evidence on the point and

not merely the evidence favorable to it." (*Rio Linda, supra*, 52 Cal.App.4th at pp. 739-740, emphasis added.) "If the evidence is in conflict, the factual issues must be resolved by trial." (*Binder, supra,* 75 Cal.App.4th at p. 839.)

MCA's approach improperly stacks the summary adjudication evidence in its favor. Viewed in the proper light, the evidence unquestionably would have supported a judgment in the Crosby heirs' favor.

B. The Trial Court's Factual Findings After The Bench Trial Do Not Render The Crosby Heirs' Challenge To The Summary Adjudication Orders Moot.

MCA also argues that the trial court's resolution of the facts in its trial of the equitable issues renders the Crosby heirs' appeal of the summary adjudication orders moot. (RB 26.) But, as explained above, the trial court never should have conducted a bench trial—or at least it should have first submitted the factually-overlapping legal issues to a jury. For that reason, the findings made at that trial are beside the point. Since the case must be remanded for a new trial by a jury, that jury must be permitted to hear all of the Crosby heirs' claims—including those erroneously eliminated from the trial by the lower court's summary adjudication orders.

C. The Trial Court's Grant Of Summary Adjudication Eliminating The Crosby Heirs' Claim For Breach Of Fiduciary Duty Was Error.

1. Special circumstances such as those shown by the facts proffered below render an artist's relationship with his marketers fiduciary in nature.

As explained in our opening brief, while a "typical distribution contract, negotiated at arm's length" does not give rise to fiduciary duties, the relationship between the record companies and Crosby (and his heirs)

was not typical. (AOB 33-43.) Bing Crosby's legendary music career launched a generation of record companies. (*Id.* at pp. 3-9.) Although the names of those companies changed—i.e., 11 years before Bing died, MCA acquired Decca Records—the close relationship between them and Bing Crosby (and his heirs) continued. (*Ibid.*) Substantial evidence established that the parties' historically close professional relationship and unique contracts created a relationship akin to a joint venture that gave rise to fiduciary duties. (*Id.* at pp. 38-40.)

In response, MCA argues that *Wolf v. Superior Court* (2003) 107 Cal.App.4th 25 (*Wolf*), disposes of the Crosby heirs' fiduciary duty claim. (See RB 39-41; 33 CT 8034.) Not only does *Wolf* fail to support MCA, it actually supports the Crosby heirs.

In *Wolf*, the plaintiff author sold to Disney the rights to his novel in exchange for a flat fee plus a percentage of the net profits from any movie based on the novel and five percent of the gross receipts from merchandise. (*Wolf, supra*, 107 Cal.App.4th at pp. 27-28.) Disney later developed and produced a movie based on the novel. (*Id.* at p. 28.) The plaintiff had no input into the script. He had nothing to do with production of the movie. And he "concede[d] [that his] complaint [was] devoid of allegations showing an agency, trust, joint venture, partnership or other 'traditionally recognized' fiduciary relationship." (*Id.* at p. 30.)

On these facts, *Wolf* held that a right to contingent compensation without more isn't enough to create a fiduciary relationship. (*Ibid.*) But the *Wolf* court expressly left open the possibility that if there were "other indicia of a confidential relationship," a contingent compensation contract *could* give rise to fiduciary duties. (*Id.* at p. 27 ["a contingent entitlement to future compensation within the exclusive control of one party does not make that party a fiduciary *in the absence of other indicia of a*

confidential relationship," emphasis added]; see also *id.* at pp. 30-31 ["contractual right to contingent compensation . . . has never, *by itself*, been sufficient to create a fiduciary relationship," emphasis added].)

Wolf distinguished the line of cases—relied upon by the Crosby heirs here (see AOB 34)—holding that fiduciary duties arise where the parties' relationship is akin to a joint venture. (*Id.* at pp. 31-33, distinguishing *Stevens v. Marco* (1956) 147 Cal.App.2d 357, *Nelson v. Abraham* (1974) 29 Cal.2d 745.) *Wolf* expressly explained that "[i]n contrast to the facts in *Nelson* and *Stevens*, there are no allegations in the instant complaint of the formation of a joint venture or a relationship 'akin' to a joint enterprise." (*Wolf, supra*, 107 Cal.App.4th at p. 32.)

Thus, *Wolf* recognized the continuing vitality of the California case law holding that the presence of special circumstances (like those in the instant case) gives rise to fiduciary duties. (See AOB 33-35.)[4/] Moreover, in no respect did *Wolf* part company with the out-of-state cases that echo this conclusion and apply it in the artist/marketer context. (See *id.* at pp. 36-38.)[5/] As those cases make clear, an informal fiduciary relationship

---

[4/] MCA's argument that the Legislature considered but did not enact legislation that would have imposed a blanket fiduciary relationship on all record companies and artists (see RB 42) is irrelevant. The Legislature did nothing to dilute the body of case law establishing that special circumstances indicating a confidential or joint-venture-like relationship, such as the evidence showed here, render the relationship between a record company (or other publisher) and an artist fiduciary in nature.

[5/] MCA's suggestion that the Crosby heirs' citation of out of state cases is irregular lacks merit. (RB 41.) California cases (including *Wolf*) often consult out-of-state authority to help determine when fiduciary duties arise. (See, e.g., *Wolf, supra*, 107 Cal.App.4th at p. 33 [citing New York case law]; *Nelson v. Abraham, supra*, 29 Cal.2d at p. 750 [New York]; *Universal Sales Corp. v. Cal. etc. Mfg. Co.* (1942) 20 Cal.2d 751, 765 [Oklahoma].)

can exist between a record company and an artist based on the longevity and importance of their relationship. (*Ibid.*, citing *Apple Records, Inc. v. Capitol Records, Inc.* (App.Div. 1988) 137 A.D.2d 50, *Ahern v. Scholz* (1st Cir. 1996) 85 F.3d 774, *Licette Music Corp. v. A.A. Records, Inc.* (App.Div. 1993) 196 A.D.2d 467.)

MCA's attempts to distinguish these cases fail:

First, MCA argues that *Apple Records, supra,* "was decided at the pleadings stage, and the court simply found that the pleadings sufficiently alleged that a special relationship existed, not that one existed as a matter of law." (RB 41.) So what? The Crosby heirs do not claim their evidence required the trial court to find that a fiduciary relationship existed *as a matter of law*; they assert only that a jury should have been permitted to weigh the conflicting evidence and to decide the issue. *Apple Records* instructs that, if supported by the evidence, facts like those here establish a special relationship giving rise to fiduciary duties.

Second, MCA notes that after *Apple Records*, New York courts have rejected claims that a record company owed a fiduciary duty to an artist. (RB 41.) Again, so what? The Crosby heirs have never claimed that *every* record company/artist relationship is fiduciary in nature. That other courts have adjudicated cases where the parties' relationships lacked the special circumstances present in *Apple Records* neither undercuts the *Apple Records* test nor demonstrates the absence of a fiduciary relationship in light of the circumstances present here.

In fact, the cases that MCA cites recognize the general rule that special circumstances give rise to fiduciary duties, and they distinguish the cases where such circumstances were present. (See e.g., *Sony Music Entm't Inc. v. Robison* (Feb. 26 2002, 01 CIV. 6415) __ F.Supp. __ (2002 WL272406) *3 ["The cases cited by Defendants are distinguishable because

they all involve special relationships that are not applicable in this situation E.g., *CBS, Inc. v. Ahern*, 108 F.R.D. 14 (S.D.N.Y.1985) (involving existence of special account for plaintiff's benefit); *Apple Records, Inc. v. Capitol Records, Inc.*, 137 A.D.2d 50, 529 N.Y.S.2d 279 (1st Dept.1988) (involving long enduring relationship). Dixie Chicks' assertions that they placed 'trust and confidence' in Sony over the six years of their relationship beginning with the 1995 'Demo Agreement' (citation) are not sufficient to create fiduciary duties in the absence of a special relationship"].)

Third, MCA claims that *Apple Records* is distinguishable because the plaintiffs in the instant case had the contractual right to audit the record companies. (RB 41.) But there is no reason why the presence of contractual audit rights should categorically negate the inference of a fiduciary relationship that otherwise arises from the parties' historically close professional relationship and unique contract terms. A fiduciary relationship can be present even where a written contract expressly disclaims the creation of a joint venture. (See *Universal Sales Corp.*, *supra*, 20 Cal.2d at pp. 764-765.) In other words, while the provisions of the parties' contracts may be relevant to the question whether a fiduciary relationship exists, they are not determinative. There is nothing necessarily inconsistent with the right to audit and the presence of a fiduciary relationship.

Fourth, MCA attempts to distinguish *Ahern v. Scholz*, *supra*, 85 F.3d 774 and *Licette Music Corp. v. A.A. Records, Inc.*, *supra*, 196 A.D.2d 467, on the ground that the defendants in those cases "were either managers or partial owners of the plaintiff" companies. (RB 42.) Again, such facts simply go into the calculus performed by the trier of fact in determining the existence of a fiduciary relationship; they do not resolve that issue as a matter of law.

In sum, there is sound authority that in appropriate circumstances a fiduciary relationship arises between an artist and the entities that bring his art to market. MCA's categorical statement that "recording contracts do not create a fiduciary duty between an artist and record company" (RB 48) is simply wrong.

2. The Crosby heirs' evidence would have supported a finding that the parties formed a fiduciary relationship "akin to a joint venture".

a. The opening brief relies only upon evidence as to which the trial court did not sustain objections.

As a threshold matter, MCA claims the opening brief relies upon evidence as to which the trial court sustained objections. (RB 43.) This is incorrect. The trial court's evidentiary rulings are explicit regarding whether MCA's objections were sustained entirely or only *partially*. (See 33 CT 8032-8033.) The opening brief only relies upon evidence that the trial court did not exclude.[6/]

[6/] For example, the opening brief cites ¶ 5 of Crosby biographer Gary Giddens' declaration describing the uniquely close professional relationship between Crosby and Jack Kapp. (See AOB 2-3, citing 16 CT 3742.) That paragraph contained the following six sentences: "There is no question but that Crosby and Kapp had a uniquely confidential relationship that lasted eighteen years, until Kapp's death in 1949, without which Decca Records would never have come into existence. Kapp began producing Crosby in 1931 for Brunswick Records. When Kapp and Lewis formulated the idea of starting a new company in the depth of the Depression, their primary asset was Crosby's extraordinary loyalty to Kapp. According to memos between Kapp and Lewis, Crosby pledged to wait until the new label was launched and sign an exclusive contract with it in exchange for a $10,000 guarantee—this at a time when the leading record company, RCA-Victor, offered him a far larger amount to sign with it. To emphasize

(continued...)

b. The Crosby heirs presented substantial evidence that a fiduciary relationship was created that continues to this day.

MCA argues that outside the parties' contracts, the Crosby heirs' fiduciary duty claim rested entirely on Crosby biographer Gary Giddens' statement that Crosby and Kapp had a unique relationship that lasted until Kapp died, and the fact that Crosby was an important recording artist. (RB 44.) But as the case law discussed above establishes, such evidence of a longstanding and important relationship is sufficient to support a finding of a fiduciary relationship. (See § II.C.1., *supra.*)

In any event, MCA ignores the bulk of the Crosby heirs' evidence, which established that although the genesis of the Crosby heirs' relationship with the record companies was Crosby's extraordinary collaboration with Kapp, that special relationship spawned a generation of record companies as well as contracts that persist to this day. (AOB 3-7, 9, 38-41.) While the relationship between Crosby and Kapp ended upon Kapp's death, their

---

[6/] (...continued)
Decca's debt to Crosby, the Los Angeles office was constructed at Crosby's feet, at 5505 Melrose Avenue, across the street from the south gate of Crosby's film studio, Paramount Pictures. Crosby remained an exclusive Decca artist for 20 years." (16 CT 3742.)

MCA made multiple objections to ¶ 5, including that the "declarant lacks personal knowledge," that "the testimony does not truly offer an opinion," and that the hearsay rule barred testimony referring "to 'memos between Kapp and Lewis' for the truth of the matter asserted therein." (See 5 Supp. CT 11683.) The trial court only sustained MCA's objection to ¶ 5 as follows: "sustain—all statements attributed to memos between Kapp & Lewis constitute inadmissible hearsay." (33 CT 8033.) The fifth sentence is the only part of ¶ 5 that contains any "statements attributable to memos between Kapp & Lewis." The opening brief therefore relies only upon the material set forth in the remaining five sentences.

legacy of record companies (i.e., Decros: Decca + Crosby) and the close relationship between the Crosby heirs and those record companies continued. (*Ibid.*)

MCA downplays the evidence of the cooperative relationship of mutual benefit that the recording contracts created. (RB 44-45.) But that evidence showed that those contracts gave Crosby the right to thorough joint control of the product. Crosby had the right to veto songs and collaborators, as well as the right to control who released his albums. (AOB 4-6, 38-39.) And the record companies were prohibited from releasing a two-sided record with recordings by anyone other than Crosby on both sides. (*Id.* at p. 39.)

Morever, the contracts obligated the record companies to exploit creative content for both parties' joint profit (see AOB 39), another indication of a fiduciary relationship. (See *Stevens v. Marco*, *supra*, 147 Cal.App.2d 357, 374 ["The royalty agreements between the parties [were] not . . . merely 'a contract of assignment and sale[,' but] plainly indicate[d] that [defendant] was to exploit and develop the use of the patents for their joint profit and that any subsequent improvements made by either would accrue to their mutual benefit"].)

The contracts here contained terms similar to those that the *Stevens* court concluded can lead to an inference of a fiduciary relationship. Under each contract, all profits are mutual; MCA must share the profits it derives from the sale of Bing Crosby records in the form of royalties or otherwise (see 16 CT 3834, 3844-3848, 3857-3858), and it must pay Crosby a share of the net proceeds from the public performance and broadcasting of the masters (see 16 CT 3835, 3847).[7/]

[7/] That some of the profit-sharing takes the form of royalties is (continued...)

In addition, MCA has a contractual obligation to maximize profits for the parties' joint benefit. For example, the 1949 Agreement requires the record companies to "use its best efforts and exercise due diligence to derive all possible income from public performances and broadcasting of all such records in the United States and to exploit them profitably in every possible manner." (16 CT 3847.) Contract terms of this type indicate a fiduciary relationship. (Compare *Wolf, supra*, 107 Cal.App.4th at pp. 32-33 [no fiduciary relationship where "Disney was under no obligation to maximize profits from the enterprise"]; compare *Crain v. Electronic Memories & Magnetics Corp.* (1975) 50 Cal.App.3d 509, 523 [contract obligating company to use best efforts to maximize benefits to shareholders formalized company's fiduciary duty to shareholders].)

In response, MCA notes the record companies had the unilateral contractual right to discontinue manufacture and sale of Crosby's records "if it deems that the records are no longer commercially satisfactory or their manufacture is no longer profitable or advisable," and that therefore all profits were not mutual and the record companies were not required to use their best efforts for the joint benefit of the parties. (RB 45.) But the language in question means only that MCA was not required to commit commercial suicide by continuing to market an unmarketable product; there is no dispute that as long as MCA manufactured Bing Crosby records, it was required to share profits in the form of royalties. At most, the language

---

[7/] (...continued)
irrelevant. (See *Universal Sales Corp., supra,* 20 Cal.2d at p. 764 [profit-sharing through a contractual royalty clause is an indication that "the parties intended to establish a contractual relationship between themselves akin to that of joint adventurers"]; cf. *Moreland v. Department of Corporations* (1987) 194 Cal.App.3d 506, 516 ["sharing of profits through royalties or otherwise (is) a critical factor in determining whether a common enterprise exists" for purposes of securities laws].)

that MCA cites gave rise to a factual question regarding the extent to which MCA was obligated to use its "best efforts" to maximize the parties' mutual profits; it does not definitively establish that no fiduciary relationship existed.

MCA also argues that any fiduciary duty arising from the Decros joint venture ended in 1960 when Decca bought out Crosby's interest in Decros, and that any fiduciary duty arising from Crosby's relationship with Kapp ended at Kapp's death. (RB 47.) In essence, MCA argues that any fiduciary duties ended as a matter of law at the moment the underlying relationships that gave rise to the fiduciary duties ended.

But MCA's view of fiduciary duties as evanescent things that may disappear when a formal relationship ends does not comport with the law. "As a general rule, the fiduciary duty does not terminate merely because the relationship which gave rise to it terminates." (Chodos, R., The Law Of Fiduciary Duties (2000) at p. 238 [citing case examples].) Rather, a "fiduciary duty has a 'sticky' quality: once it has arisen, it tends to persist and continue even beyond the termination of the relationship which gave rise to it." (*Id.* at p. 237.)

Thus, the continuing existence of a fiduciary relationship remains a question of fact—even where the parties *concede* they ended their formal relationship. For example, in *Ahern v. Sholz, supra*, music manager Ahern had ceased to be recording artist Scholz's manager years before the alleged breach of fiduciary duty. (85 F.3d at p. 794.) The two men had not even been "on speaking terms." (*Ibid.*) Yet, the First Circuit held that because "a reasonable juror could find" that the parties' "special relationship of trust and confidence" persisted, "a directed verdict is inappropriate on the question of whether Ahern owed Scholz a fiduciary duty." (*Ibid.*)

Similarly, even though the Beatles had broken up and John Lennon had died, it was still a question of fact whether the special relationship that the Beatles and Capitol Records had formed in 1962 persisted. (*Apple Records, supra*, 529 N.Y.S.2d at pp. 280, 283.)

The same is true here. The Crosby heirs presented substantial evidence that the fiduciary relationship that Crosby formed with his record companies persisted from generation to generation. (AOB 40-41.) MCA continued to control and exploit the master recordings under the original recording contracts, and to have the obligation to share profits with the Crosby heirs and to render accountings. (*Ibid.*; cf. Chodos, R., The Law Of Fiduciary Duties, at pp. 247-251 [to the extent that the fiduciary maintains possession and/or control of "the res," he continues to have "an obligation to manage it for the cestui's benefit," as well as to account honestly and to make disclosures regarding it, citing cases].) And as recently as 1986, MCA reaffirmed Crosby's special status—it signed the CD Amendment, under which it promised that Crosby's records would receive the most favorable method of royalty computation offered to any MCA artist. (AOB 11-12.) Nothing ever occurred to suggest that the changes in record company ownership extinguished the longstanding fiduciary relationship that had been established. (See *id.* at pp. 40-41.)

3. The Crosby heirs presented substantial evidence that the parties formed a limited fiduciary relationship.

Substantial evidence showed the parties' contracts at least imposed limited fiduciary duties on MCA to track Crosby's MFN clause and to render honest accountings. (AOB 41-43.) MCA does not dispute that the Supreme Court recognized in *Hobart v. Hobart Estate Co.* (1945) 26 Cal.2d 412, that limited fiduciary duties may exist in appropriate circumstances.

(See AOB 41-42.)[8/] MCA offers no real basis for concluding it did not owe such limited fiduciary duties to the Crosby heirs.

Duty to track MFN clause. The MFN clause did more than create a mere right to "contingent compensation." (See RB 46). It created *affirmative duties* of fidelity, disclosure and management. By providing Crosby the right to the most favorable royalty calculation terms afforded to any MCA artist, the MFN clause necessarily required MCA (the party with exclusive access to the information) to track the royalty terms in the contracts it signed with other artists and to disclose to the Crosby heirs when those terms were more favorable than Crosby's.

This is precisely the type of circumstance in which a limited fiduciary obligation is recognized. Fiduciary duties arise where one party has "unusually great opportunities to cheat without detection and unusually great incentives to do so.'" (See *Wolf, supra,* 107 Cal.App.4th 25, 41 & fn. 8, Johnson, J., concurring and dissenting.)

Here, MCA had strong incentives not to track the MFN clause: If only contract damages were available, MCA had nothing to lose—especially since MCA's chances of getting caught were slim. Indeed, even an audit by the Crosby heirs would have disclosed nothing about MCA's deals with other artists. (See AOB 12, 42.) The information necessary to determine a breach of the MFN clause was exclusively in MCA's control.

MCA responds that it had a "contractual duty" rather than a fiduciary duty to track the MFN clause. (RB 46.) This is a non sequitur.

[8/] See also *American T. Co. v. California etc. Ins. Co.* (1940) 15 Cal.2d 42, 57 ["Conceding the absence of a fiduciary relationship in the ordinary case, [the cases] nevertheless hold that where special circumstances or facts are present which make it inequitable for the director to withhold information from the stockholder, the duty to disclose arises"].

Fiduciary duties often arise from contractual duties. (See AOB 33-35.) Given MCA's "opportunities to cheat without detection" and its "unusually great incentives to do so," MCA had a limited fiduciary duty to keep track of, and disclose to the Crosby heirs, any more favorable deals made with other artists.

Duty to render honest accountings. Where, as here, a contract requires one party to account to the other, a limited fiduciary duty arises as to that obligation. (AOB 42-43.) MCA ignores most of the relevant authorities (and all of the policies on which they are based), instead quibbling with a statement in *Waverly Productions, Inc. v. RKO General, Inc.* (1963) 217 Cal.App.2d 721, 730, 734 (*Waverly*). (RB 46-47.) MCA asserts that *Wolf v. Sup. Court, supra*, 107 Cal.App.4th 25, "clarified" *Waverly* by suggesting that "*Waverly* recognized simply that [the distributor] had a duty to account, not that RKO was a fiduciary with respect to its accounting obligation." (RB 47, quoting *Wolf, supra*, 107 Cal.App.4th at p. 34.)[9/]

Wolf misstates *Waverly's* holding. *Waverly* unequivocally held that "RKO was not a fiduciary with respect to the performance of the terms of this contract (*except as to accounting for rentals received*)." (*Waverly, supra,* 217 Cal.App.2d at p. 734, emphasis added.) Other courts have understood *Waverly* to have meant what it said. (See *Recorded Picture Co. v. Nelson Entertainment, Inc.* (1997) 53 Cal.App.4th 350, 371, fn. 10 ["*Waverly* . . . state[s] that the distributor owed a fiduciary duty to the

---

[9/] Of course, *Wolf* could not "clarify" *Waverly* since the two cases were decided by different courts. (See *Waverly, supra*, 217 Cal.App.2d 721 [Second District, Division Two]; *Wolf, supra*, 107 Cal.App.4th 25 [Second District, Division Seven].)

producer to provide an accounting of proceeds received from subdistributors"].)

Wolf provides no principled basis for disregarding *Waverly's* explicit recognition that a limited fiduciary duty can arise from an obligation to render accountings. Nor does *Wolf* mention, let alone discuss, the Supreme Court precedent recognizing limited fiduciary duties in appropriate circumstances. (See pp. 34-35, *supra.*) *Waverly* and the other authorities establish that MCA had a limited fiduciary duty to render honest accountings to the Crosby heirs.

D. The Trial Court's Summary Adjudication Of The Crosby Heirs' Fraud Claims Was Error.

The Crosby heirs presented substantial evidence that MCA engaged in a fraudulent plan to underpay royalties by concealing the existence of the 1943 Agreement and secretly breaching both it and the CD Amendment's MFN clause. (AOB 47-50.) MCA argues on appeal that the Crosby heirs nevertheless could not prove fraudulent concealment because (1) MCA had no obligation to provide a copy of the 1943 Agreement; (2) the Crosby heirs would not have acted differently even if they had received a copy of that agreement, and (3) the Crosby heirs failed to allege wrongful conduct or damages beyond breach of contract. (RB 35-37.) None of these arguments has merit.

First, MCA contends it had no obligation to provide a copy of the 1943 Agreement when HLC requested all recording contracts. (RB 35.) But the case law establishes that once MCA undertook to provide HLC with *all* recording contracts, it had an obligation to provide *all* recording contracts—it could not hold one back at its discretion. (See authorities cited at AOB 49.) MCA offers no response to these authorities.

Second, MCA argues that the Crosby heirs cannot establish they would have acted differently had MCA sent them a copy of the 1943 Agreement in 1986. (RB 36.) MCA bases this argument on evidence that when HLC's Roy Farrow negotiated the CD Amendment in 1986, HLC had in its possession earlier contracts containing "identical language" to that in the 1943 Agreement and that such earlier contracts would have governed in the absence of the 1943 Agreement. (*Ibid.*, citing 16 CT 3724.) MCA reasons that since Farrow signed the CD Amendment "with full knowledge of identical language in other Crosby contracts," he necessarily would have done so had MCA produced the 1943 Agreement. (*Ibid.*)

But while the earlier contracts contained similar language regarding the record companies' right to release the masters only on records (and not on later-developed formats, like CDs), they did *not* contain identical royalty terms. (See 15 CT 3684-3688, 3689-3695.) None of the other contracts contained the key language in the 1943 Agreement stating that Crosby was entitled to receive a royalty of "15% of the established wholesale price" for records retailing at $1.00 or more. (See 16 CT 3834.) MCA cannot dispute that the Crosby heirs would have acted differently had they learned in 1986 rather than 1999 that they were entitled to, but had not received, a 15% of wholesale royalty. They likely would have brought suit at that time to recover the underpayment. And they likely would have declined to sign the CD Amendment with a record company that had defrauded them out of millions in royalties.

Third, MCA argues that the alleged fraud was not "separate from" the breach of contract, i.e., that there was no allegation of "any tortious conduct independent of MCA's alleged breach of contract," and that therefore there was no actionable fraud claim. (RB 37.) MCA is wrong. The Crosby heirs alleged that MCA's concealment was done with intent to

defraud. Thus, the Crosby heirs' fraud claims were not based on MCA's breaches of contract; they were based on (1) MCA's intentional fraudulent concealment of the 1943 Agreement, (2) its intentional concealment of its breaches of both that agreement and the CD Amendment's MFN clause, (3) its breach of fiduciary duties to make material disclosures to the Crosby heirs, and (4) its repeated misrepresentations that it was paying royalties for each song pursuant to the rate called for in the applicable contract. These wrongful acts constitute the requisite violations of independent duties necessary for tort liability. (See AOB 50; see also 12 CT 2813-2817, 2820.)

Fourth, MCA argues that the Crosby heirs failed to allege any damages separate from the breach of contract damages. (RB 38.) So what? It is irrelevant that the amount of compensatory damages available for the Crosby heirs' fraud claim might have been identical to that available for the contract claim. (See RB 38.) Delay in receiving full payment constitutes fraud damages (*Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, 666), and the Crosby heirs' evidence showed just such a delay in the payment of royalties.

In addition, proof of fraud justifies the imposition of punitive damages. (Civ. Code, § 3294.) MCA is incorrect that without compensatory damages separate from the contract claim, no punitive damages are recoverable. (RB 38.) In *Walker v. Signal Companies, Inc.* (1978) 84 Cal.App.3d 982, the defendants attacked the fraud judgment as "duplicative of the compensatory damages awarded for breach of contract." (*Id.* at p. 995.) The Court of Appeal held that even though the fraud claim did not give rise to separate compensatory damages, it *could* give rise to punitive damages. (*Id.* at pp. 995-996 ["Although the contract may fix the compensation, it does not prevent recovery of exemplary damages. (Citations.) The application of this rule which permits punitive damages

where both fraud and breach of contract exists is only consistent with the underlying policy for the application of punitive damages"].)

The Crosby heirs' fraud claims should have been permitted to go to trial.

E. The Trial Court's Grant Of Summary Adjudication On The Statute Of Limitations Was Error.

The Crosby heirs presented substantial evidence that the delayed discovery rule applied to toll the statute of limitations. (AOB 44-48.) In response, MCA argues that the trial court's "factual findings" established as a matter of law that the Crosby heirs were on notice of MCA's wrongdoing. (RB 27-28.) But as we have explained, the trial court had no business making factual findings at the summary adjudication stage, where the critical issue is whether the evidence viewed in the light most favorable to the party resisting summary adjudication nonetheless leads to the sole conclusion that the moving party must prevail. (See § II.A., *supra*.) As we now discuss, that wasn't so here.

1. The Crosby heirs were not dilatory in the pursuit of their claims under the CD Amendment because undisputed evidence showed they had no way of learning before this litigation that the MFN clause had been triggered.

The undisputed evidence demonstrated the Crosby heirs had no reasonable way of learning of MCA's breaches of the CD Amendment's MFN clause before this litigation. (AOB 45-46.) The triggering of the MFN clause depended entirely on the deals MCA made with its other artists—information the Crosby heirs had no access to, even in an audit. (See *id.* at p. 12.) Thus, the Crosby heirs' knowledge of breach required disclosure by MCA. MCA's assertion that "[h]ad Appellants used their

contractual audit right to investigate their suspicions, they would have made the very same 'discoveries' on which the claims in this lawsuit are based" (RB 30), therefore is utterly meritless.

In addition, MCA's claim that the Crosby heirs were placed on constructive notice of their breaches of the MFN clause by events that took place in 1986, 1994, 1995 and 1996, founders on the shoals of logic. (See § II.E.2., *infra*.) These events could provide no constructive notice of breaches of the MFN clause that occurred *after* 1996. (See AOB 13 [describing evidence of MCA's multiple breaches of the MFN clause over the years—including after 1996].)

The Crosby heirs "should not suffer where circumstances prevent[ed] [them] from knowing [they] were harmed" and MCA "should not be allowed to knowingly profit from [its] injuree's ignorance." (*April Enterprises, Inc. V. KTTV* (1983) 147 Cal.App.3d 805, 831; see also *Gryczman v. 4550 Pico Partners, Ltd.* (2003) 107 Cal.App.4th 1, 5-6.) The trial court erred in concluding that the Crosby heirs should have been aware of MCA's breach of the MFN clause and that therefore the discovery rule did not apply as a matter of law

2. At most, MCA's evidence created a factual dispute regarding whether the Crosby heirs were placed on notice of royalty underpayments before 1999.

MCA relies upon the trial court's conclusion that the delayed discovery rule did not apply as a matter of law because "MCA's undisputed facts establish that HLC and Trust 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."

(RB 27.) But as we now discuss, none of those "undisputed facts" was, in fact, undisputed.

HLC's limited review of royalty computations in 1986. The trial court stated it was "undisputed" that the "limited audit of MCA's royalty computations" conducted in 1986 revealed "a lack of contractual support for certain accounting activities" and thus put HLC on notice of *all* of MCA's wrongdoing. (33 CT 8029.) Not so.

First, HLC's limited review could not have notified the Crosby heirs of their claims for breaches of the CD Amendment's MFN clause: The CD Amendment was not signed until *after* that review took place. (AOB 10-11.)

Second, the limited review could not have put the Trust on notice since the Trust did not take part in it and was not aware of its results. (See 1 Supp. CT 10485-10486.)

Third, even as to HLC, the limited review could not put it on notice regarding breaches of the 1943 Agreement, because it is undisputed that HLC's accountant *did not possess* that agreement and thus did not conduct the audit to determine whether royalties were paid properly under it. (See AOB 10-11, 47.) Because the 1943 Agreement is where the 15% of wholesale royalty provision appears, the limited review provided no means for HLC to discover MCA's failure to pay that royalty rate. (*Ibid.*)

Fourth, although HLC's limited review uncovered minor royalty underpayment under Crosby's other agreements, the mere fact that MCA had breached some agreements did not put the Crosby heirs on notice that MCA had breached the 1943 Agreement. Numerous contracts governed the parties' relationship. Each contract contained different royalty terms. Each was applicable to different songs. A breach of one contract cannot constitute constructive notice of unrelated breaches of others. (See *Miller v.*

Bean (1948) 87 Cal.App.2d 186, 190 [knowledge of earlier breach could not start the statute of limitations as to the later breach because the first breach "was not the breach upon which the action is founded, and it did not bring about the result complained of"].) That HLC decided not to sue for the minor breaches uncovered by the limited review does not mean it waived the right to sue for damages resulting from MCA's major breaches of the separate and independent agreement that MCA secreted.

Fifth, it is undisputed that MCA promised it would remedy the discrepancies that HLC's accountant uncovered. (15 CT 3661.) "One cannot justly or equitably lull his adversary into a false sense of security, and thereby cause his adversary to subject his claim to the bar of the statute of limitations, and then be permitted to plead the very delay caused by his course of conduct as a defense to the action when brought." (*Carruth v. Fritch* (1950) 36 Cal.2d 426, 433; see also *Kalkruth v. Resort Properties, Ltd.* (1943) 57 Cal.app.2d 146, 150 [same].)

Underpayment of Gary Crosby's royalties. The trial court noted evidence that the Trust began inquiring about MCA's possible underpayment of royalties after Gary Crosby suggested in 1994 that the Crosby heirs might not be receiving all royalties to which they were entitled. (RB 28.) But Gary Crosby's concerns—which the evidence showed stemmed from MCA's underpayment of royalties for *his own songs*—at most created a fact question regarding whether the Trust should have suspected MCA's breaches of Bing Crosby's recording contracts. (See 1 Supp. CT 10477-10478, 10570-10571.) A jury at least should have been permitted to weigh whether MCA's failure to pay royalties to *another performer* could constitute constructive notice that MCA was underpaying Bing Crosby's royalties.

Discussions of auditing MCA in 1995-96. The trial court also relied on evidence that in the 1995-96 time frame, representatives of HLC and the Trust discussed auditing MCA's royalty payments. (RB 28.) Here's what the evidence showed:

After resisting the Trust's requests that it provide royalty statements, HLC finally provided them in 1995. (AOB 13-14.) The Trust concluded that HLC had underpaid royalties by $1.2 million. (1 Supp. CT 10453-10456.) When the Trust confronted HLC, HLC's representatives were disturbed by the discrepancy and suggested an audit of MCA. (*Id.* at p. 10486; see also *id.* at pp. 10455-10457.) The Trust considered this suggestion a mere "fishing expedition," since HLC had provided no basis to suspect that MCA was underpaying royalties. (*Id.* at p. 10486.)

Thus, as to the Trust, there was ample evidence that it reasonably believed that HLC—not MCA—was the source of the underpayment. As to HLC, at most a factual question existed regarding who knew what when. As to both sets of Crosby heirs, the constructive notice question could not be resolved as a matter of law.

3. There was substantial evidence the Crosby heirs reasonably did not know about breaches of the 1943 Agreement before this litigation.

As explained in the opening brief, the Crosby heirs presented substantial evidence that they reasonably did not know MCA was failing to pay the 15% of wholesale royalty provided for in the 1943 Agreement. (AOB 46-48.) MCA's responses are meritless.

First, MCA claims the Crosby heirs waived their claim of error because they did not argue below either that the royalty statements made it difficult to discern the royalty rate being paid or that the shift in the ratio

between the wholesale and retail price of records hid MCA's contract breaches. (RB 31.) Not so. The Crosby heirs repeatedly argued that because the royalty statements did not state royalty rates, they obscured MCA's chronic underpayment. (See, e.g., 9 CT 1991-1992, 10 CT 2468; 1 Supp. CT 10454-10458.) The Crosby heirs also argued below that MCA had manipulated the ratio between the wholesale and retail price of records. (42 CT 10164-10165.)[10/]

Second, MCA cites evidence it claims shows MCA had informed the Crosby heirs that it was not paying a 15% of wholesale royalty. (RB 31.) But the evidence MCA cites establishes only that it sent letters to HLC stating that it would pay a 7% royalty for certain songs. Nothing in that evidence indicated the Crosby heirs should have known the 1943 Agreement's 15% of wholesale royalty applied to those songs. Nor did MCA's evidence establish that *the Trust* received copies of MCA's letters to HLC. Thus, even if MCA's letters could have put HLC on notice that it wasn't receiving the 15% of wholesale royalty rate on songs recorded under the 1943 Agreement, there is no basis for imputing that knowledge to the Trust.

Third, MCA argues its failure to send the 1943 Agreement to HLC was of no moment because the Crosby heirs always had that agreement in their possession, or at least they received a copy of it in 1988. (RB 32-33.) But the undisputed evidence was that while the 1943 Agreement might have been in one of the 150 unorganized banker's boxes of materials that Bank of the West sent to Kathryn Crosby (9 CT 2017), HLC's representatives

---

[10/] Although the Crosby heirs did not argue the ratio issue during the summary adjudication stage, they did make the point later. (42 CT 10164-10165.) Because review of summary adjudication is de novo, the timing of the Crosby heirs' argument is beside the point.

told MCA they could not locate Crosby's contracts and requested that MCA provide them for an audit. (AOB 10-11.) MCA proceeded to take advantage of the situation. While purporting to provide copies of all contracts to HLC, MCA intentionally left out the most important one—the 1943 Agreement containing the 15% of wholesale royalty provision. (*Ibid.*) Although MCA finally provided a copy of that agreement in 1988, it was years after the audit and in connection with an unrelated inquiry. (AOB 11, fn. 3.) And in any event, there is no dispute that the Trust had no access to the 1943 Agreement until this litigation. (See 1 Supp. CT 10458.)

Even when, in 1999, the Crosby heirs ultimately audited royalty payments under the 1943 Agreement, MCA hid the ball; when the auditor asked MCA why it wasn't paying the 15% of wholesale royalty, MCA asserted the 1943 Agreement had been superceded by another agreement signed in 1948. (RT V-41; Ex. 84.) MCA later admitted that the 1948 agreement was unsigned and inoperative. (RT DD-63-64.)

* * * * *

The Crosby heirs' evidence would have permitted a trier of fact to conclude that delayed discovery was reasonable. MCA's conflicting evidence merely created factual disputes that should have been resolved by a jury.

III. AS A MATTER OF LAW, THE CROSBY HEIRS WERE ENTITLED TO AN AWARD OF THEIR COSTS.

The trial court awarded a net monetary judgment to the Crosby heirs. MCA took nothing. As explained in the opening brief, the Crosby heirs were therefore "prevailing parties" as a matter of law, and the trial court erred by denying their request for costs and instead awarding MCA its costs. (AOB 50-54.)

The relevant cases uniformly hold that the party with a net monetary recovery is, under Code of Civil Procedure section 1032, entitled to an award of costs: "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 entitled to costs as a matter of right," and the trial court has no discretion to order otherwise. (*Mitchell v. Olick* (1996) 49 Cal.App.4th 1194, 1198; see also authorities cited at AOB 51-54.)

In response, MCA concedes that "a number of courts have construed California Code of Civil Procedure section 1032 to provide that courts lack discretion to deny prevailing party status to a litigant who obtains a net monetary recovery." (RB 48.) MCA then cites one case suggesting *in dicta* that trial courts retain discretion to consider other factors indicating success in litigation. (RB 48-49.) That case—*Sears v. Baccaglio* (1998) 60 Cal.App.4th 1136 (*Sears*)—is clearly distinguishable.

The issue in *Sears* was the propriety of a fee award rendered pursuant to Civil Code section 1717. (*Sears, supra*, 60 Cal.App.4th at p. 1139.) While section 1717 gives trial courts discretion to find the "prevailing party" by determining which party "recovered a greater relief," that statute only applies "where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded . . . to the prevailing party." (Civ. Code, § 1717, subds. (a) & (b)(1); see also *Wakefield v. Bohlin* (2006) 145 Cal.App.4th 963, 974.)

Here, none of the parties' contracts contains any provisions regarding the award of attorneys fees and costs. In addition, the present case involves only an award of costs. As *Sears* itself explains, a party who is the "prevailing party" for purposes of costs under Code of Civil Procedure section 1032 is not necessarily the prevailing party entitled to attorney fees under Civil Code section 1717: "By its own terms, section

1032 defines prevailing party only for 'costs' under that section and does not purport to define it for other statutes. Courts have consistently held the prevailing party for the award of costs under section 1032 is not necessarily the prevailing party for the award of attorney's fees in contract actions under section 1717." (*Sears, supra,* 60 Cal.App.4th at p. 1142, citations omitted.)

Because *Sears* decided only the propriety of a contract-based fee award, its conclusion that the party with the greatest net monetary recovery is not necessarily the prevailing party under section 1032 is dicta. But even if it weren't, *Sears'* suggestion that in some cases, trial courts retain discretion to determine who had greater success in litigation does not dictate a different result in this case.

The Crosby heirs' victory here was not "Pyrrhic": They not only recovered over $200,000 in damages plus interest, they also forced MCA, on a going-forward basis, to pay CD royalties using a significantly more favorable calculation method. Moreover, this litigation was the necessary vehicle for achieving that result; MCA didn't concede that the CD Amendment's MFN clause had been triggered in 2003 until its opening statement.[11/] (3 RT V-18-19.) This situation bears no comparison with the litigation result in *Sears*, where the defendant was deemed to be the prevailing party because the plaintiff actually lost the case but ended up getting a partial refund of a paid debt because the defendant had been compensated from other sources.

Finally, MCA inaccurately states that rescission was the Crosby heirs' "primary objective." (RB 49.) Rescission was one of numerous objectives, several of which the Crosby heirs achieved. Because

---

[11/] The record contains evidence from which a jury could conclude that the breach occurred much earlier. (See AOB 12-13.)

the Crosby heirs obtained a substantial net monetary recovery (and MCA took nothing), they are the "prevailing parties," entitled to their costs as a matter of law.

CONCLUSION

The judgment should be reversed and the matter remanded for a jury trial on all issues, including those erroneously limited by the summary adjudication orders. At the very least, the cost award should be reversed and the matter remanded so the Crosby heirs may recover their costs.

DATED: December 17, 2007

LAW OFFICES OF MARK A. BRODKA
Mark Brodka

GREINES, MARTIN, STEIN & RICHLAND LLP
Kent Richland
Cynthia Tobisman

By: _____
Cynthia E. Tobisman
Attorneys for Plaintiffs and Appellants
HLC PROPERTIES, LTD. and THOMAS E. O'SULLIVAN AS TRUSTEE FOR THE WILMA WYATT CROSBY TRUST

CERTIFICATION

Pursuant to California Rules of Court, 8.204, I certify that this Appellants' Reply Brief contains 13,935 words, not including the tables of contents and authorities, statement of interested parties, the caption page, signature blocks, or this Certification page.

DATED: December 17, 2007

Cynthia E. Tobisman

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 5700 Wilshire Boulevard, Suite 375, Los Angeles, California 90036-3697.

On **December 17, 2007**, I served the foregoing document described as **APPELLANTS' REPLY BRIEF** on the interested party in this action by placing a true copy thereof in a sealed envelope addressed as stated below:

Steven A. Marenberg, Esq.
Philip M. Kelly, Esq.
Kara McDonald, Esq.
IRELL & MANELLA LLP
1800 Avenue of the Stars, Suite 900
Los Angeles, California 90067-4276
Counsel for Defendants and Respondents MCA RECORDS, INC., GRP RECORDS, INC., UMG RECORDINGS, INC., MCA, INC., and UNIVERSAL STUDIOS, INC.

Clerk to
The Honorable Terry B. Friedman
Los Angeles Superior Court
West District, Santa Monica Courthouse
1725 Main Street
Santa Monica, California 90401-3299

California Supreme Court
San Francisco Office
350 McAllister Street
San Francisco, California 94102
Four Copies

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

Executed on **December 17, 2007**, at Los Angeles California.

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