2d Civil No. B204015

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

ALAN LADD, Jr., et al.,

Plaintiffs, Respondents and Cross-Appellants,

vs.

WARNER BROS. ENTERTAINMENT, INC., et al.,

Defendants, Appellants and Cross-Respondents.

Appeal from Los Angeles Superior Court, No. BC300043
Honorable Ricardo Torres

CROSS-APPELLANTS' REPLY BRIEF

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INTRODUCTION

There is an old legal adage: "if the law is against you, argue the facts." Warner's Cross-Respondent's Brief puts a new twist on that adage: "if the standard of review is against you, argue the facts anyway." Its brief reads as if Warner won the cross-appeal issues after a trial. It didn't. It obtained nonsuits. Properly, it must present the evidence in the light most favorable to Ladd. Instead, Warner consistently discusses the evidence in the light most favorable to Warner, urging what in essence are jury arguments.

For example, it proffers only *its* facts and spin as to whether Ladd knew in 1992 that Warner had misstated "Blade Runner" profitability; in arguing that its 2003 payment of $431,628 in previously withheld "Blade Runner" profits was not an admission that the 1996 Settlement Agreement did not apply to such profits; and in arguing that Ladd was not damaged by Warner's admitted improper deletion of Ladd credits and logos from films. When the record is construed most favorably to Ladd, as the nonsuit standard requires, the nonsuits plainly must be reversed.

• ***The fraud and contract claims regarding "Blade Runner" profitability***: Warner's primary argument is that the 1996 Settlement Agreement unambiguously bars Ladd's "Blade Runner" profits claims. It does not.

Warner's 2003 payment of previously withheld "Blade Runner" profits without raising the 1996 Settlement Agreement belies its later litigation interpretation of that agreement. Warner argues that its payment

should be ignored as "post-dispute." But Warner erroneously conflates the 2001-2003 revelation of "Blade Runner" accounting errors with the later eve-of-trial dispute over Settlement Agreement interpretation. Even if "post-dispute," Warner acted contrary to its own self-interest after Ladd raised the accounting error. Such conduct compellingly demonstrates the parties' mutual understanding of the Settlement Agreement's scope. Pre- or post-dispute, until eve of trial Warner never raised the 1996 Settlement Agreement as barring Ladd's "Blade Runner" grievance but rather acted consistent with *Ladd's* view of the Agreement, imposing no restrictions on Ladd's auditing, paying Ladd the past profits that Warner thought it owed, and changing its accounting to adopt the view of Ladd's auditor regarding the profitability of "Blade Runner." That strongly suggests that Warner, like Ladd, never understood the Agreement to encompass "Blade Runner" profits until some last-minute, eve-of-trial lawyering.

In any event, the 1996 Settlement Agreement, on its face, only releases claims arising from "the distribution and exploitation" of Ladd's films "through September 30, 1992." This language makes that release irrelevant to post-1992 distribution profits. Warner nonsensically claims that such "distribution" encompasses Warner's pre-1992 accounting when applied to new post-1992 deals. It ignores the plain meaning of "distribution and exploitation" (i.e., sales, licensing and merchandising) and impermissibly makes surplusage the *separate* provision allowing *limited* future use of certain pre-September 30, 1992 accounting practices. The

1996 Settlement Agreement cannot reasonably be read to extend to post-1992 accounting errors and frauds.

Warner's remaining arguments are more of the same – overly technical arguments premised on pouring through language or facts under the wrong standard of review.

• ***Warner's undisputed wrongful deletion of Ladd credits and logos.*** Warner's brief glosses over Ladd's fact-of-damage evidence and instead attacks Ladd's damages methodologies as imprecise. But when the fact of damage is established, liberal standards apply for approximating damage amounts in order to prevent wrongdoers from escaping liability based on uncertainties they created. The damages approaches that Ladd proffered are all well-recognized in the law. Especially under nonsuit standards, imprecision in calculating a loss is no basis to deny any recovery whatsoever.

And, even assuming insufficient evidence of quantifiable loss, Ladd is entitled to a nominal-damages judgment to help prevent Warner's *continuing* breaches of its duty to protect Ladd's credit/logo rights.

At bottom, Warner claims an impossible-to-meet evidentiary hurdle that would preclude any established actor, director, producer or studio, even Warner itself, from ever recovering for wrongful credit/logo omission. Under Warner's theory, the well-known can never prove injury from the loss of a film credit. But would Warner truly stand idly by and claim "no injury" if someone deleted *Warner's* own logo or credits from a DVD movie or packaging (as Warner did to Ladd on both "Chariots of Fire" and

"Once Upon A Time In America")? Would Warner say "no injury" if someone intentionally replaced *Warner's* credits and logo on a DVD movie and packaging with the logo and credits of *another studio*, such as Columbia or Fox (as Warner did to Ladd on "Once Upon A Time In America")? Of course not. Warner would be first in line at the courthouse, and the first to argue that impossible-to-achieve mathematical precision is not required to prove damages. Warner cannot deny to others the remedies it would claim for itself.

ARGUMENT

I.
WARNER'S "BLADE RUNNER" EVIDENTIARY DISCUSSION VIOLATES THE NONSUIT STANDARD OF REVIEW.

Warner's brief, tellingly, never once mentions the governing standard of review. The standard for reviewing nonsuit grants is clear: An appellate court must reverse a nonsuit "unless interpreting the evidence most favorably to plaintiff's case and most strongly against the defendant and resolving all presumptions, inferences and doubts in favor of the plaintiff a judgment for the defendant is required as a matter of law." (*Nally v. Grace Community Church* (1988) 47 Cal.3d 278, 291, internal quotation marks and citations omitted.) "[T]he evidence most favorable to plaintiff must be accepted as true and conflicting evidence must be disregarded." (*Ibid.*, internal quotation marks and citation omitted.)

This rule equally governs testimony by a single witness that may contain inconsistencies, confused statements or contradictions. (See, e.g., *Meyser v. American Bldg. Maintenance, Inc.* (1978) 85 Cal.App.3d 933, 940 [on nonsuit, irreconcilable or inconsistent testimony "'still presents a conflict in the evidence even though found in the testimony of a single witness'"]; *Smith v. Lockheed Propulsion Co.* (1967) 247 Cal.App.2d 774, 781 [on nonsuit, it is not the reviewing court's function to "pass on the credibility of a witness or determine whether he has been impeached by his own contradictory statements"]; see also *Palmer v. Tschudy* (1923) 191 Cal. 696, 699 [when a witness's testimony is "in some respects confused and

self-contradictory," the jury has a right to accept some portions and discredit others].)

Warner doesn't follow the above standards. It doesn't try. Instead, its Cross-Respondent's Brief consistently portrays the evidence in the light most favorable to Warner. It takes snippets of witnesses' testimony out of context without revealing their contrary statements. We will not burden this court with an unnecessary line-by-line refutation of Warner's factual spin. Instead, the factual presentation in Ladd's Cross-Appellant's Opening Brief properly presents the evidence in the light consistent with the nonsuit standard. (See XAOB 85-97.)[1] As we discuss the particular nonsuited claims below, we will highlight some of the instances where Warner has stated the facts and made inferences in *its* favor, rather than the required standard of stating the facts and making all inferences in *Ladd's* favor.

II.
THE 1996 SETTLEMENT DOES NOT COVER LADD'S "BLADE RUNNER" CLAIMS.

Warner's primary claim is that the 1996 settlement and release of certain pre-1992 claims operated to release all possible "Blade Runner" claims, both pre- and post-1992. That is not so. "Blade Runner" was not a subject of and not encompassed within the 1996 settlement and release. Nor did that release apply to post-1992 claims that had not yet accrued.

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[1] Consistent with our opening brief, for simplicity we collectively refer to Ladd, Kanter and the other plaintiffs as "Ladd" unless otherwise indicated.

A. Warner's Post-Release Actions Support, Indeed Compel, The Inference That The Parties Never Intended The 1996 Release To Cover "Blade Runner," As To Either Post- Or Pre-1992 Claims.

1. Extrinsic evidence is relevant to determine whether the 1996 release applies to "Blade Runner" at all.

Warner blithely assumes that the 1996 release necessarily applied to "Blade Runner" as to both pre-1992 and post-1992 claims even though there was no "Blade Runner" dispute being resolved by the parties; rather, that release arose out of an audit that did not involve "Blade Runner." But the 1996 Settlement Agreement is reasonably susceptible to being read as never having been intended to apply to "Blade Runner" issues. The subject "motion pictures" can be understood to be limited to those motion pictures as to which disputes then existed regarding profit and revenue accountings and *not* to include "Blade Runner." (See *Pacific Gas & E. Co. v. G. W. Thomas Drayage etc. Co.* (1968) 69 Cal.2d 33, 36, 40-41 & fn. 9 [contract language providing indemnity for "injury to property, arising out of or in any way connected with the performance of this contract" could be read, with help of extrinsic evidence, to be limited to injury to *third parties'* property, not plaintiff's property].)

The Agreement cannot be viewed in a vacuum. Even apparently unambiguous language must be interpreted in light of the surrounding circumstances that might give rise to an ambiguity not apparent on its face. (XAOB 104-105.) Such circumstances include the issues the parties had in mind when they reached their agreement and a party's post-release conduct at odds with the interpretation the party later proffers. (XAOB 105-106.)

2. Warner acknowledged its "Blade Runner" accounting error, without claiming that the error had been released.

As the opening brief explains, Warner's actions in 2001 and afterwards speak far louder than its eve-of-trial theory as to the 1996 Settlement Agreement's reach. Its *actions* fully support Ladd's interpretation that "Blade Runner" accounting and fraud issues fell outside the 1996 Settlement Agreement's scope.

Specifically, after the 2001 revelation of Warner's "Blade Runner" accounting errors,

- Warner allowed Ladd to audit the movie back to its pre-1992 inception, never claiming that the 1996 Settlement Agreement applied to "Blade Runner" or imposing audit restrictions like it imposed on movies that had been part of the settled 1992 audit. (XAOB 106-107.)
- Warner's senior vice president Edwards admitted to Ladd's attorney that "it looks like we owe your client some money" for "Blade Runner" accounting errors. (*Ibid.*)
- Warner changed its pre-1992 "Blade Runner" profit accounting. (*Ibid.*)
- Warner paid Ladd $431,628 to cover what Warner claimed it owed Ladd for past "Blade Runner" profits. (*Ibid.*)
- It did all this never mentioning the 1996 settlement as having waived or released Ladd's right to contest Warner's "Blade Runner" accounting. Warner did not first raise the 1996

settlement as a defense to its "Blade Runner" accounting errors until the eve of trial. (*Ibid.*)

Warner barely acknowledges these facts. (See XRB 54-55, 68-69.) But it does *not* dispute them.

3. Ignoring the nonsuit standard of review, Warner improperly characterizes its additional "Blade Runner" payments as a mere accommodation, not an acknowledgment of an unreleased debt.

Warner begrudgingly acknowledges that it paid Ladd over $400,000 post-2001 for improperly withheld "Blade Runner" profits. It downplays the payment with a characterization both defying credulity and flouting the nonsuit standard of review. Warner claims that its senior vice president "Edwards explained that he paid the money to Ladd simply to resolve the dispute, *not* because he believed Warner had made a mistake." (XRB 60, original emphasis; see also XRB 55 [asserting payment made "[h]oping to resolve" the claim].) That's a nice story for a jury, perhaps. But for nonsuit purposes, Edward's self-serving spin is irrelevant.

As Warner's officer, Edwards unqualifiedly *admitted* that "it looks like we owe your clients some money." (7RT 1597-1598; see also 7RT 1600 [same].) He also admitted that Warner unconditionally pays past amounts due (as it did here) only when it has made a "flat out mistake" but that it requires a settlement and release when paying disputed claims. (See 13RT 3765-3766, 3770-3773.) Warner, thus, is not in the "accommodating" business. Warner ignores this evidence.

Here, Warner paid Ladd *every penny* that Warner agreed that it owed Ladd.[2] It changed its erroneous accounting entry. And it did both, without requesting a release or settlement. (See XAOB 89-90; see 14RT 3977 [Edwards admitting there was no settlement].) A reasonable jury could well reject Warner's after-the-fact attempt to pass its conduct off as some sort of goodwill gesture, and could well conclude that Warner is not in the habit of paying money it doesn't believe it truly owes and certainly not without a formal release and settlement.

Warner also speculates that Edwards might not have known about the 1996 settlement when paying Ladd in 2003. (XRB 69.) But what Edwards actually knew is irrelevant. Edwards is a senior vice president – a corporate officer. (13RT 3740-3741.) He spoke for Warner, the corporation, and the defendant here is Warner, not Edwards personally. Knowledge of the 1996 Settlement is imputed to Warner, the corporation, regardless whether Edwards personally had actual knowledge. (*Sanders v. Magill* (1937) 9 Cal.2d 146, 153; see *Sanfran Co. v. Rees Blow Pipe Mfg. Co.* (1959) 168 Cal.App.2d 191, 204.) The 1996 Settlement Agreement presumably is part of Warner's corporate records and, hence, its institutional knowledge.

In any event, Warner had the burden of proof on its release defense; it presented no evidence that Edwards *didn't* know about the 1996

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[2] Warner actually owes more. Not only did Warner improperly refuse to pay interest on the past due amount, but Warner's revised calculations showed "Blade Runner" broke even in 1995, whereas Ladd's accountant determined the film broke even in 1991. (See XAOB 89-90.) Thus, although Warner claims it paid everything it owes Ladd, it didn't. Warner still owes almost $1 million. (5RT 1007-1008; 6AA 1458.)

settlement when he cut the 2003 check to Ladd. Edwards has been the head of Warner's profit participation department since 1979, and thus he was responsible for overseeing profit claims and audits both during Ladd's 1992 audit and Warner's 1996 settlement of that audit. (13RT 3741.) As such, the jury could reasonably infer that Edwards was involved with that settlement, or at least knew about it, when the agreement was signed in 1996.[3]

And, even putting that reasonable inference aside, the jury could reasonably infer that Edwards – as the head of Warner's profit participation department and a Warner senior vice president engaged in "Blade Runner" "settlement negotiations" with Ladd in 2001-2003 – would investigate, speak with counsel and confirm key contracts (such as prior settlement agreements) before cutting a nearly half a million dollar check in 2003 to a profit participant *who had raised audit disputes and had a pending lawsuit against the company.* (See 14RT 3971-3972, 3974.)

A jury could reasonably infer that if Warner truly believed that the 1996 Settlement Agreement applied to Ladd's "Blade Runner" claims, Warner would have raised the issue before paying hundreds of thousands of dollars and before the eve of trial.

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[3] The copy of the 1996 Settlement Agreement in the record does not show who signed it on Warner's behalf (see 4AA 943); Edwards was a logical candidate to have done so.

4. Whether "pre-" or "post-" dispute, Warner's 2001 recalculation of Ladd's "Blade Runner" profit participation, without the slightest protest, creates a strong inference that the parties did not include "Blade Runner" in the 1996 settlement and release.

Warner does not dispute that "courts can examine how the parties performed the contract before any dispute arose over its meaning, because pre-dispute conduct is considered a reliable indicator of what the parties believe the contract means." (XRB 68.) But Warner then turns the concept on its head by claiming the rule "has no application here" because "[t]he conduct Ladd points to occurred *after* a dispute had arisen about whether Warner was properly calculating Ladd's profits in 'Blade Runner.'" (XRB 69, original emphasis.) Warner is wrong on two counts.

First, Warner's post-dispute conduct *at odds with* its own later litigation position is even *more* persuasive than pre-dispute conduct because Warner *knew* at that point that it was acting against its own interest. Why? Before Ladd raised the accounting discrepancy, there was no reason for Warner to even think about the release's application. Once the release was potentially in play, Warner's treatment of the release as irrelevant strongly suggests that Warner, like Ladd, did not understand the 1996 Settlement to apply to "Blade Runner" profit issues.

Second, Warner's responses to Ladd's 2001 "Blade Runner" audit – e.g., paying past profits owed, changing its accounting – predate the *release* dispute. Warner conflates the dispute *over the release's meaning* with the issues surrounding the "Blade Runner" *accounting*. The dispute over release meaning didn't arise until the eve of trial in 2007, when Warner first

asserted the release as barring Ladd's "Blade Runner" claims. Warner's actions *after* the accounting error revelation in 2001 predate the release dispute by years. If Warner truly believed that the 1996 Settlement even potentially barred Ladd's "Blade Runner" profits claim, it presumably would have said something before unreservedly paying over $400,000.

B. The 1996 Release, By Its Terms, Did Not Extend To Post-1992 Sales And Licenses.

Even if the 1996 release applies to "Blade Runner" claims, it does not apply to Warner's post-1992 accounting calculations and misrepresentations. Warner claims that Settlement Agreement paragraph 3.1 somehow released claims regarding post-1992 "Blade Runner" sales and licenses. (XRB 60.) It does nothing of the sort. If anything, that paragraph says the opposite. Paragraph 3.1 releases claims "arising from" or "in any way relating to the distribution and exploitation *through September 30, 1992*, of the [subject] motion pictures . . . ." (4AA 937 [¶ 3.1], emphasis added.) By its terms paragraph 3.1 is limited to pre-October 1992 distribution and exploitation. It cannot possibly release Warner's decade-long post-1992 failure to pay "Blade Runner" profits. Indeed, according to Warner, there were no such profits until 1995. (7RT 1598, 1600.)

To get around this obvious problem, Warner hypothesizes that pre-1992 "distribution and exploitation" really means pre-1992 accounting errors that are repeated and carried forward as to post-1992 sales, licensing, or receipts. (XRB 60.) The release contains no such nonsensical

"distribution" definition. Contract language is understood "in [its] ordinary and popular sense . . . ." (Civ. Code, § 1644; see XAOB 110.) So understood, "distribution and exploitation" means *sales, licensing and merchandising*, not erroneous accounting entries. (See, e.g., Dictionary.com <http://dictionary.reference.com/> [as of October 27, 2009] [distribution: "the marketing, transporting, merchandising, and selling of any item"]; *ibid.* [exploitation: "use or utilization, esp. for profit"; "the combined, often varied, use of public-relations and advertising techniques to promote a person, movie, product, etc."].)

Warner cites the Warner-Ladd Distribution Agreement as defining "distribution" to include "how costs, expenses and profits are allocated" (XRB 61, citing 4AA 896-903) and "the procedures Warner used to *calculate* profits" (XRB 50, original emphasis). The Distribution Agreement contains no such definition. (See 4AA 896-903). Rather, it uses "distribution" in its ordinary and popular sense – the licensing and use of Ladd's movies. (See 4AA 896.) In any event, the 1996 Settlement Agreement does not purport to incorporate any Distribution Agreement definition or term. (See 4AA 937-943.)

The rest of the Settlement Agreement confirms that paragraph 3.1 only pertains to accounting for sales, licensing, or revenues generated *before* September 30, 1992. In a *separate* provision, Ladd "consent[s] to the *future use* of accounting practices used by [Warner] in accounting to [Ladd] through September 30, 1992." (4AA 938, ¶ 3.4, emphasis added.) That would be surplusage under Warner's interpretation of paragraph 3.1.

But contract language is read to avoid surplusage. (*Appalachian Ins. Co. v. McDonnell Douglas Corp.* (1989) 214 Cal.App.3d 1, 12; Civ. Code, § 1641.)

At a minimum, the 1996 release is reasonably susceptible to being read as *not* applying to post-1992 accounting shenanigans, especially as regards post-1992 licensing, sales, and revenues. Indeed, that is its only reasonable reading. To the extent that the language is ambiguous or may be so in light of extrinsic evidence, a *jury* must decide its meaning, a meaning that can include any construction to which it is reasonably susceptible under the evidence *as a whole.* (XAOB 104-106.) Warner's release claim, thus, is particularly weak as to post-1992 "Blade Runner" profits.

C. Warner's Admitted "Blade Runner" Profit Miscalculations Fall Outside Any Consent To "Future Use Of [Existing] Accounting Practices."

1. The "future use" provision does not encompass accounting miscalculations or ploys not disclosed or known to Ladd in 1992.

Warner next argues that the Settlement Agreement's "future use" provision validated its continued post-1992 deception as to, and withholding of, "Blade Runner" profits. As the opening brief explains, that provision – in which Ladd consented "to the future use of accounting practices" used through September 30, 1992 – does not encompass "unknown" or undisclosed practices. (XAOB 109-110; 4AA 938 [¶ 3.4].) The Agreement generally released "known and unknown" claims regarding distribution/exploitation through September 30, 1992; the omission of such

language in the "future use" provision indicates that it only encompasses accounting practices known to Ladd as of September 30, 1992, such as what the 1992 audit uncovered. (XAOB 109-110; compare 4 AA 937-938 [¶¶ 3.1 & 3.3 both releasing "unknown" claims] with *id.* at 938 [¶ 3.4, not mentioning "unknown" practices].)

"Blade Runner" was not part of the 1992 audit and, as explained below, disputed fact issues exist regarding whether Ladd knew in 1992 about the "Blade Runner" accounting error. (See § II.D, *post.*) Warner's brief cites no apposite authority for the proposition that the "future use" provision could reasonably encompass "unknown" practices. (See XRB 62-63.) It ignores the established authority that releases concerning future misconduct are disfavored and must be construed "'against the released party.'" (XAOB 108-109, emphasis omitted.)

Warner tries to characterize the "future use" provision as an "exception" to the general release of pre-September 30, 1992 distribution/exploitation claims set forth in paragraph 3.1. (XRB 70-71.) Wrong. Warner re-writes the Settlement Agreement. The "future use" provision is *not an exception* to paragraph 3.1's general release. The "general" release only applies to past distribution. The "future use" provision, by its terms, applies to *future* conduct, *not* past. (See 4AA 937-938.) The "consent to future use" is set forth as an entirely separate provision, Paragraph 3.4, *not* as an exception to Paragraph 3.1. (4AA 938.)

Warner cannot avoid trial by merging grammatically and logically separate provisions.

2. The profit miscalculations and misrepresentations were not an "accounting practice."

In any event, the future use provision only applies to "accounting practices." Warner's "Blade Runner" profits computational error is not a "practice," as that term is ordinarily understood. (XAOB 110-111.)

Warner proffers two unavailing responses.

First, Warner asserts that "no evidence [exists] that Warner treated the Empress investment differently than it treated investments made in connection with other films." (XRB 63.) No evidence exists, however, that Warner treated the Empress investment *the same* as investments in other films. Warner has the burden of proof on its release affirmative defense. Regardless, does Warner truly mean to suggest that Warner customarily defrauds investors by using the wrong amounts in negative cost and interest computations? Nothing in the 1996 Settlement Agreement suggests that it was intended to consent to – in perpetuity – undisclosed systematic fraud.

Second, Warner emphasizes that the 1996 Settlement Agreement states "accounting practice," not "*company-wide* accounting practice." (XRB 63, original emphasis.) But Ladd's point is *not* that it must be a "company-wide accounting practice." It's that the term "practice" means a customary or repeated procedure. (XAOB 110.) The mandate that the release of (or consent to) future misconduct be strictly construed against Warner requires "practice" to be narrowly construed. (XAOB 108-109.) It is more than a one-shot or one-movie error or deception. Including the wrong items in negative cost and interest calculations for a particular movie is not an "accounting practice." If it was just an unintended oversight, it

was not a "practice"; if it was something more sinister, it is not an *accounting* practice, it is fraud. Either way – a computational error or a deception – there's no evidence that it was more than a one-movie, one-time error. That the error or deception went unnoticed for years does not transform it into an accounting practice.

3. Warner's inadequate 2003 "Blade Runner" profits recalculation is a post-1992 accounting event.

The "future use" consent does not apply to any "accounting practices" adopted after 1992. (See 4AA 938 [¶ 3.4] [Ladd specifically reserved the right to object to any accounting practices not used "through September 30, 1992"].) In 2003, Warner recalculated "Blade Runner" profits, paying Ladd over $400,000. Thus, to the extent that "Blade Runner" profit calculations are an "accounting practice," Warner adopted a new "accounting practice" in 2003. (See XAOB 111-112; XRB 72.) Ladd claims that Warner's *new* 2003 accounting method *still* underpaid on "Blade Runner" by failing to account for a decade's worth of interest and miscalculating total "Blade Runner" profits since 1992.

Warner claims that its *new* 2003 "Blade Runner" accounting calculations are derived in part from its "pre-1992 accounting methods . . . ." (XRB 72.) But being derived from prior accounting approaches is not the same as continuing to use the *same* accounting practice. Indeed, Warner's former accounting calculations in 2001 still yielded a no-profit number in the pro forma that Warner sent to Ladd. Only after Warner *changed* its accounting did it pay Ladd over $400,000. Yet,

Ladd claims that Warner's *new* calculation is *still* too low, to the tune of about $1 million. That is not a claim about a "future use" of a former accounting practice, it is a claim that Warner's 2003 *new* accounting is wrong.

Warner's new 2003 accounting method also involves an item that was not and could not have been included in its 1992 accounting practices. In 1992, there was – by Warner's calculation – no accrued unpaid "Blade Runner" profit participation for Ladd. Warner therefore had and could have had no "accounting practice" as to whether to pay interest on such sums. In 2003, however, Warner calculated that it owed Ladd over $400,000 that had been payable beginning in 1995. Warner instituted a *new* accounting practice, however, of not paying interest on amounts it had owed (for years) to Ladd. That's a new 2003 Warner accounting practice. (See XAOB 89-90.)

4. The dispute falls within the consent's exclusion for post-1992 movie package accountings.

The "future use of accounting practices" consent excludes any practices "*with respect to* revenues" generated by post-1992 licensing groups that differ from pre-1992 licensing groups. (4AA 938 [¶ 3.4(b), emphasis added].) The "Blade Runner" profits fall within this exception. (XAOB 112-113.)

Warner does not deny that the "Blade Runner" licenses at issue here all involve post-1992 group licenses that differ from pre-1992 groups. (See XRB 71.) It instead claims that the trial court recognized this exception by

allowing Ladd to pursue claims based on Warner's *under*valuation of "Blade Runner" in the group licenses and by allowing Ladd to recover his 5% profit participation on the amount of revenue undervaluation. (XRB 71.) But Warner argues (and the trial court agreed) that, at the same time, Ladd could not seek any unpaid 5% profit share on the "Blade Runner" revenues (understated as they were) that Warner acknowledged. In Warner's view, paying profits on acknowledged revenues is an "*accounting* claim" distinct from paying profits on Warner's undervaluation of "Blade Runner" revenues. (*Ibid.*, original emphasis.)

Warner ignores that the consent exception does not just say "revenues" or even "undervaluation of revenues"; it says "*with respect to* revenues." As the opening brief demonstrated, "with respect to" is a broadening phrase. (XAOB 112.) *Hartford Cas. Ins. Co. v. Travelers Indem. Co.* (2003) 110 Cal.App.4th 710, 716-721 & fn. 4, directly so holds. It interprets "with respect to" as equivalent to "arising out of," requiring only an indirect causative link or nexus, having a connection or relationship with something. (*Ibid.*) Warner has *no* response. (XRB 71.)

Profits are directly linked to and connected with revenues. The consent exception "*with respect to* [post-1992] revenues," thus, necessarily exempts both revenues themselves and any profits derived from those revenues. Warner *admits* that by at least 1995 "Blade Runner" had broken even and it should have been paying Ladd 5% profit participation on *all* post-1995 "Blade Runner" revenues, not just its undervaluation of revenues. Yet, at least until 2003, Warner did not pay *any* profits to Ladd for "Blade

Runner" for post-1992 group licenses even under *its* method of allocating revenue and it has *never* paid interest on the wrongly withheld profits.

Ladd was entitled to recover for Warner's wrongful (and deceptive) withholding of profits that Warner admits were due on the revenues it allocated to "Blade Runner," not just—as the trial court allowed—the profit participation that Warner owed Ladd for undervaluing "Blade Runner."

To give an example, assume that Warner allocated $500,000 in revenue to "Blade Runner" in a 2000 group licensing package but should have allocated $750,000 in revenue. Under Warner's theory, Ladd could recover a 5% profit participation on the additional $250,000 in revenue but not on the underlying $500,000 that Warner had acknowledged. By contrast, Ladd's view is that it was due a 5% profit share on the *entire* $750,000 in revenue that Warner should have allocated to "Blade Runner." Any claim "with respect to" that revenue – *all* the revenue – including a claim that Warner wrongfully miscalculated the profits derived from that revenue, falls outside the "future use of accounting practices" consent.

The law is clear that the "with respect to" language favors Ladd's interpretation. Ladd should have been allowed to recover the full amount of his "Blade Runner" profit participation "with respect to [*all*] revenues" generated in post-1992 group licenses, not just as to improperly allocated revenues.

D. A Reasonable Jury Need Not Conclude That Ladd Knew In 1992 About Warner's "Blade Runner" Accounting Error; Warner Violates The Nonsuit Standard Of Review In Contending Otherwise.

Finally, through clever wordplay and an evidentiary summary that construes disputed facts in the light most favorable to Warner, Warner contends that Ladd and Kanter knew about its negative cost and interest accounting miscalculations in 1992, characterizing them as an intentionally released "known" claim. (See XRB 62; see also XRB 53-54.) The facts do not support Warner's "full disclosure" premise.

1. The evidence does not match Warner's characterization; a single, cryptic and unexplained obfuscatory line item entry is not "full disclosure."

Warner's portrayal of the evidence ignores the nonsuit standard of review. It's a jury argument, resting on Warner construing disputed facts and attenuated inferences – including equivocal testimony – most favorably to its position. Ladd and Kanter always contended that they *didn't know* in 1992 that Warner was including Empress's investment in the accounting for Ladd's profit participation. Determining what they did or didn't know was a disputed fact question for the jury to resolve.

Ladd testified repeatedly that he never knew what Warner was doing until the 2001-2002 audit. (See 11RT 2857 [Ladd testifying that the document he received in 1992 was basically two lines "negative cost" and "interest" and "That's not a statement at all. That's shorthand for something, I don't know what"], 2812 [Ladd explaining that Warner merely provided a statement showing the film had lost $19.4 million, with no

backup documentation showing how Warner "was accounting for things such as the negative cost or the interest charged"], 2860 [Ladd explaining that he didn't know Warner was charging interest on the $15.8 million and he's "not an accountant"], 2814 [Ladd explaining that he was "stunned" when the audit revealed Warner was charging interest on the Empress investment, and he never believed Warner "had the right to do that under their contract"].)

Rather, Warner contends that Kanter knew about the issue in 1992 based on the single accounting statement that Warner sent in March 1992. After showing a $19.5 million *loss* based on $36.2 million in gross receipts and $55.7 million in expenses, here's the entirety of what Warner's 1992 accounting statement broke out as the negative cost and interest components:

Negative Cost	15,836,480
Interest	22,874,889
Net Distribution Expenses	16,957,778

(RA 78; see copy attached as an appendix to this brief.)[4]

From this single, cryptic "Negative Cost" line item and an associated $15.8 million number, Warner claims that Kanter knew that Warner had improperly inflated the negative cost and was miscalculating interest, despite the fact that there is no explanation whatsoever of the "Negative Cost" or the "Interest," no reference to Empress or any other investor, no

[4] An attached sheet allocated revenue and expenses between domestic and foreign distribution and further broke down distribution expenses but provided no further breakdown of "Negative Cost" or "Interest." (See RA 80-81.)

reference to the unadulterated "Negative Cost" including any profit-participant's investment interest, and no explanation that the $22 million interest calculation included supposed "interest" on Empress's investment. Warner further ignores that the actual negative cost for the film substantially exceeded $15.8 million and had been borne by three different entities – Warner, Empress *and* Tandem Productions. (6RT 1348; 7RT 1595-1596; 11RT 2846.) A jury need not conclude that Kanter possessed the omniscience to divine Warner's shell game from these two lines.

Warner advances equivocal snippets from its cross-examination of Kanter to claim that he conceded to having ferreted out in 1992 the hidden true facts. (See, e.g., XRB 62 [claiming "Kanter concedes he was aware the Empress investment was being considered part of the negative cost before the release was signed"]; XRB 74 [same].) The testimony does not come close to supporting the inference Warner claims and, certainly, it is not an inference that a jury would have to make. Kanter never testified that he knew about the Empress issue in 1992 or that he understood in 1992 that Warner had included the Empress "Blade Runner" investment in the "Negative Cost" or that the $22 million interest calculation included "interest" being charged by Warner Brothers on moneys that *Empress* had invested.

Warner first cross-examined Kanter regarding the pro forma accounting statement that it sent Ladd *in 2001*, not its cursory 1992 statement. (See 7RT 1509-1511, discussing trial exhibit 225, 5AA 1361-

1365.) Warner sent the 2001 statement in response to Ladd and Kanter's inquiry after they had just learned that Warner was paying profit participation to Empress. Thus, the Empress issue was on Kanter's radar screen in 2001. Warner's counsel asked Kanter whether he could determine *in 2001* whether the $15.8 million negative cost listed on the 2001 statement was correct; Kanter responded that *at that time* (i.e., in 2001) he "was waiting for the auditor to get backup on it." (7RT 1511.) Warner's counsel then pressed Kanter, asking whether when he saw the $15.8 million in 2001 he knew that it "represented both the 50 percent contributed by the Ladd company and the 50 percent contributed by Run Run Shaw?" (*Ibid.*) Kanter responded "Well, that's actually the fact, yes" (*ibid.*) – i.e., that the $15.8 million turns out to in fact include the Empress investment, as Kanter now knows.

Certainly, a reasonable jury could have understood that Kanter was merely confirming "the fact" that the $15.8 million included the investments of both companies. It need not conclude, as Warner insinuates, that the mere $15.8 million figure alone triggered an awareness by Kanter in 2001 that the figure included Empress's investment. Rather, a jury could reasonably understand the testimony to be that Kanter was confirming "the fact" that, knowing Warner was paying profit participation to Empress but not Ladd, he eventually determined that the figure must include the Empress investment. (See, e.g., 7RT 1595-1596 [Ladd's attorney explaining that when he, Ladd and Kanter looked at the 2001 statement, Kanter said "the interest number is what throws everything out of whack"

and that the film cost "$20-some million dollars," so they "*eventually* came to the conclusion that what that must be is the portion of the cost that wasn't paid by another investor but was paid by the Ladd Company and Empress," emphasis added].)

Was Kanter actually saying that he fully understood what Warner was doing merely from examining the 2001 pro forma statement, despite his multiple assertions that he *needed backup documentation*? (See 7RT 1511; see also 7RT 1536-1537 [Kanter explaining that he and Ladd commenced the 2001 audit because Warner had not provided backup documentation showing how it calculated the interest charge], 1557 [Kanter again saying they needed backup documentation to help understand the basis for the interest charge].) A jury need not jump to that conclusion.

After setting the stage with the 2001 statement, Warner shifted to the pro forma "Blade Runner" statement it had sent Ladd in 1992. (See 7RT 1511-1514, discussing trial exhibit 1047, RA 77-90.) Of course, in 1992, unlike in 2001 when Kanter had become aware of Warner's profit participation payments to Empress, Kanter had no reason to believe that anything was amiss. The 1992 pro forma statement facially states nothing about Empress or about how Warner actually computed the listed figures. (See RA 78.) Rather, the 1992 statement, on its face, confirmed what Warner had told them -- "Blade Runner" was deep in the red (a negative $19 million). (XAOB 86-87.)

Warner tried to suggest that because the 1992 statement contains the same $15.8 million negative cost that the 2001 statement used and because

Kanter ultimately determined that the 2001 number was erroneous, then Kanter must have known in 1992 that the same number was wrong. Warner's counsel asked a long sentence that boiled down to whether Kanter noticed when he received the document in 1992 "that the negative cost that was shown on the statement was the full amount of the combined negative cost invested by the Ladd Company and by Empress Productions?" (7RT 1513-1514.) Kanter's response was equivocal. He responded "It would appear to be, Yes." (7RT 1514.)

The "would appear to be" response strongly suggests that Kanter was merely confirming that the negative cost figure in 1992 was the same as the one in 2001 that he ultimately determined – after his suspicions were raised by the Empress profit payments – to be wrongful. It certainly is not an unequivocal admission that he realized in 1992 that Warner was improperly putting the Empress investment into the negative cost being charged to Ladd. Kanter had no reason to even suspect such an issue in 1992 when he had been told that "Blade Runner" would never make a profit and he was not aware of any Empress profit payments.

To the contrary, Kanter testified that from 1992 onwards, until he learned about Warner's profit participation payments to Empress, "You know, I was still under the impression that the film was so far in the red it *wasn't worthwhile getting backup for it.*" (7RT 1514, emphasis added; see also 7RT 1534-1535 [Kanter explaining that Warner sent no backup documentation in 1992 showing how it calculated the interest charge].)

Warner simply and improperly ignores the portions of Kanter's testimony that repeatedly reject its position.

A reasonable jury could well conclude that Kanter never understood in 1992 what Warner was doing with the "Blade Runner" accounting. Warner's contention rests on attenuated inferences drawn from equivocal testimony – inferences that are irrelevant for nonsuit purposes. Indeed, Kanter's cross-examination testimony, even viewed in isolation, at most suggests that he noticed in 1992 that the pro forma statement listed a negative cost of $15.8 million. That's all. But a $15.8 million negative cost does not in and of itself suggest that Warner had improperly included the Empress investment in that cost or was improperly charging interest on the Empress investment. Kanter never testified that he knew or realized in 1992 what Warner was doing, or even that he necessarily had the accounting expertise to decipher it merely from the pro forma statement. To the contrary, he testified that even in 2001 when he suspected that something was wrong, he needed backup documentation to actually ferret out the issue.

In sum, what Kanter knew and understood in 1992 about Warner's "Blade Runner" accounting was, at best, a disputed fact issue for the jury to resolve. (See 12RT 3039, 3049 [Ladd's counsel explaining that what Ladd and Kanter knew in 1992 is a question for the jury].)

For cross-appeal purposes, nonsuit standards dictate the presumption that Ladd and Kanter didn't know until 2001-2002.

2. Warner misstates the record in claiming that the trial court found that Warner fully disclosed the facts in 1992.

As part of its theme that Ladd and Kanter always knew about Warner's misaccounting for (and charging Ladd interest on) Empress's investment, Warner claims that the trial court found that "Warner had fully and truthfully disclosed the basis upon which it was calculating 'Blade Runner' profits and thus had not concealed any material fact from Ladd." (XRB 56, citing 2AA 503, 12RT 3036-3050; see also XRB 75 [claiming the trial court found "Ladd was provided all of the information he needed to discover the alleged 'Blade Runner' accounting error"]; XRB 76 [claiming the trial court found "Warner provided Ladd with profitability statements that disclosed the basis for its accounting"].) Warner grossly overstates the trial court's ruling.

The court never concluded that Warner "fully and truthfully disclosed" the basis of its "Blade Runner" accounting in 1992. Rather, it held that there could be no fraud because Ladd had "a right to audit" and "to get an explanation" of the numbers on the pro forma statement. (12RT 3047.) Of course, the right to investigate a misrepresentation that one does not even know is a misrepresentation is far different from knowing that one is being lied to. The trial court, in essence, found constructive notice by improperly imposing a duty on Ladd and Kanter to question and investigate the truth of everything that Warner represented to them. (See § III.B., *post.*)

A finding that Ladd had a duty to investigate and even constructive notice thereby is a far cry from a finding that Warner fully disclosed. Warner did not fully disclose anything. It sent a one page accounting summary with one-line entries for negative cost and interest that did not come close to disclosing how the stated numbers were calculated. Warner never said that it was treating the Empress investment as though it was a Warner investment, nor did Warner mention Empress at all. Instead, Warner told Ladd not to bother auditing because the movie would always be deep in the red. (See § III.B, *post.*)

III.
TRIABLE TORT AND CONTRACT FRAUD ISSUES EXIST AS TO THE 1996 SETTLEMENT AND WARNER'S DECADE-LONG FAILURE TO PAY "BLADE RUNNER" PROFITS.

A. A Reasonable Jury Could Find Warner Committed Tortious Deceit Independent Of Its Contract Breaches.

Warner argues that, no matter how egregious its lies and deception, nonsuit on Ladd's fraud claim was required because breach of contract is Ladd's sole remedy. (XRB 76-78.) Nonsense.

Factually, a jury could infer that Warner knew "Blade Runner" was or was soon to be profitable and intentionally deceived Ladd, continuously misrepresenting that the movie was deep in the red, inducing Ladd not to bother with an audit that would have revealed the truth. (XAOB 99-101.) As a result, Warner kept for itself "Blade Runner" profits that it should have paid to Ladd, depriving Ladd of such moneys for a decade. Such misrepresentations relied upon by Ladd to its detriment are plainly

actionable. (Civ. Code, §§ 1709, 1710.) The fraud here is not just that Warner duped Ladd into signing a release which Warner contends now bars its claims; it is equally that for over a decade Warner lied in order to keep for itself – to steal – profits earned on "Blade Runner" that even Warner conceded, in fact, were owed to Ladd and that even now Warner has underpaid, including by refusing to pay any interest on the moneys that it misappropriated.

A failure to pay under a contract, alone, may not suffice for a tort claim and tort damages, such as punitive damages, and likewise there may be no fiduciary duty, without more, to accurately account under a contract. (XRB 76-78.) But there's more than that here. Warner *affirmatively* misrepresented "Blade Runner's" profitability. And it did so specifically to dissuade Ladd from auditing. It altered its bookkeeping to withhold moneys, in fact, due to Ladd.

Nothing in *City of Hope Nat. Medical Center v. Genentech, Inc.* (2008) 43 Cal.4th 375 (XRB 77), suggests that a contracting party can lie and steal in connection with moneys it owes another and not be liable in tort for fraud. *City of Hope* holds only that there may not be a *fiduciary* duty. (43 Cal.4th at p. 392, fn. 2.) It does not address Civil Code sections 1709 and 1710's *statutory* deceit prohibition based on actual misrepresentations or a party's failure to correct prior misrepresentations.

City of Hope does not give contracting parties carte blanche to lie and to misappropriate for themselves moneys that they know are owed to others. Unlike here, *City of Hope* did not involve any affirmative

misrepresentations; the sole theory was fiduciary duty breach. (43 Cal.4th at pp. 385-392.) A contractual relationship is not a license to misrepresent. The authorities finding *tort* fraud liability in just such circumstances remain good law. (E.g., *Robinson Helicopter Co., Inc. v. Dana Corp.* (2004) 34 Cal.4th 979, 990-991 [upholding punitive damage liability for intentional misrepresentations of fact independent of the defendant's breach of contract, i.e., the defendant's affirmative misrepresentations that its product conformed to contract specifications]; *Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, 664-666 [affirming punitive damage award based on party's misrepresentations made in connection with payments of contractually-owed profit participation].)

Ladd has a viable tort claim for fraud.

B. The Trial Court Wrongly Imposed A Duty On Ladd To Investigate Warner's Fraud When It Had No Reason To Suspect Wrongdoing.

Warner claims that the trial court found that it had fully disclosed its wrongdoing in 1992. As discussed above (§ II.D.2, *ante*.), that's not so. Rather, what the trial court erroneously held was that Warner's obfuscatory and facially innocuous accounting summary negated its fraud because Ladd *could have* investigated or audited it, no matter how facially innocuous. Warner suggests that Ladd was somehow on notice that it *should* investigate. Neither approach works.

The trial court's misplaced emphasis on Ladd's audit right is the fundamental flaw in its fraud nonsuit. The very reason Ladd did not audit

"Blade Runner" in 1992 was because Warner *specifically told Ladd "don't even bother with [an audit of Blade Runner]" because "it was a big loss" and an audit therefore "made no sense."* (11RT 2811 [Ladd], emphasis added; see 11RT 2811 [Ladd didn't suspect Warner would lie about profitability]; 11RT 2812 [Ladd: Warner said "there's no point" to auditing "Blade Runner" because it "was so far in the red"]; 7RT 1513-1514 [Kanter: he and Ladd did not audit in 1992 because they were "under the impression that the film was so far in the red it wasn't worthwhile getting backup for it"].)

Having through false representations dissuaded Ladd from investigating, Warner is in no position to complain that Ladd did not unearth its misrepresentations sooner. "It is well settled that one who has acted in a manner which would reasonably induce another to forego or discontinue an investigation of his fraudulent acts will not be heard to say that the facts would have been developed had inquiry been made." (*Sime v. Malouf* (1949) 95 Cal.App.2d 82, 108.)

C. Warner's Attempts To Excuse Its Fraudulent Misrepresentations Are Baseless.

Warner attempts to justify its misleading conduct and representations with a series of red herrings. None works.

1. Warner's representation that "'Blade Runner' would never be profitable," backed by its proffered 1992 accounting summary showing a purported $19 million loss, was a material representation of fact, not opinion.

Warner claims that its false representation "that 'Blade Runner' would never be profitable" is a mere nonactionable opinion predicting uncertain future events. (XRB 73.) Not so.

First, Warner wasn't just opining about the future. It falsely stated that "Blade Runner" *currently* had a huge ($19 million) loss and misrepresented *current* accounting status. Warner continuously failed to send contractually required "Blade Runner" accounting statements from 1982 through 2001 under the pretense it would be a waste of time since the movie was so deep in the red. (XAOB 7, 86, 100; 11RT 2809-2810; 4AA 880.) Every time Warner refused to do so, it falsely represented that "Blade Runner" *currently* remained unprofitable.

Second, Warner did not just say the movie was losing money. It specifically told Ladd in 1992, and afterwards, *not to bother auditing* the movie because the movie was currently at such a huge loss. (XAOB 86; pp. 32-33, *ante*.) That's not opinion. That's a representation of *current* fact.

Third, "an intentionally false affirmation of opinion or belief, being a misrepresentation of the state of mind of the speaker, is actionable where, as in the present case, the one making it has superior knowledge or special information concerning the subject matter of the representation." (*Sime v. Malouf, supra*, 95 Cal.App.2d at p. 101, internal citation omitted.) "'[W]hen one of the parties possesses, or assumes to possess, superior

knowledge or special information regarding the subject matter of the representation, and the other party is so situated that he may reasonably rely upon such supposed superior knowledge or special information, a representation made by the party possessing or assuming to possess such knowledge or information, though it might be regarded as but the expression of an opinion if made by any other person, is not excused if it be false.'" (*Harazim v. Lynam* (1968) 267 Cal.App.2d 127, 131, citation omitted.) Warner irrefutably had superior – in fact, exclusive – knowledge regarding "Blade Runner" profitability. It controlled the accounting and accounting statements. Its statements based on superior factual knowledge, whether about the past or the future, are actionable.

Fourth, if an opinion "misrepresents the facts upon which it is based or implies the existence of facts which are nonexistent, it constitutes an actionable misrepresentation." (*Seeger v. Odell* (1941) 18 Cal.2d 409, 414; see also 5 Witkin, Summary of Cal. Law (10th ed. 2005) Torts, § 776, p. 1126 [false statements regarding future events are actionable where the statement implies "knowledge of facts that make the predictions probable"].) A jury could well find that insofar as Warner's statements about future profitability constituted opinions, the statements implied the existence of superior knowledge and a state of facts (e.g., a $19 million loss in 1992) that actually did not exist. Warner possessed unique knowledge as to future profitability prospects; its express and implied factual representations based on such knowledge are actionable.

Warner next asserts that "there is no evidence that the future profitability of 'Blade Runner' was material to Ladd's decision to sign the release." (XRB 73.) In one sense, Warner is correct – the 1996 Settlement Agreement had nothing to do with "Blade Runner." Entirely unknown, unsuspected "Blade Runner" issues that Warner actively concealed were not part of the Settlement Agreement's consideration and were not something that Ladd was releasing.

But that's not what Warner is talking about. Warner is suggesting its "Blade Runner" misrepresentations could not have been material even if encompassed within the 1996 settlement, because there was no evidence Ladd cared about future "Blade Runner" profits. Really? Profit was the whole purpose of Ladd's distribution deal with Warner. Making a profit was *the* material element of Ladd's continuing relationship with Warner. The central object of the relationship, on its face, was material. Warner's lack-of-materiality claim, like much of its brief, is facially preposterous.

2. Warner's intent and Ladd's reasonable reliance remain open jury questions.

Warner next argues that it disclosed the full factual basis for its "Blade Runner" accounting in 1992, negating any intent to deceive. (XRB 74; see also XRB 76-77 [claiming there could be no intent to deceive "when Warner provided Ladd with profitability statements that disclosed the basis for its accounting"]).

As discussed above, Warner did not fully disclose anything. It proffered, without explanation, a single-sheet accounting summary with

otherwise unexplained cryptic line entries for the negative cost and interest. At the same time, it actively campaigned to dissuade Ladd from auditing "Blade Runner." It hid and obfuscated rather than disclosed, fully or otherwise.

The trial court did suggest that because Warner provided the 1992 one-page accounting summary, it could not have had an intent to deceive. (12RT 3047.) It reasoned that the 1992 one-page summary, with sufficient sleuthing, might have been revealed as inaccurate and, therefore, Warner disclosed a potential doorway to discovering its own deception. (*Ibid.*) But a reasonable jury would not have had to reach that conclusion. The 1992 summary *hid* the true facts. Indeed, Warner later admitted that it was inaccurate. An inaccurate and misleading disclosure can hardly be conclusive evidence of no intent to deceive. And, at the same time that Warner provided the 1992 accounting summary, Warner affirmatively dissuaded Ladd from investigating its accuracy. (See XAOB 86; pp. 32-33, *ante*.)

The reasonable inference is that Warner was actively attempting to lead Ladd off of its trail. A defendant need only intend to induce the plaintiff's action (or in this case, nonaction, i.e., noninvestigation); it need not even intend to deceive. (*Gagne v. Bertran* (1954) 43 Cal.2d 481, 488 & fn. 5.) A "[d]efendant's intent to induce plaintiffs to alter their position can be inferred from the fact that [it] made the representation with knowledge that plaintiffs would act in reliance thereon." (*Id.* at p. 488.) There's more than ample evidence that Warner knew and expected that Ladd would

follow its advice and not audit "Blade Runner" in 1992. If anything, the fact Warner sent Ladd pro forma statements in 1992 and 2001 that lacked backup for the figures and showed the movie at a huge loss *is further evidence of fraud* and a cover up, not conclusive contrary evidence.

In a variation on its theme, Warner claims that Ladd could not reasonably have relied on the 1992 accounting statement – which it later *admitted* to be wrong – because it supposedly had disclosed its accounting method. (XRB 77.) As discussed, though, Warner did not fully disclose anything. It played a shell game. Ladd, irrefutably, had the right to rely on Warner's representations about "Blade Runner" – Warner exclusively controlled the information required to determine the movie's profitability. No authority compelled Ladd to assume Warner was lying.

3. The release could not bar any post-1992 fraud claims and Warner's fraud obviates the release of pre-1992 claims.

Warner claims that in the 1996 release, Ladd released all pre- *and post*-1992 fraud claims. It asserts that all of the alleged material misrepresentations were made "*before* the release was executed" in 1996. (XRB 76, original emphasis.) Its argument fails for three reasons. *First*, as discussed above (§ II, *ante*.), the release does not apply to "Blade Runner." *Second,* the release cannot discharge the very fraud that was used to obtain it. (XAOB 103-104; see also XRB 57 [Warner admits that a release is only effective if not "obtained by fraud, deception, misrepresentation"].) *Third*, Warner did not just misrepresent before the settlement was executed in

1996. It continuously misrepresented that the movie was at a loss *until 2001*, when Ladd, after discovering Warner was paying profit participation to Empress, ferreted out Warner's misconduct. (XAOB 86, 88-89.) Warner cannot exempt itself for its post-release fraud. (XAOB 103.)

4. Ladd did not waive its fraud claims; it need not rescind an otherwise inapplicable release.

The release, if fraudulently induced, cannot preclude Ladd's claims, whether contract or tort. (See XAOB 99-104.) To avoid this rule, Warner argues that Ladd "waived the right to assert [this] fraud theory" because "[i]f Ladd believed he was fraudulently induced to sign the release, his remedy was to rescind the settlement agreement and offer to return the $500,000 that Warner paid to settle Ladd's claims, something Ladd never offered to do." (XRB 72.) *Persson v. Smart Inventions, Inc.* (2005) 125 Cal.App.4th 1141, 1154-1155, cited by Warner (XRB 72-73), defeats its argument.

First, Warner ignores the distinction between fraud in the inception and fraud in the inducement. Fraud in the inception renders a contract *void*, making rescission unnecessary. If it was Warner's "'intention to obtain a release from the consequences of the very frauds [it] w[as] committing, of which [Ladd] was ignorant, and if [it] incorporated in [the release] language designed to accomplish that purpose, this in itself, would have constituted a fraud upon [Ladd], rendering the release *void and rescission unnecessary.*'" (*Persson*, *supra*, 125 Cal.App.4th at p. 1156, fn.5, emphasis added, quoting *Sime*, *supra*, 95 Cal.App.2d at p. 110.)

Second, "Blade Runner" accounting was not the 1996 Settlement Agreement's "sole object" (indeed, it was not *any* part of that agreement). That settlement pertained to numerous movies and numerous accounting issues that had nothing to do with "Blade Runner," stemming from a 1992 audit that did not even include "Blade Runner." (See XAOB 9, 86-88; 5RT 989, 1036-1037; 6RT 1267-1268; 7RT 1525-1527; 11RT 2811, 2823.) *Persson* holds that trial courts have the equitable power to set aside portions of contracts procured by fraud, including releases, and that restoration of consideration is required only if the "ends of justice" require it. (See *Persson*, *supra*, 125 Cal.App.4th at pp. 1154-1156.) If a jury found fraud, the trial court would have the equitable power to set aside any release as to "Blade Runner" (for which apparently no consideration was paid) while affirming the 1996 settlement as to the other movies. (*Ibid.*)

Third, any "restoration" issue wouldn't even arise until after a jury found fraud, at which time the trial court would determine whether Ladd must rescind the entire contract to seek "Blade Runner" relief. The case never reached that point.

IV.
THE TRIAL COURT ERRED IN GRANTING NONSUIT ON WARNER'S UNDISPUTED CREDIT/LOGO BREACHES.

Warner does not deny that it trampled Ladd's logo and credit rights that it specifically promised to protect. Rather, it claims "no harm, no foul." In doing so, it launches into a purely factual argument as to why Ladd's

overlapping evidence of real, tangible and quantifiable harm should not be credited. That's not an appropriate basis for nonsuit.

A. Where, As Here, The Evidence Establishes The "Fact Of Damage," The Law Does Not Require Precision In A Damage Calculation.

Fundamentally, Warner's damage argument is that Ladd should not be allowed to recover anything unless his damage calculation is absolutely precise. That's not the law.

California law distinguishes between establishing the *fact* of damage and establishing the *amount* of damage. (XAOB 69-70, 115-116.) Where the *fact* of damage is established, a liberal standard of proof applies regarding the amount; this is to prevent the wrongdoer from escaping liability because of the uncertainties its wrongdoing caused. (*Ibid.*) "An innocent party damaged by the acts of a contract violator will not be denied recovery simply because precise proof of the amount of damage is not available." (*Allen v. Gardner* (1954) 126 Cal.App.2d 335, 340.)

Approximations or estimates of the amount of damages therefore suffice. (*Ibid.*; *Sanchez-Corea v. Bank of America* (1985) 38 Cal.3d 892, 908; 1 Dunn, Recovery of Damages for Lost Profits (6th ed. 2005) Standard of Proof and Admissible Evidence, § 5.2, at pp. 417-421 & Supp. 2009, pp. 100-101.) And "[t]he special circumstances of a particular case may allow the court more latitude in estimating damages, particularly where the difficulty in estimation arises from the defendant's bad faith." (*Electronic Funds Solutions v. Murphy* (2005) 134 Cal.App.4th 1161, 1181.)

Warner doesn't truly dispute any of this. Rather, it simply ignores the distinction, by claiming Ladd's proposed methods for computing damages are imprecise. Warner's Statement of Facts mentions no facts or evidence whatsoever regarding the credit/logo deletions. (See XRB 51-57.) And Warner's legal argument launches immediately into attacking the alleged imprecision of Ladd's proposed methodologies. (See XRB 79-89.)

But Warner does not and cannot dispute that Ladd's evidence established the "fact of damage." Deleting the credits and logos *harmed* Ladd. This is both instinctively true and established by a bevy of evidence that Warner's brief fails to acknowledge. Witnesses from Ladd himself to a screen credits expert testified to the significance and value of credits and logos in the movie industry, their importance in generating future business and increased fees, the special credit/logo rights Ladd had obtained from Warner, the *undisputed* fact that Warner deleted Ladd credits and logos and at times replaced them with other entities, and Ladd's resulting loss of business opportunities. (XAOB 90-95, 114-115.)

Once again violating the nonsuit standard, Warner seeks to downplay the egregiousness and harmfulness of its actions by arguing that Ladd's name and logo were prominently displayed on "Chariots of Fire" and "Once Upon A Time In America" when the movies were released and "[i]t wasn't until *decades later* that his credits were removed from a few *hundred thousand* DVD copies of the films." (XRB 50, emphasis added; see also XRB 49 [same]; XRB 79-80 [same], 85 [same].) But, Ladd's screen-credit expert testified that several hundred thousand DVDs is "an enormous

number" from an industry standpoint. (11RT 2748.) He further explained that Ladd's credits and logo are extremely important to Ladd *today* – decades after the movies were released – because the movie business is "being reinvented all the time" and "unfortunately, many people, the new ones coming up the ranks . . . aren't aware of the long list . . . of Mr. Ladd's credits" and "don't know about" his slate of "really eclectic, very different" movies. (11RT 2734.)

B. Warner's Theorized Heightened Proof Requirement Would Improperly Preclude Virtually Any Credit/Logo Rights Plaintiff From Suing, Even Warner Itself.

Although Warner doesn't say so directly, its "no harm, no foul" approach to its improper credit/logo deletions would preclude any established actor, producer, director or studio, including Warner itself, from suing for breaches of credit/logo rights, absent evidence of someone specifically stating that the credit/logo omission caused them to take their business elsewhere – the sort of "smoking gun" evidence that rarely exists.

Warner asserts that Ladd's association with "Chariots of Fire" and "Once Upon A Time In America" is "well known" and "documented on internet databases." (XRB 50; see also XRB 89 ["It is not as if Ladd's connection to 'Chariots of Fire' and 'Once Upon a Time in America' was secret'"].) It argues that the logos and credits properly appeared on prior distributions and that Ladd's role in creating the films was "a matter of public record" and "could easily be ascertained by anyone interested in the issue." (XRB 49-50, 79-80, 85.)

Warner overlooks that credits and logos are a form of branding. When someone looks at a DVD and the credit or logo isn't there, the brand name is diminished. It's not just a question of someone seeing a movie and deciding to investigate who produced it or was associated with it. The credit and logo puts them on direct notice of the affiliation. And as a person sees the credit and logo on more and more products, it increases the person's favorable impression and increases business opportunities. Any diminishment of Ladd's brand name is hugely important in today's movie business, because Ladd's name and long list of credits are lesser known to the rising generation.

The branding damage is particularly acute for the two movies at issue here. "Chariots of Fire" won multiple Academy Awards, including Best Picture – it is hugely important to Ladd's brand name. And, as for "Once Upon A Time In America," Warner didn't just diminish Ladd's brand name by omitting a credit or logo that makes it more difficult to determine Ladd's association with the movie. It intentionally *eliminated any reference to Ladd on the film and the packaging, and replaced his credits and logo with that of a different, competing company, Regency.* Is Ladd's association with the film a matter of public record, somewhere? Sure. But why would anyone even investigate Ladd's involvement, since the film and packaging expressly denote Regency as the responsible entity?

In urging a heightened standard for proving damage from credit/logo deletions, Warner disregards that "smoking gun" evidence is never required to establish liability. Warner likewise ignores that its assertions about Ladd

being well known and his affiliations with films being a matter of public record equally apply to Warner itself. Yet would Warner claim "no harm" if someone removed Warner's logo and credits from a movie or DVD packaging? Would Warner claim "no foul" if someone replaced Warner's credits and logos on a film with another studio's name and logo, just because the truth was ascertainable on a website somewhere?

Of course not. Warner would sue, just as Ladd did. And Warner would have to construct a damages theory based on approximations, extrapolations, and estimates from past experience, just as Ladd did. And that would be good enough. Either that, or Warner would have no damage remedy if someone simply removed its logos and credits from DVDs or movie showings. We seriously doubt that it is really Warner's position that Warner would have no damage claim if this were *its* logo and *its* credit being deleted.

C. Ladd's Multiple Damages Methodologies Support A Damage Award Computation.

Ladd presented at least four different logical methods to compute damages. (XAOB 117-119.) Any one method alone, and all taken together, meet California's liberal standards for estimating damages once the fact of injury has been established.

1. Warner's factual quibbles with Ladd's damages calculations are jury argument, not the stuff of nonsuit.

(1) ***Ladd's $4 per DVD estimate.*** (See XAOB 117-118.) Warner does not deny that an owner of personal or literary property is entitled to testify about the value of that property right. (See XRB 89; see XAOB 118.) Instead, it argues that "after Ladd signed the Termination Agreement, it was Warner, not Ladd, that owned the films." (XRB 89.) Warner is half right. Although the Termination Agreement gave Warner certain ownership rights, it *preserved* all of Ladd's credit/logo rights; Ladd retained ownership of *those* intangible property rights. If Warner were correct, it could delete at will Ladd's logo and credits from films, something even Warner does not claim. As the owner of the credit/logo rights, Ladd is an appropriate party to opine on the value of those rights. Ladd valued those rights at $4 per DVD. (13RT 3614-3616.) Even alone, that constituted substantial evidence for the claim to go to the jury.

(2) ***Valuing the special credit/logo rights by comparing Ladd's deals with and without them.*** (See XAOB 117.) Warner does not deny that, compared to Ladd's subsequent deals, its deal with Ladd gave Ladd a lower per-movie producer fee in return for unique credit/logo rights. It concedes that *Paramount Productions v. Smith* (9th Cir. 1937) 91 F.2d 863, approved valuing an omitted credit "by taking the difference between the author's sale of stories with and without credit rights" (XRB 85) and that *Popovich v. Sony Music Entertainment, Inc.* (6th Cir. 2007) 508 F.3d 348,

approved valuing an omitted logo using the plaintiff's costs to obtain the same logo right elsewhere (XRB 87).

Instead, Warner launches into purported factual distinctions, again ignoring the nonsuit standard of review. Warner argues that, unlike *Paramount Productions*, Warner's initial releases of "Chariots of Fire" and "Once Upon A Time In America" contained the proper credits and logo, and Ladd's role in the films was ascertainable if someone really wanted to investigate. (XRB 85.) But the author's role in *Paramount Productions* was ascertainable if anyone bothered to investigate. And that Warner only *sometimes* deprived Ladd of credit/logo rights does not compel denying damages altogether. At most, it's a jury argument geared toward mitigating the amount of damage undoubtedly suffered.

The same is true with Warner's argument that the impact of the lost credits differs between "Chariots of Fire" and "Once Upon A Time In America," because the "Chariots of Fire" DVDs contained some references to Ladd while Ladd's name and logo were altogether stripped from "Once Upon A Time In America." (XRB 85-86.) That's merely a jury argument that the jury should award less damages on "Chariots of Fire" than "Once Upon A Time In America." It's not a reason to deny damages altogether, particularly for "Once Upon A Time In America."

Warner similarly misses the point in arguing that Ladd's "Braveheart" producer fee doubled to $1.5 million only after "Braveheart" won an Academy Award, and therefore the "Braveheart" deal does not support Ladd's position that his credit rights are "worth $1.2 million" (the

difference between the final "Braveheart" fee and Ladd's $300,000 per-movie fee on the Warner movies). (XRB 87.) But the "Braveheart" Academy Award does not alter the fact that it is still an apples-to-apples comparison between producer fees; "Chariots of Fire" also won an Academy Award, yet Ladd's producer fee was only $300,000. In any event, even the pre-Academy-Award "Braveheart" fee ($750,000) confirms the substantial value of Ladd's special credit/logo rights with Warner.

Warner speculates that the difference between Ladd's producer fee for the Warner films and his higher "Braveheart" producer fee might not be solely "attributed to the fact that he received credit rights for Warner projects but not for 'Braveheart.'" (XRB 86.) It asserts that the Warner deal and financial arrangement was "not the typical producer arrangement" and that Ladd may have been denied the "Braveheart" credit rights for reasons other than the producer's fee. (XRB 86-87.) But, on nonsuit, all evidence and reasonable inferences must be construed in the light most favorable to Ladd. If Warner wants to introduce or emphasize contrary evidence regarding "Braveheart," it can do so in its defense case to the jury. Again, Warner argues the *amount*, not the necessary *absence*, of quantifiable damages.

Finally, Warner tries to confuse the issue by suggesting Ladd's cases involve the misappropriation of intellectual property and this case is different. (XRB 87-88.) Warner's point is unclear. *Paramount Productions* involved the improper distribution of a story without the proper author's credit. *Popovich* involved distributing CDs without the proper

logo. In both cases, the party had been paid for their underlying services but their contractual credit and logo rights were violated. If those are misappropriation of property cases, then so is this one. Warner had no right to distribute Ladd's movies without the proper credits and logo. It had no right to strip all references to Ladd from "Once Upon A Time In America." In doing so, without his permission, Warner misappropriated Ladd's property rights and denied him an asset he had specifically bargained for. He is as entitled to damages as the plaintiffs in *Paramount Productions* and *Popovich*.

(3) ***Determining damages based on Ladd's diminished producer fees and credit rights after Warner's credit/logo deletions***. (See XAOB 117.) Warner does not challenge the underlying methodology of calculating the credit/logo deletion damages by comparing Ladd's deals before and after the wrongdoing. Instead, it claims the comparison is "purely speculative" on this record. (XRB 88.) It *speculates* that the difference in Ladd's producer's fees may have reflected "Braveheart's" Academy Award and notable cast. (*Ibid.*) But one would assume that the "Braveheart" award would have garnered Ladd better fees and rights on subsequent movies, not worse.

Warner also claims "there is no evidence that any of the studio executives involved in negotiating Ladd's fee on the later films even saw the DVDs with the missing credits, much less noticed the absence of the Ladd's [sic] name or logo." (XRB 88.) But Ladd explained that studio executives examine credits existing in the marketplace in determining what

rights to extend on current movies (13RT 3624-3625); that testimony controls for nonsuit purposes. Moreover, when Ladd's counsel sought to elicit specific testimony regarding what the executives who negotiated "Gone, Baby, Gone" and "Unfinished Life" said in 2003 about Ladd's current credits in the marketplace, Warner successfully blocked the testimony "as go[ing] beyond the scope of what we're doing." (13RT 3635.) Warner therefore cannot properly cite the absence of this evidence as showing Ladd's claim is "speculative."

Ladd also argues that even if the executives saw the Warner DVDs, "[i]t's not as if Ladd's connection to 'Chariots of Fire' and 'Once Upon a Time In America' was secret." (XRB 89.) Says who? Again, this is nonsuit. And even assuming the executives knew of Ladd's affiliation, Warner cannot sweep under the carpet for nonsuit purposes the evidence that the absence of Ladd's special credit/logo rights on distributed product impacted his ability to negotiate more favorable terms on new movies. (13RT 3618-3625, 3634-3635.)

(4) ***The credit-expert's lost opportunities approach.*** (See XAOB 117.) Attempting to argue by reducing to absurdity, Warner asserts that Ladd's expert would have taken "300,000 'lost opportunities' (the number of DVDs that omitted Ladd's logo) and multiplied that number by Ladd's $1.5 million producer fee for 'Braveheart (Ladd's most recent film),' which would have resulted in a total damage award of *$450 billion.*" (XRB 84, original emphasis.) From this premise, Warner asserts that "[c]ertainly the trial court was not obligated to present a 'theory' to the jury

that could have resulted in such a ridiculous and speculative damages award." (*Ibid.*)

The prospect of a $450 billion verdict is a nice work of fiction. Even putting aside the factual errors in Warner's premise,[5] Warner ignores that Ladd never even remotely suggested any such amount of damages. Ladd contended the damages were in the range of $1-2 million. (11RT 2825; 13RT 3614-3616.) Nor did Ladd's expert, nor anyone else, state that the jury could derive a proper amount of damages simply by multiplying the total DVDs by Ladd's producer fee on any film. Rather, Ladd's expert said the jury, based on all the evidence it heard, would have to determine "how many" of the DVD opportunities to "factor in." (11RT 2735-2736.) Ladd's damage estimate of $1-2 million would comport with the jury concluding that Ladd lost only one potential deal on the scale of "Braveheart," not 300,000.

Indeed, all of Ladd's proffered calculations were remarkably consistent in yielding a damage amount of $1-2 million.

2. Warner violates the nonsuit standard of review by focusing on only part of Ladd's testimony.

In trying to brush aside the quantifiable damage evidence, Warner asserts that Ladd *conceded* that he was not financially damaged and that he only suffered speculative emotional and reputational harm. (XRB 80

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[5] "Braveheart" was not Ladd's last movie; more than 300,000 DVDs lacked the contractually-required credits; and Warner did more than just "omit[] Ladd's logo" – it removed all trace of Ladd from the "Once Upon A Time In America" movie and packaging, intentionally substituting Regency's name and logo in Ladd's place.

[claiming Ladd asserted only emotional harm and admitted reputational harm was speculative], citing 11RT 2824, 2838; XRB 51 [claiming Ladd "acknowledged that his only real harm was emotional distress and embarrassment"]; XRB 51, 80, 82-83.) Although acknowledging that Ladd confirmed that his $4 per DVD estimate "represented the value of his credit in the marketplace," Warner claims that Ladd "then promptly acknowledged that he had no idea whether he suffered any financial damage as a result of the removal of the logo and credits from the DVDs." (XRB 82, citing 13RT 3635-3636, 3643.)

Warner's characterization of Ladd's testimony eviscerates nonsuit standards. Not only does Warner present a jury argument that portrays the testimony in the light most favorable *to Warner*, it impermissibly tries to elevate cross-examination snippets that Warner likes over testimony by Ladd that Warner dislikes. Nonsuit standards bar both approaches. (See § I, *ante*.)

Warner's sweeping assertions that Ladd admitted he was only damaged emotionally ignores ample contrary testimony. For example, Ladd testified that he was damaged "not only emotionally" but also because he is out trying to raise money and people are denying that he was involved with certain movies he claims as his credits (11RT 2823-2824); he estimated his damages at several million dollars (11RT 2825); he asserted that the credit/logo deletions harmed his reputation and career (11RT 2836); he estimated $4 a unit as the value of the "branding" he lost when Warner deleted his credits and logo, a brand that means as much as cash

(13RT 3615-3618); he explained that after Warner distributed the DVDs lacking the proper branding, he received lower producer fees on his next movies and was unable to obtain the same type of front-billing branding he had on the Warner deals (13RT 3618-3622, 3635); and he also described his $4 per DVD estimate as his quantification of the value of the loss of the credit in the marketplace, including loss of prestige and loss of other films (13RT 3634-3636). That testimony controls for nonsuit purposes.

Warner nevertheless claims that Ladd admitted his damage assessment "was based on 'speculation.'" (XRB 80.) But a layperson is not charged with knowing the difference between admissible estimates and impermissible speculation. In any event, Warner improperly focuses only on snippets of testimony it likes, *not* Ladd's testimony as a whole. Warner relies on a cross-examination answer that pertained to whether Ladd's reputation was harmed by the absence of a tree logo on the DVD packaging *for "Braveheart,"* not "Chariots of Fire" or "Once Upon A Time In America" (see 11RT 2838). Nonsuit standards bar Warner's evidentiary spin. Warner impermissibly ignores Ladd's later testimony that "[i]t's *not* speculative" that he was damaged by the absence of a logo on "Braveheart" because "everybody in the business thinks it was [an] Icon film" since Icon got an up-front logo and Ladd was denied a similar right even though he owned the project. (13RT 3630, emphasis added; see also 13RT 3631 [Ladd stating he was damaged without the logo on "Braveheart" because people didn't realize it was his picture]; see also 13RT 3612.)

Moreover, Warner's credit/logo deletions differed from the "Braveheart" context. On "Braveheart," Ladd was unable to negotiate the same unique credit/logo rights he obtained on the Warner movies, and instead received a higher producer's fee. (XAOB 91; 12RT 3014-3016; 13RT 3611-3613, 3620.) From a damage standpoint, that's fundamentally different from Warner wrongfully removing unique credits and logos that Ladd specifically bargained for and relinquished a higher producer's fee to obtain. And, unlike the "Once Upon A Time In America" DVDs where Warner removed *all* references to Ladd from both the packaging and movie and listed another company in his place, the "Braveheart" packaging noted that the movie was a Ladd Company production. (See 11RT 2838.) For nonsuit purposes, "Braveheart" is irrelevant to Warner's defense.

Finally, again impermissibly ignoring the testimony it doesn't like, Warner cites to cross-examination testimony where Ladd said he was "not sure" if he was damaged financially (13RT 3632) and that he "d[id]n't know" whether he was damaged financially (13RT 3643). Even if that testimony is considered contradictory and inconsistent with his prior testimony, it's irrelevant under nonsuit standards. (See § I., *ante*.) In any event, a more realistic view of Ladd's testimony is that he was merely acknowledging that there is no absolute certainty to any damage calculation in these circumstances, *not* that he personally did not believe he was damaged financially. Construing Ladd's testimony is the jury's job.

D. At A Minimum, Ladd Is Entitled To Nominal Damages.

Warner indisputably breached its contract obligations in distributing DVDs of "Chariots of Fire" and "Once Upon A Time In America" lacking the proper credits and logos. (See XAOB 119-120.) Warner does *not* dispute this. Such undisputed contract breaches, in and of themselves, entitle Ladd to nominal damages, regardless of any "'inability to show that actual damage was inflicted on him . . . .'" (XAOB 120, citation omitted.)

Warner seeks to evade even nominal damages by asserting that Ladd's otherwise timely nominal damages jury instruction request came too late because it was after the trial court granted nonsuit "without seeking reconsideration of the nonsuit ruling." (XRB 90.) In effect, Warner argues that the trial court should be allowed to compound an error by declining to rule correctly on the basis that it has already ruled incorrectly. Of course, if nominal damages were available, the trial court should never have granted nonsuit in the first place. The trial court recognized that. Notwithstanding Warner's claim that the court "refused the instruction because it had already ruled the claim had been dismissed" (XRB 90), the trial court rejected Ladd's requested nominal damages jury instruction on *substantive*, not procedural, grounds:

> "I have ruled on this issue. I'm not changing it. . . . So [the nominal damages instruction] requested by plaintiffs is refused, and there is no quantifiable loss in any amount, *not even nominal. That is what I am stating for the record, and that's the reason you can't go with that issue to the jury.* I

don't care if you talk about the credit wasn't there, *but there is no damages for it.* That's what I ruled on."

(15RT 4548-4549, emphases added.)

That's not surprising. No case has ever applied Code of Civil Procedure section 1008 to trial motions, such as nonsuit, motions in limine, or directed verdicts. Nor was Ladd asking the trial court to revisit its prior ruling. It was proffering a new jury instruction on a nominal damage theory that the trial court had not previously considered. Ladd had a right to request a nominal damages jury instruction that comported with the evidence and with the court's prior ruling that Ladd had failed to prove quantifiable loss. (See *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 572 [party entitled to instruction on any theory supported by the evidence].)

Both the nonsuit ruling and the jury instruction denial are reviewable on appeal. Either the trial court erred in granting nonsuit or in rejecting the instruction or both. It was not right in ignoring nominal damages *both* at the nonsuit *and* instructional stages.

Substantively, the trial court failed to recognize that the very reason nominal damages are awarded is to establish breach of contract liability *where it is difficult to quantify loss or no quantifiable loss exists.* (See XAOB 119-120.)

Warner suggests that Ladd suffered no prejudice in not being awarded nominal damages. (XRB 90, citations omitted.) That may be so where nominal damages "would be of no consequence" to the plaintiff.

(*Sill Properties, Inc. v. CMAG, Inc.* (1963) 219 Cal.App.2d 42, 55; see XRB 90 and cases cited there.) But a failure to award nominal damages is reversible error "where the complaining party is substantially prejudiced thereby." (5 C.J.S. (2009) Appeal and Error, § 1071.)

Here, a nominal damages award is of substantial importance to Ladd.[6] The issue of Warner deleting credits and logos involves a *continuing* contractual relationship and Warner's *continuing* contractual obligations to protect Ladd's logo and credit rights on numerous movies. Also, obtaining a ruling that Warner violated the contract will help Ladd demonstrate, when negotiating movie deals with third parties, that he is entitled to these credits and logos from Warner. This case doesn't involve an isolated one-shot issue regarding Ladd's rights that won't arise again and lacks continuing significance. (See *O'Dea v. County of San Mateo* (1956) 139 Cal.App.2d 659, 662-663 ["award of even nominal damages has some importance" where defendant asserted defenses which it may assert again and could impact the value of plaintiff's property]; 5 C.J.S. (2009) Appeal and Error, § 1071 [failure to award nominal damages is reversible error where a nominal damage judgment would "serve to vindicate and establish some right"].) Nominal damages are particularly important here, where there is no assurance that Warner will not claim res judicata or collateral estoppel should it continue to violate Ladd's credit/logo rights.

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[6] In claiming a nominal damage award is unnecessary since "the trial court already awarded Ladd his costs" (XRB 90), Warner assumes (contrary to its claims as appellant) that the remainder of the judgment will be affirmed.

Indeed, the issue already has arisen again. It is undisputed that Warner has deleted Ladd credits and logos from DVDs regarding other movies besides the two at issue in the trial ("Chariots of Fire" and "Once Upon A Time In America"), including "Night Shift" and "The Right Stuff," another Best Picture Academy Award nominee. (6RT 1233-1235, 1257; 7RT 1541-1542; 11RT 2722-2724.)

A nominal damages award would vindicate Ladd's permanent rights to have his logos and credits properly protected. It would establish breach if Warner again deletes Ladd credits and logos. It would put Warner's personnel on notice of the issue and possibly reduce the occurrence of future breaches by Warner. In contrast, allowing Warner to walk away without even a finding of liability, serves no purpose other than to set the stage for Warner to further disregard Ladd's contract rights.

If this Court does not order a trial on compensatory damages, it should direct the trial court to enter a nominal damages judgment for Ladd regarding Warner's undisputed credit/logo breaches.

CONCLUSION

Warner won nonsuit on the cross-appeal issues, not at trial. The record, construed in the light most favorable to Ladd, as nonsuit standards dictate, compels the reversal of the nonsuit on Ladd's credit/logo deletion claims and the nonsuit on Ladd's fraud and contract claims regarding "Blade Runner" profitability.

The portion of the judgment relating to the "Blade Runner" and credit/logo claims should be reversed and remanded for a trial of those and any related (e.g., other logo/credit deletion) claims.

Dated: October 29, 2009

STROOCK & STROOCK & LAVAN LLP
John M. Gatti
John J. Lucas

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CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, rule 8.204 (c)(1), the attached **CROSS-APPELLANTS' REPLY BRIEF** was produced using 13-point Times New Roman type style and contains **13,971** words not including the tables of contents and authorities, caption page, Certificate of Interested Entities or Persons, or this Certification page, as counted by the word processing program used to generate it.

Dated: October 29, 2009

Edward L. Xanders

APPENDIX

31-Mar-92

LKW PARTICIPATION CALCULATION
DECEMBER 31, 1991

	BLADERUNNER
Gross after Cash B/E	
Reportable Gross	36,205,086
Less Cash B/E	55,669,147
	(19,464,061)
Share	0
Rollback gross after B/E	
Reportable Gross	0
Less Actual B/E	0
	0
Share @ 5%/20%	0
Less basic fee	0
	0
TOTAL AMOUNT DUE	0
Less Previously Paid	0
TOTAL AMOUNT PAYABLE	0
Cash B/E Calculation	
Negative Cost	15,836,480
Interest	22,874,889
Net Distribution Expenses	16,957,778

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 5900 Wilshire Boulevard, 12th Floor, Los Angeles, California 90036.

On October 29, 2009, I served the foregoing document described as: **CROSS-APPELLANTS' REPLY BRIEF** on the parties in this action by serving:

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[LASC Case No. BC300043]

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

Executed on October 29, 2009, at Los Angeles, California.

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

ANITA F. COLE