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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

ALAN LADD, JR., et al., Plaintiffs and Appellants, v. WARNER BROS. ENTERTAINMENT, INC. Defendant and Appellant.	B204015 (Los Angeles County Super. Ct. No. BC300043)

APPEAL from a judgment and orders of the Superior Court of Los Angeles County, Ricardo A. Torres, Judge. Affirmed in part and reversed in part.

Horvitz & Levy, John A. Taylor, Jr., Frederic D. Cohen, Jason R. Litt; Weissman Wolff Bergman Coleman Grodin & Evall, Michael Bergman, Steven Glaser and Julie B. Ephraim for Defendant and Appellant.

Greenberg Traurig, John M. Gatti, John J. Lucas; Stroock & Stroock & Lavan, John M. Gatti, John J. Lucas; Greines, Martin, Stein & Richland, Robert A. Olson and Edward L. Xanders for Plaintiffs and Appellants.

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* Pursuant to California Rules of Court, rule 8.1110, this opinion is certified for partial publication. The portion of this opinion to be deleted from publication is enclosed within double brackets, [[ ]].

Defendant and appellant Warner Bros. Entertainment Inc. (Warner) appeals a judgment on a jury verdict awarding plaintiffs and appellants Alan Ladd, Jr. (Ladd), Jay Kanter, L-K Producers Corporation, Ketram Corporation and Kanter Corporation (collectively, Ladd) $3,190,625 in damages. Warner also appeals the trial court's orders denying its four motions for judgment notwithstanding the verdict (JNOV).[1]

Ladd cross-appeals from the judgment, insofar as the trial court granted Warner's motions for nonsuit on certain claims by Ladd.[2]

Warner licensed packages of movies to broadcast television and cable networks. Ladd's movies were included in those packages. In a practice known as "straight-lining," Warner allocated the same share of the licensing fee to every movie in a package, regardless of its value to the licensee. The gravamen of Ladd's action against Warner is that by allocating the same portion of the licensing fee to every movie in a package without regard to the true value of each movie, Warner deprived Ladd of a fair allocation of the licensing fees to which Ladd was entitled as a profit participant.

We hold that under the implied covenant of good faith and fair dealing, Warner was bound to act in good faith toward profit participants. Warner had an obligation, as conceded by a Warner executive, to "fairly and accurately allocate license fees to each of the films based on their comparative value as part of a package." Therefore, the record supports the jury's determination that Warner's straight-lining method of allocating licensing fees to profit participants breached the implied covenant of good faith and fair dealing.

We further hold that because the statute of limitations is an affirmative defense, a defendant who asserts the plaintiff's claims are partially barred by the statute of limitations has the burden of proving which portion of plaintiff's damages are time-

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[1] An order denying a motion for JNOV is appealable. (Code Civ. Proc., § 904.1, subd. (a)(4).)

[2] The partial nonsuit ruling is reviewable on the appeal from the final judgment entered on the subsequent verdict. (*Wilson v. Century 21 Great Western Realty* (1993) 15 Cal.App.4th 298, 304.)

barred. Here, Warner's failure to present damage segregation evidence constituted a failure of proof on an affirmative defense, entitling Ladd to recover all of his proved damages.

In sum, we uphold the jury's verdict in its entirety. However, the orders granting nonsuit on Ladd's claims relating to Blade Runner and deletion of screen credits and deletion of Ladd's company logo are reversed and the matter is remanded for a retrial of those claims.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Facts.*

This action arises out of Ladd's claim that Warner undervalued and underpaid the license fees attributable to the following twelve motion pictures: Blade Runner, Body Heat, Night Shift, Tequila Sunrise, Outland, Chariots of Fire, and the Police Academy franchise, consisting of the original and sequels 2, 3, 4, 5 and 6.

By way of background, in 1979, Warner and Ladd entered into a joint venture, essentially a "mini-studio" within a studio. Ladd had control over development of movies, financing of movies, production and distribution. Warner's role was to finance the films.

In 1985, the parties entered into a Termination Agreement, under which the parties ended their joint venture, with Warner remaining obligated to pay Ladd the profit participation called for under their earlier agreement.

In 1993, Ladd conducted a profit participation audit (the first audit) of the motion pictures for the period from October 1, 1988 through September 30, 1992. The audit did not cover Blade Runner because Warner represented to Ladd said movie was unprofitable and was "so far in the red it was not worthwhile to issue [profit] statements." (In March 1992, Warner provided Ladd with a one-page statement indicating Blade Runner had lost $19.5 million as of December 31, 1991.)

Following this audit, the parties entered into a 1996 settlement agreement and release. Warner agreed to pay Ladd $500,000 and to increase royalty payments on home videos. Pursuant to the 1996 settlement agreement, the parties released "all claims,

whether known or unknown, arising from, based on, or in any way relating to the distribution and exploitation through September 30, 1992 of the motion pictures (the 'Properties') produced pursuant to, and/or referenced in" the earlier agreements between Warner and Ladd.

In 2001, Ladd learned another Blade Runner investor, Empress Investments (Empress), was receiving payments from Warner even though Warner told Ladd the movie was unprofitable. Ladd retained James Perry (Perry) to audit Warner's records (the second audit). Warner limited Perry's audit to the four-year period from April 1, 1997 through March 31, 2001, for all films except Blade Runner and Outland, which Warner allowed Perry to audit back to their inception. Following the second audit, Ladd filed the instant lawsuit.

2. *Proceedings.*

a. *Pleadings*.

On July 31, 2003, Ladd filed this action against Warner. The operative third amended complaint included causes of action for breach of contract, breach of the implied covenant of good faith and fair dealing, fraud and negligent misrepresentation. In addition to compensatory and punitive damages, Ladd sought an accounting and imposition of a constructive trust. The gravamen of the action is that Warner deprived Ladd of the bargained for profit participation in the Termination Agreement by undervaluing Ladd's films relative to other films in television licensing packages.

b. *Trial testimony.*

On July 9, 2007, the matter came on for a jury trial. The evidence showed Warner licensed films to broadcasters or to cable in a package, in a practice known as straight lining, in which "every feature film in that group or package is given the exact same value regardless of its value to the broadcaster or to the channel." David Simon (Simon), Ladd's expert, with 32 years experience in the television and entertainment industry, testified that in treating every movie as though it had the same value, "the studio was not doing its expert work, as a provider or distributor of content, in weighing the value of each of these titles . . . ."[3]

Simon's testimony in this regard was corroborated by Eric Frankel (Frankel), the president of Warner's domestic cable distribution, who was called by Ladd as an adverse witness. (Evid. Code, § 776.) Frankel testified that in the licensing process, Warner has an obligation to act in good faith toward profit participants, and as part of Warner's good faith obligation, Warner was required to "fairly and accurately allocate license fees to each of the films based on their comparative value as part of a package."

With respect to damages, Simon determined Warner should have allocated an additional $97 million in licensing fees to Ladd's films. Ladd was entitled to 5 percent of gross revenues on all films once Warner recouped its costs, except for Chariots of Fire, on which Ladd was entitled to 2.5 percent. Thus, on the $97 million in underallocated licensing fees, Ladd's profit participation should have been $3,190,625.

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[3] The licensing agreements between Warner and third parties were *not* the contracts being sued upon. Ladd was suing Warner for breach of the Termination Agreement. The licensing agreements reflected the underallocation of licensing fees and thus a breach of the Termination Agreement's implied covenant of good faith and fair dealing. The licensing agreements also were relevant to establishing the extent of Ladd's damages.

c. *Nonsuit rulings*.

After Ladd's case in chief, the trial court granted nonsuit on Ladd's cause of action for fraud in connection with Blade Runner, finding "no evidence of fraud."

The trial court also granted nonsuit on Ladd's claim for Blade Runner profits, on the ground said claim was foreclosed by the 1996 settlement agreement. With respect to Blade Runner, Ladd was permitted to proceed solely on the claim that Warner had underallocated licensing fees to said film during the four-year period before this action was commenced.

The trial court also granted nonsuit on Ladd's claim Warner improperly deleted Lad's screen credits or company logo from the films Chariots of Fire and Once Upon a Time in America. The trial court ruled it found "no evidence of any lost opportunities or any ascertainable loss due to loss of screen credit in the record."

The defense rested its case on July 26, 2007.[4]

d. *The verdict.*

Due to the nonsuit rulings, only two causes of action went to the jury: breach of contract and breach of the implied covenant of good faith and fair dealing. The jury was instructed, inter alia, "There are no express contractual obligations restricting the discretion afforded to [Warner] in licensing the library films in which [Ladd] [has] a participation interest. Therefore, to prove their claims regarding [Warner's] licensing of

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[4] On July 27, 2007, one day after the defense rested, Warner sent Ladd's counsel a letter demanding, for the first time, that the Blade Runner claims be arbitrated pursuant to the arbitration clause in the 1996 settlement agreement. Ladd refused and Warner continued to participate in the trial through judgment. On December 12, 2007, two days before filing its notice of appeal in the instant action, Warner filed a new action in the superior court, seeking to compel arbitration. The trial court denied the petition to compel, ruling: "Having engaged in extensive, merits litigation in the Prior Action, including a lengthy trial, and having failed to petition for arbitration during those proceedings, Warner waived its right to arbitrate the matters advanced in this action." Warner appealed. The order denying Warner's petition to compel arbitration was affirmed in *Warner Bros. Entertainment, Inc. v. Ladd*, No. B208831 [nonpub. opn filed Dec. 8, 2009]. (Evid. Code, §§ 452, subd. (d), 459.)

the films, [Ladd] must prove that [Warner] breached the contract or the implied covenant of good faith and fair dealing."

On August 2, 2007, the jury returned a special verdict in Ladd's favor. The jury specifically found Warner breached the contract with Ladd or the covenant of good faith and fair dealing implied into the contract, and that Ladd suffered a monetary loss in the form of underpayment of profit participation as a proximate result of that breach. The jury determined that in the period from August 1, 1999 (four years prior to the filing of the complaint) to the present, Warner had underallocated the license fees for Ladd's films, including Blade Runner, in the amount of $97,251,000 (which was consistent with Simon's testimony). With respect to damages, the jury found Ladd should have been paid $3,190,625 in additional profit participation on said license fees.

Judgment on the verdict was entered on September 25, 2007.

e. *Post-trial motions.*

On October 9, 2007, Warner filed a motion for new trial as well as four motions for JNOV, seeking entry of judgment in its favor. Warner later withdrew its new trial motion.

Warner sought JNOV on the following grounds: Ladd was restricted to recovering damages incurred on or after August 1, 1999, but the verdict included damages on claims barred by the statute of limitations; the evidence was insufficient as a matter of law to support the amount of damages awarded by the jury; the evidence was insufficient to support the finding that the damages awarded were proximately caused by any breach; and the evidence was insufficient to support the finding that Warner breached its contract, including the implied covenant of good faith and fair dealing, with Ladd.

On November 19, 2007, the JNOV motions came on for hearing. Warner's counsel acknowledged that in withdrawing the motion for new trial, Warner was purposely "going for broke," leaving the trial court with only two choices – either to

uphold the entire verdict for Ladd or to enter a judgment in favor of Warner, notwithstanding the jury's verdict.[5]

The trial court denied all four motions for JNOV. It found substantial evidence supported the jury's determination that the way in which Warner allocated license fees to Ladd breached the implied covenant of good faith and fair dealing, and that said breach caused Ladd damage.

As for the JNOV motions relating to the amount of damages, the trial court expressed concern that some portion of the damage award represented damages which may have been incurred prior to August 1, 1999, but recognized "nobody ever told the jury how much" of the licensing fees were earned before or after that date. "[A]t no time did anybody ever break down these numbers." The trial court explained "the reason I can't grant the motion for JNOV . . . is because there is evidence to support [the verdict] . . . . I can't say the plaintiff cannot win. . . . [I]f I grant the JNOV, I'm saying that there is no money that they can get. [¶] And it would have been easier for this Court if there was . . . the new trial [motion]."

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[5] By forgoing a motion for new trial on the ground of excessive damages, Warner also was "going for broke" on appeal. "*Failure to move for a new trial on the ground of excessive . . . damages precludes a challenge on appeal to the amount of damages if the challenge turns on the credibility of witnesses, conflicting evidence, or other factual questions*. [Citations.] A trial court ruling on a new trial motion on the ground of excessive or inadequate damages must weigh the evidence and acts as an independent trier of fact. [Citations.] Thus, the trial court is in a far better position than the Court of Appeal to evaluate the amount of damages awarded in light of the evidence presented at trial. [Citations.] [¶] 'When defendants first challenge the damage award on appeal, without a motion for new trial, they unnecessarily burden the appellate courts with issues which can and should be resolved at the trial level. [Fn. omitted.]' [Citation.]" (*County of Los Angeles v. Southern Cal. Edison Co*. (2003) 112 Cal.App.4th 1108, 1121, italics added.)

f. *The appeals.*

The parties filed timely notices of appeal and cross-appeal. Warner appealed the judgment and the orders denying its motions for JNOV. Ladd appealed the judgment, specifying the partial grant of nonsuit.

CONTENTIONS

Warner contends: Ladd failed to prove Warner breached its contractual obligations by undervaluing Ladd's films in license fee agreements; the judgment must be reversed because Ladd failed to specify the amount of damages Ladd incurred during the permissible time period; assuming Simon's testimony provides a basis for establishing liability and calculating Ladd's damages during the relevant time frame, the judgment should be reduced to the maximum amount of damages supported by his testimony; and in the event this court does not reverse the judgment outright or reduce it to the maximum supported by Simon's testimony, this court should grant Warner a new trial.

Ladd contends the trial court erred in its nonsuit rulings because: more than sufficient evidence and inferences exist to allow a reasonable jury to conclude Warner knew the falsity of its representations that Blade Runner was not profitable; the settlement of the 1992 audit claims did not bar Ladd's Blade Runner profitability claims, especially those accruing after 1992; and Warner's movie credit and logo deletions undeniably damaged Ladd, precluding nonsuit.

DISCUSSION

I. WARNER'S APPEAL

1. *Substantial evidence supports the jury's determination Warner breached the implied covenant of good faith and fair dealing*.

As indicated, the special verdict included the finding that Warner breached the contract with Ladd or the covenant of good faith and fair dealing implied into the contract. Warner challenges the sufficiency of the evidence to support said finding. The contention fails.

a. *Warner owed a duty to allocate license fees fairly to Ladd's movies.*

As a preliminary matter, every contract in California contains an implied covenant of good faith and fair dealing that " 'neither party will do anything which will injure the right of the other to receive the benefits of the agreement.' " (*Kransco v. American Empire Surplus Lines Ins. Co*. (2000) 23 Cal.4th 390, 400.) The implied covenant "finds particular application in situations where one party is invested with a discretionary power affecting the rights of another. Such power must be exercised in good faith." (*Carma Developers (Cal.), Inc. v. Marathon Development California, Inc*. (1992) 2 Cal.4th 342, 372.)

Consistent therewith, Frankel, the president of Warner's domestic cable distribution, who was called by Ladd as an adverse witness (Evid. Code, § 776), testified that in the licensing process Warner has an obligation to act in good faith toward profit participants. Frankel acknowledged that as part of Warner's good faith obligation, Warner was required to "fairly and accurately allocate license fees to each of the films based on their comparative value as part of a package." Frankel testified the valuation factors included "the vintage of the film, the box office, the genre, the star, the awards, the utility, can you play it in multiple day parts or is it a movie that's too sexy that maybe you can only play at 10:00 at night."

Thus, Ladd established Warner owed a duty to fairly allocate license fees to each of the films based on their relative value in an overall package.

b. *Substantial evidence supports the jury's finding that Warner breached said duty to Ladd.*

In this regard, Ladd's expert witness, Simon, testified Warner often licensed films to broadcasters or to cable in a package, in a practice known as straight lining, in which "every feature film in the package is given the exact same value regardless of its value to the broadcaster or to the channel." In evaluating its movies, Warner internally assigned each movie a grade of A, B or C.[6] Simon generally agreed with Warner's ratings and noted that all Ladd's films were rated either A or B. The problem was that Warner allocated the same proportion of the license fee to each title in the package, irrespective of the film's letter grade. Simon opined that in treating every movie as though it had the same value, "the studio was not doing its expert work, as a provider or distributor of content, in weighing the value of each of these titles . . . ."

Simon also testified that in non-straight lined film packages, movies that were less valuable than Ladd's received greater value. For example, there were times when Daffy Duck and Bugs Bunny animated films were allocated double the money that was allocated to Chariots of Fire, a valuable feature film which won multiple Academy Awards, including Best Picture. Those animated films are wholly owned by Warner, which means Warner keeps every dollar generated by licensing fees on those films. Simon determined that Warner was overallocating license fees to movies that were studio owned or that did not have profit participants.

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[6] Movies that are rated a C are "relegated to filler material." There is a need for C movies because many channels broadcast 24 hours a day. However, Frankel acknowledged there is no licensing demand for individual C movies, which is why they are bundled in a package together with A and B movies. Leslie Cohen, director of film acquisitions at HBO, testified that in one licensing deal, Warner added a group of old Tarzan movies to a licensing package at no cost. Warner then allocated a license fee of $40,000 to each of the Tarzan movies, thereby reducing other movies' allocations in the package.

c. *Warner's purported justifications for straight-lining are meritless.*

Warner seeks to avoid the unfairness of its allocations by contending that in certain cases, the buyers insisted on paying the same license fee for every film they acquired. However, the evidence showed licensees only care about the aggregate amount they are paying for an entire package of films. For example, in one licensing deal between Warner and HBO, a package of films was negotiated for a price of $141,475,000, of which $400,000 was allocated to Chariots of Fire. However, HBO didn't care whether Warner internally allocated $1 million of the licensing fee to Chariots of Fire, and some other picture would have been allocated $600,000 less.

Further, Robert Levi, a defense expert, testified the buyer/licensee "did not have a say in what the allocation would be from Warner Bros.'s standpoint," and the buyer could not dictate how Warner would allocate internally the monies from a licensing package to specific films within that package. Thus, Warner's claim "the buyer made me do it" is meritless.

Warner also defends its straight-lining of films in a licensing package on the ground it is "undisputed" the practice of straight-lining is common in the industry. However, the prevalence of straight-lining was a disputed issue at trial. Defense expert Levi testified it was "unusual" that a licensing agreement "would list each film in the package as having an equal license fee." The evidence also showed MGM did not engage in straight-lining because different movies have different values.

Moreover, even if straight-lining were a common practice, it would not absolve Warner of its duty to Ladd, as a profit participant, to fairly allocate fees derived from licensing packages.

d. *Conclusion as to breach of the implied covenant of good faith and fair dealing*.

Substantial evidence supports the jury's determination that Warner breached its obligation to Ladd, as a profit participant, to fairly allocate licensing fees to Ladd's movies based on their relative worth in licensing packages.

Warner's remaining contentions all relate to Ladd's damages. We now address those issues.

2. *No merit to Warner's contention the judgment must be reversed on the ground the $3,190,625 verdict includes damages that were incurred prior to the permissible time period; Warner had the burden at trial to prove all facts essential to its affirmative defense and failed to do so.*

Warner contends the judgment cannot stand because the record contains no evidence identifying the amount of damages Ladd suffered during the permissible time period. Warner asserts the verdict includes damages that are barred by the 1996 settlement agreement, which agreement expressly barred claims arising through September 30, 1992. Warner further argues the verdict includes damages incurred prior to August 1, 1999, damages which are barred by the four-year statute of limitations. (Code Civ. Proc., § 337.)[7]

Warner's contention the verdict cannot stand because it includes damages that preceded the permissible time period is resolved by certain basic principles. The statute of limitations is an affirmative defense, as is a settlement and release. (*Samuels v. Mix* (1999) 22 Cal.4th 1, 10; *Walton v. City of Red Bluff* (1991) 2 Cal.App.4th 117, 131.)

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[7] Ladd commenced this action on July 31, 2003. Both the cause of action for breach of written contract and the cause of action for breach of the implied covenant of good faith and fair dealing are governed by the four-year statute of limitations. (Code Civ. Proc., § 337, subd. (1); *Krieger v. Nick Alexander Imports, Inc.* (1991) 234 Cal.App.3d 205, 220 [action for breach of implied covenant of good faith and fair dealing is controlled by four-year limitations period for an action arising on written contract].) Accordingly, the trial court instructed the jury "Plaintiffs may only recover damages, if any, based on the alleged underpayment of revenue received from August 1, 1999 through the present."

As with any affirmative defense, Warner had the burden to prove all facts essential to its defenses that the 1996 settlement and release and the 1999 accrual of the statute of limitations barred some portion of Ladd's damages. (Evid. Code, § 500; *Samuels v. Mix, supra*, 22 Cal.4th at p. 10 ["a defendant must prove the facts necessary to enjoy the benefits of a statute of limitations"]; *Walton, supra*, at p. 131 [defendant bears burden of proving a claim is barred by a release].)[8]

As stated in *Western Recreational Vehicles, Inc. v. Swift Adhesives, Inc., a Div. of Reichhold Chemicals, Inc*. (9th Cir. 1994) 23 F.3d 1547, 1553, "[t]he statute of limitations is an affirmative defense and its elements must be proved by the party asserting it. Where a part of plaintiff's claim for damages is barred by the statute of limitations and a part of it is not, the defendant pleading the statute as an affirmative defense has the burden of specifically proving which portion of plaintiff's damages are barred by the statute. Failure to so prove will result in a complete failure of the affirmative defense . . . . The obligation to segregate the damage should fall upon the wrongdoer and not upon the person he has harmed." (Italics omitted.)

Although Warner faults Ladd for not presenting evidence to establish what portion of damages may have been barred by Warner's statute of limitations and release defenses, the burden of producing such defense evidence rested with Warner, not with Ladd.

We reiterate the trial court's ruling on Warner's motions for JNOV: "I didn't hear this argument before. The one thing I remember about this case is that I couldn't put my finger on an amount – a specific amount before and after the pertinent dates. . . . I could never put my finger on the amounts before 1992, after 1992, before 1999, after 1999. [¶] . . . . [T]here's no question that before 1992 – that was released by the [1996]

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[8] *Walton v. City of Red Bluff, supra*, 2 Cal.App.4th at page 131, states: "[w]here a claim is unenforceable the burden is on the defense to demonstrate unenforceability. When a claim is barred by the *statute of limitations* the issue must be pleaded as an affirmative defense. [Citation.] Other claims of unenforceability must be raised by affirmative defense, such as a claim a contract is barred by the *statute of frauds* [citations] [waiver at trial by failure to object], *res judicata* [citations] [same], *release* [citation], or *accord and satisfaction* [citation]." (Italics added.)

agreement. There's no question that the statute of limitations barred anything before August the 1st, 1999. I have those dates firm in my head and I understand that." The trial court explained, "[y]ou're giving me an argument that was never made to the jury. Nobody wanted to play with numbers in this case. This is the first time we're playing with numbers."

The essence of the "numbers" presented to the jury was as follows. Simon testified Ladd's films were underallocated $97 million in licensing fees. Ladd's claimed profit participation percentage in said licensing revenues was $3,190,625. The jury awarded Ladd precisely that amount in compensatory damages.

When Simon testified to the amount of underallocated licensing fees, Warner could have elicited on cross-examination what portion, if any, of the $97 million in licensing fees preceded August 1, 1999. Alternatively, Warner could have presented its own witnesses to break down the licensing fees it earned from Ladd's movies, year by year. Warner chose not to do so at trial. Warner cannot at this juncture complain about a damages case it wishes it had presented at trial.

As the trial court stated to Warner's counsel at the hearing on the JNOV motions, "you've got accountants, and . . . there's absolutely no reason why they couldn't have been broken down. But I don't know why they weren't broken down. But you've taken the position, 'Well, since you didn't break them down . . . there's no evidence to support the verdict.' . . . [¶] But I cannot say . . . that the plaintiff cannot win. [The motion for JNOV is] a dispositive motion. And if I [were] to grant the JNOV, I'd say under no circumstances can they win. And that's not true." The trial court added, "you know, I get this all the time in cases where . . . the defendants will say, 'Well, if you are going to award damages – and I don't think you should – let me tell you what – the damages that you should award' . . . 'if any.' "

The trial court also recognized Warner's counsel had *intentionally* placed the court in a "dilemma", by not seeking a new trial on the ground of excessive damages and moving solely for JNOV. However, because the evidence, and particularly Simon's

testimony, provided substantial support for the damages awarded by the jury, a JNOV did not lie.

In sum, we reject Warner's contention the judgment must be reversed because Ladd failed to specify the amount of damages incurred during the permissible time period. We hold Warner had the burden at trial to show what portion, if any, of Ladd's damages may have been barred by the 1996 settlement agreement (which released all claims through September 30, 1992) or by the August 1, 1999 accrual of the four-year statute of limitations. Warner failed to meet its burden below, entitling Ladd to recover all the proven damages.

[[Begin nonpublished portion.]]

[[3. *No merit to Warner's challenge to sufficiency of evidence to support the damage award.*

a. *Simon's methodology.*

By way of background, Simon testified he reviewed all 218 license agreements Warner produced in this lawsuit. Of the 218 licensing agreements, Simon selected a core group of 58 agreements from the larger markets which typically dictate the value of movies and which, in his opinion, collectively provided a cross-section of the domestic and international marketplace. As indicated, Warner internally assigned each movie a grade of A, B or C and Simon generally agreed with Warner's ratings. (Ladd's titles were all A's or B's.) Simon differed with Warner as to the *allocation* of the license fees *within a package*. Simon increased Warner's revenues on Ladd's A films by 50 percent, and on Ladd's B films by 25 percent. Guided by the average underallocation in the 58 core licensing deals, Simon determined Warner had underallocated $97 million to Ladd's films.

b. *Warner's arguments regarding Simon's testimony are unavailing*.

Even assuming Warner's contentions in this regard are not barred by Warner's failure to seek a new trial on the ground of excessive damages (*County of Los Angeles v. Southern Cal. Edison Co., supra,* 112 Cal.App.4th at p. 1121), the contentions fail.

Warner asserts Simon "speculated" that Ladd's films were undervalued by the same percentages in the more than 180 license agreements he had not reviewed, and that Simon "extrapolated" from 57 agreements that he analyzed to the other agreements that he failed to analyze. The record is contrary. Simon testified he reviewed all 218 license agreements produced by Warner, and those agreements were "consistent with" the undervaluation he found in the 58 core agreements.

Warner further contends the damage award is unsupported because only 20 of the licensing agreements reviewed by Simon were admitted as documentary exhibits. Warner argues that without all the licensing agreements in evidence, the jury lacked "sufficient information to determine whether Ladd's films were undervalued" and "could not verify whether Simon correctly performed [his] analysis."

Thus, in essence, Warner is attacking the weight of Simon's testimony, on the ground Simon's oral testimony was not fully corroborated by the documentary exhibits. However, Simon testified he reviewed all 218 agreements, thereby laying a foundation for his testimony, and the jury found Simon's testimony credible. Jurors need not review and sift through every document on which experts base their opinions to double-check the accuracy of the analysis. The jury was entitled to rely on Simon's testimony. If Warner believed Simon's testimony regarding the other licensing agreements was inaccurate, it could have cross-examined him on those other agreements, or presented its own expert testimony about them.

Moreover, Warner did not object or seek to restrict the scope of Simon's testimony to the 20 licensing agreements which were admitted as documentary exhibits. Therefore, Warner waived said objection. (Evid. Code, § 353.) "[E]vidence which is admitted in the trial court without objection, although incompetent, should be considered in support

of that court's action [citations] and objection may not be first raised at the appellate level." (*Estate of Fraysher* (1956) 47 Cal.2d 131, 135.)

In an attempt to overcome its failure to object below to Simon's testimony regarding licensing agreements which were not admitted as documentary exhibits, Warner's reply brief contends it "is not here raising an evidentiary challenge to Simon's testimony, it is arguing that the verdict is not supported by substantial evidence." The argument is meritless. The effect of Warner's failure to object below to Simon's testifying to damages beyond the 20 licensing agreements which were admitted as documentary exhibits is that said objection to Simon's testimony was waived. (Evid. Code, § 353.) Therefore, Simon's testimony regarding those other licensing agreements was properly considered by the jury (*Estate of Fraysher, supra,* 47 Cal.2d at p. 135), and it constitutes substantial evidence to support the verdict.

4. *Remaining issues not reached.*

Because Simon's testimony constitute substantial evidence to support the verdict, it is unnecessary to discuss Warner's contentions that this court should reduce the judgment to the maximum amount of damages supported by Simon's testimony, or that this court should grant Warner a new trial.

II. LADD'S CROSS-APPEAL

1. *Standard governing appellate review of nonsuit*.

As we stated in *Claxton v. Atlantic Richfield Co*. (2003) 108 Cal.App.4th 327, 334 (*Claxton*), "[b]ecause a successful nonsuit motion precludes submission of plaintiff's case to the jury, courts grant motions for nonsuit only under very limited circumstances. (*Campbell v. General Motors Corp*. (1982) 32 Cal.3d 112, 117.) A court may not grant a motion for nonsuit if the evidence presented by the plaintiff would support a jury verdict in the plaintiff's favor. (*Carson v. Facilities Development Co*. (1984) 36 Cal.3d 830, 838 (*Carson*); *DiPalma v. Seldman* (1994) 27 Cal.App.4th 1499, 1505-1506 (*DiPalma*).)"

In determining " ' "whether plaintiff's evidence is sufficient, the court may not weigh the evidence or consider the credibility of witnesses. Instead, the evidence most favorable to plaintiff must be accepted as true and conflicting evidence must be

disregarded. The court must give 'to the plaintiff['s] evidence all the value to which it is legally entitled, . . . indulging every legitimate inference which may be drawn from the evidence in plaintiff['s] favor . . . .' " [Citations.]' (*Carson, supra*, 36 Cal.3d at pp. 838-839; accord, *DiPalma, supra*, 27 Cal.App.4th at p. 1506)." (*Claxton, supra*, 108 Cal.App.4th at p. 334.)

On appeal from a judgment of nonsuit, " 'the reviewing court is guided by the same rule requiring evaluation of the evidence in the light most favorable to the plaintiff. "The judgment of the trial court cannot be sustained 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." [Citations.]' (*Carson, supra*, 36 Cal.3d at p. 839; accord, *DiPalma, supra*, 27 Cal.App.4th at p. 1506.)" (*Claxton, supra*, 108 Cal.App.4th at p. 335.)

Although " 'a judgment of nonsuit must not be reversed if plaintiff's proof raises nothing more than speculation, suspicion, or conjecture, reversal is warranted if there is "some substance to plaintiff's evidence upon which reasonable minds could differ . . . .' [Citations.] Only the grounds specified by the moving party in support of its motion should be considered by the appellate court in reviewing a judgment of nonsuit. [Citations.]' (*Carson, supra*, 36 Cal.3d at p. 839; accord, *DiPalma, supra*, 27 Cal.App.4th at p. 1506[.])" (*Claxton, supra*, 108 Cal.App.4th at p. 335, italics omitted.)

2. *Trial court erred in granting nonsuit on Ladd's Blade Runner fraud claim.*

By way of background, Ladd showed Warner fraudulently represented that Blade Runner was so grossly unprofitable that there was no need to send Ladd accounting statements or to conduct an audit as to Ladd's profit participation in the movie. The trial court granted nonsuit on this claim, finding no evidence of fraud.

Generally, " ' "[t]he elements of fraud . . . are (a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or 'scienter'); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and

(e) resulting damage." ' [Citation.]" (*Small v. Fritz Companies, Inc*. (2003) 30 Cal.4th 167, 173.)

Viewing the evidence in the light most favorable to Ladd, in accordance with the applicable standard of review, the evidence showed: In March 1992, Warner provided Ladd with a one-page statement indicating Blade Runner had lost $19.5 million as of December 31, 1991. Warner repeatedly misrepresented to Ladd that Blade Runner was so far in the red it would never make a profit. Warner told Ladd there was no reason to send accounting statements or to bother with a costly audit because the movie was so unprofitable. Ladd relied on Warner's representations, knowing Warner had a duty to act in good faith. Warner's misrepresentations only came to light in 2001, when Ladd discovered Warner was paying profit participation to Empress.

Warner's payment of profit participation to Empress, but not to Ladd, *on the same movie*, is sufficient to raise a triable issue as to fraud. Therefore, the trial court erred in taking the issue away from the jury by granting nonsuit on the Blade Runner fraud claim. That claim must be resolved by the trier of fact.

3. *Trial court erred in ruling the 1996 settlement barred Ladd's claims relating to Blade Runner profits; a release procured by fraud is ineffective.*

In the 1996 settlement agreement, the parties released "all claims, whether known or unknown, arising from, based on, or in any way relating to the distribution and exploitation through September 30, 1992 of the motion pictures (the 'Properties') produced pursuant to, and/or referenced in" the earlier agreements between Warner and Ladd.

In granting nonsuit with respect to Ladd's Blade Runner claims, the trial court ruled both "past and *future claims* were barred by the [1996 settlement] agreement between the parties." (Italics added.) The jury was advised, "[Ladd's] claims for fraud, negligent misrepresentation, breach of contract and breach of the implied covenant of good faith and fair dealing based on the dispute over the accounting treatment of the negative cost and interest for the film 'Blade Runner' are no longer in this case."

As a preliminary matter, to the extent the trial court held the settlement agreement barred *future claims* relating to Blade Runner, that ruling is contrary to the language in the agreement resolving all claims only "through September 30, 1992."

Further, as discussed above, Ladd presented substantial evidence Warner falsely represented that Blade Runner was so deeply in the red that there was no need to bother with a costly audit. Thus, Ladd "[d]idn't even bother to audit because it made no sense." As a result, the first audit, which led to the 1996 settlement agreement, omitted the film Blade Runner.

Civil Code section 1542 provides: "A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor." Here, the release executed in 1996 extended to "all claims, whether known or unknown." A written release "extinguishes any obligation covered by the release's terms, *provided it has not been obtained by fraud, deception, misrepresentation*, duress, or undue influence. [Citations.]" (*Skrbina v. Fleming Companies* (1996) 45 Cal.App.4th 1353, 1366, italics added.) "All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law." (Civ. Code, § 1668.) A release provision which has been "procured by fraud" may be set aside as unenforceable, without rescinding the entire agreement. (*Persson v. Smart Inventions, Inc*. (2005) 125 Cal.App.4th 1141, 1153-1154.)

As discussed, Ladd presented substantial evidence of fraud by Warner relating to the extreme unprofitability of Blade Runner, inducing him to refrain from auditing that film. If the trier of fact were to determine the inclusion of Blade Runner in the 1996 release was procured by fraud, the 1996 release would be ineffective with respect to Ladd's Blade Runner claims. On this record, the trial court erred in construing the settlement agreement, on nonsuit, as barring Ladd's Blade Runner claims.

4. *Trial court erred in granting nonsuit on Ladd's claims relating to deletion of screen credits and company logo*.

The trial court granted nonsuit with respect to Ladd's claims relating to deletion of promised screen credits and company logo from the films Chariots of Fire and Once Upon a Time in America, on film and from DVD packaging. The trial court held there was "no evidence of any lost opportunities or any ascertainable loss due to loss of screen credit in the record." The trial court's ruling was clearly erroneous.

"Where the *fact* of damages is certain, the amount of damages need not be calculated with absolute certainty. [Citations.] The law requires only that some reasonable basis of computation of damages be used, and the damages may be computed even if the result reached is an approximation. [Citation.] This is especially true where . . . it is the wrongful acts of the defendant that have caused the other party to not realize a profit to which that party is entitled. [Citations.]" (*GHK Associates v. Mayer Group, Inc*. (1990) 224 Cal.App.3d 856, 873-874.)

In opposing nonsuit below, Ladd's papers discussed in detail *Tamarind Lithography Workshop, Inc. v. Sanders* (1983) 143 Cal.App.3d 571 (*Tamarind*). In that case, the appellant wrote, directed and produced a film and the respondent failed to give him the screen credit for which he had contracted. (*Id*. at p. 573.) With respect to damages, *Tamarind* stated: "There is no doubt that the exhibition of a film, which is favorably received by its critics and the public at large, can result in valuable advertising or publicity for the artists responsible for that film's making. Likewise, it is unquestionable that the nonappearance of an artist's name or likeness in the form of screen credit on a successful film can result in a loss of that valuable publicity. However, whether that loss of publicity is measurable dollar wise is quite another matter." (*Id*. at p. 576.)

After reviewing the case law, *Tamarind* concluded "the awarding of damages must be premised upon calculations, inferences or observations that are logical. Just how logical or reasonable those inferences are regarded serves as the determining factor. Accordingly, where the jury in the matter sub judice was fully apprised of the favorable

recognition [the subject] film received from the Academy of Motion Picture Arts and Sciences, the Los Angeles International Film Festival, and public television, and further, where they were made privy to an assessment of the value of said exposure by three experts, [[9]] it is reasonable for the jury to award monetary damages for that ascertainable loss of publicity." (*Tamarind, supra*, 143 Cal.App.3d at p. 577.)

Tamarind, supra, 143 Cal.App.3d at page 576, cited with approval *Paramount Production v. Smith* (9th Cir. 1937) 91 F.2d 863 (*Paramount*). In *Paramount,* the court was provided with evidence from which the "jury might easily compute the advertising value of the screen credit." (*Id*. at p. 867.) The particular evidence presented included the earnings the plaintiff/writer received for his work on a previous film in which he did not contract for screen credits. This evidence was in turn easily compared with earnings that the writer had received for work in which screen credits were provided as contracted. Moreover, evidence of that artist's salary, prior to his receipt of credit for a play when compared with earnings received subsequent to his actually receiving credit, was "if believed, likewise sufficient as a gauge for the measure of the damages." (*Ibid*.)

In the instant case, Ladd's expert, Vance Scott Van Petten, testified that in determining a producer's fees, "you look at the last two or three movies, . . . what was the fee they received. And that's usually what you use as the baseline." The evidence showed that prior to the credit and logo deletions, Ladd was paid a producing fee of $1.5 million on the movie Braveheart. After the deletions occurred, Ladd was only able to negotiate producer's fees of $400,000 and $500,000 respectively, for the films Gone Baby Gone and An Unfinished Life.

Further, Ladd estimated damages of "roughly $4 a unit" for the DVDs lacking the proper credits, representing lost prestige, lost ability to negotiate similarly favorable credits with other studios, and loss of potential business. (See *Popovich v. Sony*

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9 In *Tamarind*, the experts "all rendered opinions that publicity received by someone with the credit 'A film by' for a documentary similar to appellant's, which received similar honors, could be quantified in monetary terms between $50,000 and $150,000." (143 Cal.App.3d at p. 577, fn. 6.)

Entertainment, Inc. (6th Cir. 2007) 508 F.3d 348, 359 [upheld $5.6 million damage award for missing credits based on evidence of $3 damage per CD].) "California courts have consistently held that an owner of literary property may properly testify as to its value even if he is not an expert in such matters. (*Golding v. R.K.O. Pictures, Inc.* [(1950)] 35 Cal.2d 690, 700-701 and cases cited therein.)" (*Donahue v. United Artists Corp*. (1969) 2 Cal.App.3d 794, 802.) The credit and weight to be given such evidence is for the trier of fact. (*Schroeder v. Auto Driveaway Co*. (1974) 11 Cal.3d 908, 921.)

Warner makes much of Ladd's testimony on cross-examination that "it's all speculation" whether he was harmed by the absence of the Ladd logo on a particular movie, Braveheart, and that he responded "I don't know" when asked whether the credit deletions damaged him financially. However, Ladd's statements in that regard merely go to the weight of Ladd's testimony. Further, the evidence in this regard was not limited to Ladd's testimony; Ladd's expert, Van Petten, also testified regarding these damages. The mere fact the damages cannot be determined with precision does not mean that Ladd is not entitled to compensation for the deprivation of valuable screen credit and logo rights to which Ladd was entitled. As Ladd recognized in his testimony, when he stated "I would leave that up to a jury," it is the function of the trier of fact to assess the damages. In making that determination, jurors consider and weigh the expert testimony and other evidence that is presented by both sides at trial.

In sum, viewing the evidence adduced by Ladd in light of the applicable case law, the trial court erred in granting nonsuit on the screen credit and company logo claims. The issue of Ladd's damages with respect to these items is to be determined by the trier of fact.**]]**

[[End nonpublished portion.]]

DISPOSITION

The orders denying Warner's motions for JNOV are affirmed. The orders granting nonsuit on Ladd's Blade Runner and screen credits/logo claims are reversed and the matter is remanded for a retrial of those claims. In all other respects, the judgment is affirmed. Ladd shall recover costs on the appeal and cross-appeal.

CERTIFIED FOR PARTIAL PUBLICATION

KLEIN, P. J.

We concur:

KITCHING, J.

ALDRICH, J.