2d Civil No. B 077509

IN THE COURT OF APPEAL OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FIVE

MAIN LINE PICTURES, INC., a Delaware corporation,

Plaintiff and Respondent,

vs.

KIM BASINGER, an individual; MIGHTY WIND PRODUCTIONS, INC., a California corporation; INTERNATIONAL CREATIVE MANAGEMENT, INC., a Delaware corporation, et at.,

Defendants and Appellants.

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Appeal from the Los Angeles County Superior Court
Honorable Judith C. Chirlin, Judge, Case No. BC 031180

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# REPLY BRIEF OF APPELLANTS KIM BASINGER AND MIGHTY WIND PRODUCTIONS, INC.

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GREINES, MARTIN, STEIN & RICHLAND
IRVING H. GREINES, State Bar No. 039649
ROXANNE HUDDLESTON, State Bar No. 135536
9601 Wilshire Boulevard, Suite 544
Beverly Hills, California 90210-5215
310/859-7811

KATTEN MUCHIN ZAVIS & WEITZMAN
HOWARD L. WEITZMAN, State Bar No. 038723
MARK A. WOOSTER, State Bar No. 123461
E. RANDOL SCHOENBERG, State Bar No. 155281
1999 Avenue of the Stars, Suite 1400
Los Angeles, California 90067-6042
310/788-4400

Attorneys for Defendants and Appellants KIM BASINGER and MIGHTY WIND PRODUCTIONS, INC.

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# INTRODUCTION

Our opening brief demonstrated the judgment unquestionably must be reversed. Among other things, we established the judgment is legally deficient for reasons which include that the "and/or" special verdict returned by the jury is incomprehensible, precluding ascertainment of which defendant or defendants were found by the jury to have entered into and breached a contract; that no enforceable oral or written contract was ever proven to exist; that the trial court committed multiple prejudicial errors in instructing and refusing to instruct the jury on key issues; that the damage award was not supportable on any legally cognizable theory; and that the attorney's fee and cost awards were precluded by governing statutory and decisional law.

For the most part, Main Line ignores the main issues. Instead, it "responds" by falsely proclaiming that the "central issue presented for review" is whether substantial evidence supports the judgment (RB p. 1) and it then devotes most of its brief to urging that substantial evidence exists. Main Line's battle with that strawman, however, cannot overcome reality, namely, that most of defendants' arguments raise pure legal issues not governed by the substantial evidence standard of review. In short, Main Line's brief is largely irrelevant.

Rather than coming to grips with the real issues, Main Line spends most of its time dodging them by omission and mischaracterization. Consider, for example, the following:

A. In responding to the argument that the "and/or" special verdict is fatally defective, Main Line asserts the error was waived because defendants failed to object. Not so. Nine pages of reporter's transcript explicitly document that defendants timely and strenuously objected to the "and/or" formulation when the trial court first presented the erroneous special verdict form (RT 2651-2659), that defendants later reiterated their objection (RT 2862-2863), and that they raised the issue again in post-trial motions (CT 1800-1801, 2125-2127). We cannot conceive why Main Line would represent otherwise.

B. Ignoring California Supreme Court and Court of Appeal decisions squarely establishing that use of the "and/or" special verdict form requires reversal, Main Line relies on and misrepresents the holding of a distinguishable 1932 Florida case, Cochrane v. Florida East Coast Ry. Co. (1932) 145 So. 217. (RB p. 32.) What Main Line also fails to disclose is that the Florida court condemned the use of "and/or" in the following unmistakable terms:

> "In the matter of the use of the alternative, conjunctive phrase 'and/or' . . . we take our position with that distinguished company of lawyers who have condemned its use. It is one of those inexcusable barbarisms which was sired by indolence and dammed by indifference, and has no more place in legal terminology than the vernacular of Uncle Remus has in Holy Writ. I am unable to divine how such senseless jargon becomes current. The coiner of it certainly has no appreciation for terse and concise law English." (At pp. 218-219.)

How Main Line could possibly take comfort in Cochrane--the only case it cites in response to the "and/or" argument--is a complete mystery.

C. Main Line also claims--again falsely--that defendants never objected to its failure to file a noticed motion to procure attorney's fees. (RB 27.) In fact, in defendants' motion to tax costs, under a heading entitled "Main Line Is Not Entitled To Attorney's Fees Without A Noticed Motion" (CT 1898-1899), they unequivocally objected.

D. Main Line's "response" to our damages argument is another demonstration of its inability or refusal to address the issues. Uncontroverted juror declarations, received in evidence and never stricken, established the jury improperly awarded gross, not net, lost profits. Main Line simply opts to ignore the uncontroverted evidence, as well as a recent California Supreme Court decision (Ann M. v. Pacific Plaza Shopping Center (1993) 6 Cal.4th 666) squarely establishing the juror declarations must be considered.

E. Although we established that Main Line's expert's testimony was based on a theory of damages which the law does not recognize and which, by the expert's own admission, failed to take into account the factors that must be considered before lost profits may be awarded, Main Line simply reiterates its expert's testimony on the issue, never responding to the legal issue that damages which are not legally cognizable are not recoverable, no matter how many experts testify concerning them and no matter how vehemently they attest such damages were suffered. As a matter of law, the expert's invented "lost profit differential" analysis can no more support the exorbitant judgment than an expert's testimony concerning a plaintiff's "lost hopes and dreams" damages could.

F. When unable to ignore an issue, Main Line simply misstates the governing standard of review, as it does when it claims an "abuse of discretion" standard dictates whether jury instructions are erroneous and whether a statute governing awards of attorney's fees and costs was

violated. Main Line even relies on overruled or out-of-date authority, citing People v. Resendez (1968) 260 Cal.App.2d 1, overruled by People v. Hutchinson (1969) 71 Cal.2d 342, 351, to argue juror declarations are inadmissible to show the jury relied on matters outside the evidence to reach its verdict and, citing LaGue v. Delgaard (1956) 138 Cal.App.2d 346, superseded by People v. Honeycutt (1970) 20 Cal.3d 150, 156, to argue the abuse of discretion standard governs review of uncontroverted evidence of jury misconduct.

This is just the tip of the iceberg. Time and time again, Main Line fails to refute any of the numerous errors defendants have demonstrated. Rather than responding to the merits of our arguments, Main Line repeatedly makes factual assertions about the record without citing to the record, and makes statements about the law without even bothering to cite authority. Under the law, the judgment in this case is riddled with error. It should be reversed with directions to enter judgment in defendants' favor both because Main Line induced the court to use the meaningless "and/or" special verdict form and expressly agreed to take the risk of reversal on that ground and because Main Line failed to prove the existence of an enforceable oral or written contract. At a minimum, because of the multiple prejudicially erroneous jury instructions, the utter lack of support for the damage, attorney's fee and cost awards, and the prejudicial jury misconduct, the judgment must be reversed and remanded for a new trial.

## LEGAL DISCUSSION

### I. THE JUDGMENT MUST BE REVERSED BECAUSE THE SPECIAL VERDICT FINDINGS AND JUDGMENT AGAINST BASINGER "AND/OR" MIGHTY WIND ARE FATALLY UNINTELLIGIBLE, GIVING NO CLUE WHETHER THE JURY RETURNED A VERDICT AGAINST BASINGER ALONE, MIGHTY WIND ALONE, OR BOTH.

#### A. Contrary To Main Line's Assertion, The Record Conclusively Establishes Defendants Timely Objected To The Special Verdict Form.

Under California Supreme Court and Court of Appeal authority directly on point, the use of a special verdict form couched in terms of whether Basinger "and/or" Mighty Wind entered into and breached an oral or written contract compels reversal. (AOB pp. 13-18.) Amazingly, Main Line now attempts to escape the error by claiming at one point in its brief that defendants did not object to the special verdict form until just before judgment was entered (RB pp. 33-34), although elsewhere it concedes defendants timely objected (RB p. 7 ["(Defendants) argued for separate instructions and jury questions on all issues with respect to Ms. Basinger and her loanout company"]).

The record is clear. Defendants vehemently objected to the "and/or" formulation at the very moment the trial court first proposed the special verdict form. (RT 2651-2659.) Specifically, after the trial court asked the parties to "take a look at the special verdicts" (RT 2651) and apprised it "did not separate them [defendants] out for consideration in the verdict form" (RT 2652), defendants argued that each defendant was entitled to a separate finding and that the absence of separate findings would deprive defendants of due process. (RT 2652-2659.) After hearing argument, the trial court inquired whether Main Line was willing to take the risk of an "and/or" finding, rather than asking "for a separate finding with respect to each [defendant]," and Main Line proclaimed it was willing to take the risk. (RT 2659.) Defendants later reiterated their position, stating: "We also objected to Mighty Wind and Miss Basinger being referred to in the, I guess, conjunctive/disjunctive rather than having separate questions about each person." (RT 2862-2863.)

Defendants again raised the "and/or" issue in their motion for new trial (CT 1800-1801) and in their reply to Main Line's opposition to that motion (CT 2125-2127). They did not, as Main Line claims, keep silent until the proposed judgment was submitted.

The record speaks for itself. It definitively establishes that defendants timely and repeatedly objected to the form of the special verdict. We cannot begin to perceive how Main Line could honestly maintain otherwise.

B. Under Controlling California Authorities, Jury Findings Couched In Terms Of One Fact Or Party "And/Or" Another Are Unintelligible As A Matter Of Law And Must Be Reversed.

1. The "and/or" special verdict form and judgment are fatally uncertain.

The expression "and/or" is "used to imply that either or both of the things mentioned may be affected or involved" in the issue. (Random House Unabridged Dictionary (2d ed. 1993) p. 77, col. 2.) Because the term is inherently incomprehensible, its use has been condemned by our Supreme Court (In re Bell (1942) 19 Cal.2d 488, 560) and by the Court of Appeal (California Shipbuilding Corp. v. Ind. Acc. Com. (1948) 85 Cal.App.2d 435, 436), both courts declaring that use of "and/or" terminology in a judgment compels reversal. (In re Bell, supra, 19 Cal.2d at p. 500 ["the ambiguity of the judgment . . . would thus clearly warrant a reversal"]; California Shipbuilding Corp., supra, 85 Cal.App.2d at p. 437 [annulling "and/or" workers' compensation award].)

Main Line pretends to distinguish these dispositive cases; in reality, however, it does nothing more than recite their controlling holdings. (RB p. 32.) In fact, Bell and California Shipbuilding are indistinguishable from this case. Exactly as in In re Bell, it is impossible to determine what the jury found, i.e., whether it found that Basinger alone, Mighty Wind alone, or both entered into and breached a contract; as in California Shipbuilding, it is impossible to determine a material issue of fact, namely whether Basinger, Mighty Wind or both were liable for Main Line's injuries. (California Shipbuilding, supra, 85 Cal.App.2d at p. 437.)[1/]

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1/ Rather than coming to grips with the decisive California authorities on this point, Main Line dredges up a 1932 Florida case and falsely claims it approved a "judgment [which] contained the term 'and/or'. . . ." (RB p. 32.) That case (Cochrane, supra, 145 So. 217) merely held that a pleading--a petition for preference in a bank insolvency proceeding--was not fatally defective for alleging the "insolvency and/or unsound condition of the bank" because the petitioner was entitled to allege either. (At p. 218.) The opinion did not, as Main Line claims, address, much less approve, an "and/or" judgment. In the context of reversible error, an uncertain alternative pleading

(continued...)

Bell and California Shipbuilding are but two of many California cases addressing the effect of uncertain jury findings where multiple defendants have been sued. The rule is "that the intention of the jury must not be left to inference or presumption, that it must be expressly declared, and that where it is not expressly declared in reference to any one of several defendants who have separately answered, it must be taken that the jury has failed to pass on that particular issue." (Keller v. Smith (1933) 130 Cal.App. 128, 133, emphasis added; Irelan-Yuba etc. Min. Co. v. Pacific G. & E. (1941) 18 Cal.2d 557, 569-571 [intention of jury in returning verdict against one defendant, but silent as to another, could not be left to inference or presumption but was, instead, failure to find against that defendant, requiring reversal]; Brokaw v. Black-Foxe Military Institute (1951) 37 Cal.2d 274, 279 [same]; Walters v. Marler (1978) 83 Cal.App.3d 1, 20, disapproved on other grounds, Gray v. Don Miller & Associates, Inc. (1984) 35 Cal.3d 498, 507 [applying rule to silence on one of multiple theories of liability].)

Here, exactly as in each of the cited cases, the jury failed to pass on the central issues in this case. It failed to decide who was a party to and who breached a contract. This alone requires reversal.

2. There was substantial evidence on which the jury could have concluded that Basinger or Mighty Wind was not a party to any contract.

Rather than cite a single pertinent authority, Main Line urges that the unintelligible findings are harmless because "the undisputed evidence shows that both Ms. Basinger and Mighty Wind were parties to the [purported] contract." (RB p. 32.) Nonsense. If the jury had not been improperly precluded from separately determining the liability of each defendant, it readily could have concluded that either defendant was not a party to the contract. For instance:

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1/(...continued)
form is a far different creature than a fatally uncertain verdict and judgment. Although the Florida court declined to hold that use of "and/or" in a pleading was reversible error, it strongly echoed California's condemnation of the terms in other contexts. (At pp. 218-219; see quotation at p. 2, supra, of this brief.)

Significantly, Main Line has cited no case other than the self-defeating Cochrane decision in response to In re Bell and California Shipbuilding.

a. The jury could have determined Basinger was not a contracting party by relying on evidence such as: (1) Mazzocone's testimony that he understood the contract was between Main Line and Mighty Wind (RT 780); (2) Wyman's repeated references to the "agreement between Main Line and Mighty Wind" (Exs. 30, 34, 49, 66, 76); (3) the proposed execution draft's provisions stating that Mighty Wind would cause Basinger to report for the movie and Mighty Wind would receive payment (Ex. 76, pp. 1-2; CT 13-14); (4) the proposed execution draft's eight page loanout agreement[2/] which would have been superfluous if Main Line were contracting with Basinger directly (Ex. 76, pp. 13-20); and (5) the proposed execution draft's signature lines for Main Line and Mighty Wind, but not Basinger (Ex. 76).[3/]

b. The jury could also have concluded that Mighty Wind never entered into a contract by relying on such evidence as: (1) the exchange of multiple drafts of the proposed long-form agreement, each containing a signature line for Mighty Wind, thus expressing an intent to reduce the agreement to a signed writing, which never occurred (Exs. 34, 42, 49, 57, 66, 76); (2) Wyman's letters specifically reciting that, if the terms were acceptable, an execution copy would be forwarded (Exs. 30, 34, 66, 76); (3) the letters accompanying every draft of the proposed long-form agreement expressly reserved the right to make further changes (Exs. 24, 30, 32, 34, 42, 49, 57); and (4) several material terms appearing in the draft long-form agreement were expressly conditioned on signature, again establishing that signatures were required but never given (Ex. 76, pp. 1, 3).

It is no small wonder, then, that Main Line fails to cite to the record when it falsely proclaims the evidence was undisputed. In fact, the jury readily could have concluded that Basinger or Mighty Wind did not enter into a contract; indeed, the use of "or" in the special verdict form

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2/ By the loanout agreement, Mighty Wind would have loaned Basinger's services to Main Line to make Boxing Helena upon finalization of a contract with Main Line. (Ex. 76, pp. 13-20.)

3/ The record citations Main Line gives to support its assertion that it "never bargained for and none of the parties ever intended that Mighty Wind would provide services to Main Line" (RB p. 33) in fact establish precisely the opposite. Specifically, Mazzocone testified that Philips "inform[ed] me that . . . [Mighty Wind is Basinger's] production company and that's who the contract should be made with and that's where the payment [was to] be paid--to Mighty Wind" (RT 780); Wyman testified that Mighty Wind was Basinger's "company that furnishes her services; so payments you would make for [her] services are actually made to her company. . . ." (RT 538-539.) This, of course, establishes that Main Line was bargaining with Mighty Wind for Mighty Wind to furnish Basinger's services for Boxing Helena.

authorized such a finding. Because the evidence was disputed and conflicting on these issues, jury resolution was imperative. That is precisely why special verdicts exist. (Code Civ. Proc., § 624 ["The special verdict must present the conclusions of fact as established by the evidence . . ."]; Myers Building Industries, Ltd. v. Interface Technology, Inc. (1993) 13 Cal.App.4th 949, 959-960 [the purpose of a special verdict is to have the jury resolve all the ultimate facts presented to it].) Here, the trial court's incomprehensible and illegal "and/or" special verdict form precluded the jury from performing its constitutional function. For this reason, the judgment must be reversed.[4/]

3. The constitutional infirmities infecting the "and/or" special verdict and judgment are not cured by Main Line's simplistic chant that "one could not breach without the other."

Having neither authority nor logic on its side, Main Line attempts to dodge reversal by repeatedly proclaiming that "a breach by one would necessarily constitute a breach by the other." (RB pp. 4, 32, 33; RT 1442.) Repetition of a mantra, however, offers Main Line no salvation.

The issues the jury was required to resolve were, first, determination of who was a party to any contract and, then, determination of whether that party breached. If, however, the jury determined that Basinger or Mighty Wind was not a party to any contract, as the "or" part of the "and/or" special verdict form expressly permitted the jury to find, there was no way that defendant could be found to have "breached." This is so for the elementary reason that one who is not a party to a contract cannot possibly "breach" it. (Gruenberg v. Aetna Ins. Co. (1973) 9 Cal.3d 566, 576 [those who are not parties to an insurance contract cannot be liable for breach]; Mayes v.

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4/ The indecipherable "and/or" special verdict form fails to pass constitutional muster for an additional reason. It precluded ascertainment whether the constitutionally-required minimum of nine jurors ever agreed as to who was a party to and breached a contract. (Cal. Const., art. I, § 16 [at least nine jurors must agree on a verdict]; Kirby v. Adcock (1953) 116 Cal.App.2d 570 [any finding that does not command a favorable vote by three-fourths of the jury is ineffective].) Here, the jury poll showed only that nine jurors agreed that Basinger "and/or" Mighty Wind entered into a written contract. (CT 1501-1506; RT 2908-2909.) Yet the vote may have been internally split, so that the requisite nine-juror minimum may never have agreed on the liability of any single defendant. For example, it is possible that one, two or three jurors may have believed that Basinger alone entered into a contract, while the others may have believed that Mighty Wind did so, with no agreement by nine jurors on any single defendant's liability. The "and/or" formulation which Main Line insisted be given precludes anyone from knowing whether this additional constitutional requirement was satisfied.

Sturdy Northern Sales, Inc. (1979) 91 Cal.App.3d 69, 76-77, disapproved on other grounds, Applied Equipment Corp. v. Litton Saudi Arabia (1994) 7 Cal.4th 503, 521 [defendants who were not parties to franchise agreement were not liable for its breach]; Gold v. Gibbons (1960) 178 Cal.App.2d 517, 519 ["Breach of contract cannot be made the basis of an action for damages against defendants who did not execute it and who did nothing to assume its obligations"].)

Here, the special verdict form expressly told the jury it could find that either Basinger "or" Mighty Wind was a party to a contract, but we do not know what the jury found; the incomprehensible "and/or" special verdict form precludes us from ever knowing the answer to that crucial question.

Main Line's mantra that "one could not breach without the other"--ergo, it does not matter that the jury never resolved who was a party to the purported contract--turns the law of corporations on its head. Nowhere does Main Line dispute that a corporation and an individual are presumptively separate (Mid-Century Ins. Co. v. Gardner (1992) 9 Cal.App.4th 1205, 1212), nor does it dispute that the presumption can be overcome only by proving alter ego--a theory Main Line expressly disavowed at trial (RT 1440) and on appeal (RB p. 7, fn. 5) and a theory on which (if it had been asserted) Main Line would have borne the burden of proof. (MacPherson v. Eccleston (1961) 190 Cal.App.2d 24, 27 [corporate entity may be disregarded only when plaintiff proves elements of alter ego].)[5/]

A corporation, of course, can only act through a natural person; it can never act or fail to act unless its officers or shareholders act on its behalf. In every closely held corporation, there are only one or two people who can act on behalf of the corporation. If Main Line's mantra applied in such circumstances, the corporate veil would automatically be pierced and personal shareholder liability would automatically follow in every case, even though alter ego is never proven. That decidedly is not the law. Consider just a few examples:

a. In Vasey v. California Dance Co. (1977) 70 Cal.App.3d 742, a closely-held corporation failed to pay rent under its lease. The corporation could have paid its rent only if one of its two shareholders wrote the rent check; conversely, the corporation's failure to write the check could only have resulted from a shareholder's decision. Applying Main Line's mantra that the

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5/ Throughout its brief, Main Line, without citation of any authority, erroneously asserts the burden of proof was on defendants. (E.g. RB pp. 7, 33.)

corporation could not "breach" without the shareholders also "breaching," the shareholders would be personally liable for the corporation's breach. The Court of Appeal, however, held that only the corporation could be held liable because alter ego was never proven. (Id. at pp. 748-749.)

b. In Shafford v. Otto Sales Co., Inc. (1953) 119 Cal.App.2d 849, a solely-owned corporation failed to pay sales commissions to a broker. To borrow Main Line's words, the corporation could not "breach" by failing to pay the commissions unless the sole shareholder also "breached" by refusing to pay. The Court of Appeal reversed the judgment against the shareholder, holding: "Breach of contract by the corporation . . . does not support an inference that the corporate entity was being misused for personal purposes." (At p. 861.)

c. In Fogelsong v. Commissioner of Internal Revenue (7th Cir. 1980) 621 F.2d 865, a case we cited (AOB p. 34) but which Main Line pretends does not exist, the IRS presented a variation of Main Line's mantra in a suit over whether income should be attributed to a personal services corporation or to its sole shareholder who "really" earned it. (At p. 868.) The IRS argued, in essence, that "one could not 'earn' without the other" and, thus, the separate existence of the individual and his corporation could be ignored. (Ibid.) The Court of Appeals summarily rejected the assertion, strongly reaffirming the doctrine of separate corporate existence. (Ibid.)

In each of these examples, even though the shareholder called the shots and caused the breach, the shareholder could not be held liable absent proof of alter ego, a theory Main Line specifically disavowed. Under these authorities, breach by the corporation could occur without a breach by the shareholder because the corporation was the only party to the contract. As Shafford astutely noted:

> "There are many cases . . . holding that sole ownership and actual control are not enough to warrant a court in piercing the corporate veil. [Citations.] These cases recognize that the formation of even a one-man corporation to obtain limited liability is a proper objective unless used for improper purposes. They hold that complete stock ownership and actual one-man control will not alone be sufficient to impose liability on the individual. In the absence of confusion of corporate with individual affairs, or failing to disclose to third parties the existence of the two entities, or abuse or bad faith in the exercise of corporate control, the corporation entity will not be disregarded." (Shafford v. Otto Sales Co., Inc., supra, 119 Cal.App.2d at p. 862.)

Without citing a single case, Main Line would have this court: (a) destroy the age-old principle that corporations are presumed separate from their shareholders absent assertion and proof of alter ego liability; (b) ignore well-settled authority that the jury must decide such questions; and (c) refuse to follow controlling California law holding that an "and/or" finding of liability is reversible error.

Here, there was evidence on which the jury could have decided that only one defendant was a party to the asserted contract while the other was not; indeed, the "or" portion of the "and/or" special verdict form expressly authorized such a result. Contrary to Main Line's mantra, it is entirely possible the jury could have found that only one defendant was a party to a contract and, thus, that only one breached. By reason of the incomprehensible "and/or" special verdict, however, it is impossible to identify which of the defendants the jury determined was a party to and breached a contract. This destroyed defendants' constitutional right to a jury trial. The judgment must be reversed.

### C. The Reversal Should Be With Directions To Enter Judgment In Defendants' Favor.

Under this court's dispositive decision in Myers, supra, 13 Cal.App.4th at p. 949, the reversal should be with directions because Main Line improperly insisted the erroneous verdict form be used and declared it was willing to take the risk regarding any absence of separate findings. (AOB pp. 17-18.)

Surprisingly, Main Line does not even attempt to refute the applicability of Myers. Instead, it buries Myers with a "compare" citation in a footnote in which Main Line, citing Jentick v. Pacific Gas & Elec. Co. (1941) 18 Cal.2d 117, 121, asserts the doctrine of invited error applies only to an appellant. (RB p. 33, fn. 22.) It does not. Myers itself applied the invited error doctrine to a respondent who, like Main Line, insisted the court use an erroneous special verdict form and vigorously opposed the defendants' efforts to obtain a correct one. (Myers, supra, 13 Cal.App.4th at p. 960, fn. 8.)[6/]

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6/ Jentick does not assist Main Line. It merely held: "Under the doctrine of 'invited error' a party cannot successfully take advantage of error committed by the court at his request." (18 (continued...)

Myers' holding resulted not simply from the plaintiff/respondent's improper insistence that the court utilize the erroneous special verdict, but also from Myers' recognition of the established principle that it is plaintiff's burden to propose a verdict that will support its judgment. As Myers declared: "[Plaintiff/respondent] is attempting to enforce the judgment based on the special verdict and must bear the responsibility for a special verdict submitted to the jury on its own case." (Id. at 961-962.)

Here, Main Line--far from satisfying its burden--vigorously resisted defendants' efforts to obtain a proper verdict. The result is that Main Line succeeded in obtaining an incomprehensible, erroneous verdict that unconstitutionally fails to disclose the identity of the defendant against whom the jury intended to impose liability. The trial court specifically acknowledged that Main Line's insistence on the "and/or" verdict carried risks and it inquired whether Main Line was willing to take the risks. Main Line said it was. As in Myers, the reversal should be with directions to enter judgment in defendants' favor.

The "and/or" issue is dispositive of the entire case. If the court agrees with our position on this issue, it need not address any other issues or read further in this brief. If it is curious, however, it will discover Main Line has utterly failed to refute any of the other points raised in our opening brief, as we now explain.

## II. THE JUDGMENT SHOULD BE REVERSED (AGAIN WITH DIRECTIONS TO ENTER JUDGMENT IN DEFENDANTS' FAVOR) BECAUSE THERE IS NO ORAL OR WRITTEN CONTRACT AS A MATTER OF LAW.

### A. Contrary To Main Line's Assertion, The Question Whether There Exists A Legally Enforceable Contract Is One Of Law.

In response to our argument there is no legally enforceable oral or written contract, Main Line asserts the substantial evidence test applies. (RB p. 14.) Main Line is wrong. Our argument

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6/(...continued)
Cal.2d at p. 121; emphasis added.) Nothing in this language establishes (or even suggests) that invited error applies only to prevent an appellant from claiming error based on his own conduct; indeed, the Supreme Court's careful use of the words "a party" and the phrase "take advantage of" (rather than "complain of") demonstrates it was articulating a concept applicable to all litigants, as Myers correctly holds.

that there is no viable contract is not premised on the presence or absence of substantial evidence; rather, it is based on pure questions of law: (1) the parties' failure to comply with the applicable SAG collective bargaining term, requiring that agreements to perform in the nude satisfy certain written criteria, precludes the existence of an enforceable oral or contract as a matter of law; (2) when parties exchange contract drafts containing signature lines, expressly condition material contract terms on signature, and repeatedly represent that execution copies will be prepared once all terms are settled, the absence of signatures precludes the existence of an enforceable contract as a matter of law; and (3) when a proposed written contract calls only for a corporation to sign, any written contract that might exist can only exist with the corporation, as a matter of law.

The question whether probative facts support the legal conclusions drawn from them does not involve weighing or resolving conflicts in evidence or judging the credibility of witnesses but, rather, presents solely a pure legal question. (Smith v. Dept. of Motor Vehicles (1969) 1 Cal.App.3d 499, 503.) Whether a contract exists is a question of law. (Houston Gen. Ins. Co. v. Superior Court (1980) 108 Cal.App.3d 958, 964; American Mut. Liab. Ins. Co. v. Superior Court (1974) 38 Cal.App.3d 579, 590-591.) Here, even when the evidence is viewed in the light most favorable to Main Line, there exists no legal basis which supports the existence of an enforceable oral or written contract.

B. Since The Controlling SAG Collective Bargaining Agreement Specifically Requires A Writing Describing The Extent Of The Nudity And Type Of Physical Contact Required And Since No Writing Fulfilling These Criteria Exists As To The Nude Scenes Contemplated In Boxing Helena, There Was No Enforceable Oral Or Written Contract As A Matter Of Law.

In our opening brief, we demonstrated that (1) Basinger's performance in the nude in Boxing Helena was a "deal point" (RT 631); (2) the SAG collective bargaining agreement requires that agreements to perform in the nude be reflected in a writing describing the extent of the nudity and type of physical contact required (Ex. 1036, § 41); and (3) individuals may not contract in derogation of collective bargaining agreements. (AOB pp. 19-20.)

Main Line's brief does not contest any of these issues, nor does it challenge the important policy the SAG collective bargaining provision governing nudity seeks to protect, namely, to ensure

that actors' consent concerning the type and degree of nudity--a highly sensitive and personal decision, easily subject to exploitation--is the product of conscious choice, rather than on-the-set pressure by a director (with cast and crew waiting and a production schedule at stake) to "take it off" to enhance box office rewards. Under the law, the profoundly important policy embodied in SAG's requirements must be strictly enforced for the protection of all performers.

Rather than addressing the foundational SAG issues, Main Line focuses on whether SAG requires a signed writing. (RB pp. 15-16.) While SAG may well require a signed writing when it states that "[t]he appearance of a performer in the nude or sex scene . . . shall be conditioned on his prior written consent" (Ex. 1036, § 41), Main Line does not deny that SAG requires some writing, describing both the extent of the nudity and the type of physical contact required. None was ever proven here.

1. The "deal memorandum" drafts never contained any description of the nudity and physical contact required and, thus, did not satisfy SAG requirements.

Main Line argues that SAG requirements were met because "Basinger gave Main Line . . . a deal memo . . . which generally described the nudity and the type of physical contact required." (RB pp. 15-16.) The assertion is meritless.

It is undisputed the original draft of the deal memorandum was silent as to nudity (Ex. 22, RT 631); Philips' comment to that draft was: "Nudity - none, & no body doubles" (Ex. 24). However, Main Line--apparently referring to exhibit 25 (a third draft of the deal memorandum)--misleadingly claims that "Philips noted on a version of the deal memo that 'there is substantial nudity - KB ok with it . . . no frontal nudity - nothing graphic - more subliminal' [R.T., Vol. 19, p. 1638; Ex. 25.]" (RB p. 11.) Main Line suggests this reference satisfied the SAG requirement as to nudity. Main Line, once again, is wrong. What Main Line fails to mention is the undisputed evidence revealed that Philips' notations reflected what she was being told by Main Line and Dreyfus; they were not her own comments. (RT 1638-1639 ["This was what they told me. They said 'No'. There is substantial nudity. K.B. [Basinger] okay with it. Check with her. Close[d] set only"].)

But even if the notations--"No frontal nudity. Nothing graphic. More subliminal"--could somehow be construed as reflecting Philips' own thoughts, they still do not satisfy SAG requirements. Merely stating there is "no frontal nudity" and "nothing graphic" does not even begin to satisfy SAG's requirement that there be a written explanation of "the type of physical contact required in the scene."

Moreover, Main Line fails to explain how--and it cites no authority for the proposition that--the third draft of a memorandum, which was to be used as a basis for preparing a formal written agreement which, in turn, undergoes eight subsequent revisions can somehow be deemed to constitute a binding document governing the nudity issue. As a matter of law, it could not. All of the long-form drafts, including the May 29 proposed execution draft (which is the "written contract" upon which Main Line expressly premised its suit [CT 1-34, 2091]) contained an integration clause which stated:

> "Until and unless superseded by a more formal signed agreement between the parties, this document (and any exhibits hereto) contains the full and complete understanding between the parties, and supersedes all prior and contemporaneous agreements and understandings pertaining hereto and cannot be modified except by a writing signed by each party." (Ex. 76, p. 11; see Exs. 66, p. 11; 57, p. 11; 49, p. 11; 42, p. 11; 34, p. 11; 32, p. 10; 30, p. 10; emphasis added.)

Where, as here, a later version of a purported contract contains an integration clause, any earlier version is "legally irrelevant" and cannot be used to modify the integrated document. (EPA Real Estate Partnership v. Kang (1992) 12 Cal.App.4th 171, 175, 176-177 ["contract supplement/addendum" was properly excluded from evidence because the parties' final version omitted the supplemental terms and contained an integration clause].)

The draft deal memorandum did not come close to satisfying SAG requirements. But even if it somehow had, Main Line sued upon the integrated May 29 execution draft, claiming it was the parties' written contract. (CT 1-34, 2091.) Main Line cannot now rely on an earlier draft purportedly containing different provisions, nor maintain that one or more of those superseded drafts somehow constituted the parties' final agreement.

2. Neither the proposed execution draft, nor the script to which the execution draft referred, contained any nudity description which satisfied SAG requirements.

Main Line asserts the proposed execution draft satisfied SAG requirements. (RB pp. 15-16.) It did not. That draft's only reference to nudity merely acknowledged there were to be nude and sex scenes in the film and that, at some unspecified point in the future, Basinger and Lynch would attempt to agree on the contents of those scenes. (Ex. 76, pp. 8-9; AOB pp. 20-21.) There is nothing in that provision that purports to describe "the extent of the nudity and the type of physical contact in the scene," as SAG mandates.

Main Line next claims the proposed execution draft satisfied SAG criteria because it "specifically incorporated by reference the entire approved screenplay of 'Boxing Helena,' a writing that intimately detailed all nudity and physical contact required in the film." (RB p. 16, fn. 10.) This, too, is untrue. Indeed, Main Line does not point to a single script passage which supposedly satisfies SAG criteria. This is not surprising because review of the script (Ex. 15) reveals it does not even come close to meeting SAG's requirements.

For example, the script describes a "sexual dance" performed by an unidentified woman that begins with the woman dressed, describes some physical contact between her and a man ("she lifts his willing hand up to the soft skin between her breasts, and guides his fingers slowly down to her navel)," but nowhere identifies who the woman is or whether the woman is nude. (Ex. 15, pp. 16-17.) Another scene describes Helena--the character Basinger would have played--as "having sex"; however, the type of sex (and, thus, the type of physical contact required) is never disclosed, nor can it be deciphered whether she is clothed, partly clothed or completely nude. (Ex. 15, p. 19.) Another scene is similarly vague; physical contact is described, but no mention is made whether Basinger was required to perform the scene nude. (Ex. 15, p. 96 ["The two of them kiss and Helena begins tracing the features of Nick's face with the tip of her nose, and then with her tongue. Nick plays with one of her nipples and we see Helena's eyes flutter"].) In the entire script there is only one scene of the many that suggest potential nudity and physical contact which actually mentions both, but even it does so in such terse terms that it is impossible to guess whether it was

Basinger who was required to appear nude in the scene, or what sort of physical contact would be required. (Ex. 15, p. 21 ["Helena is on top of Ray, naked, and the two are really going at it"].)[7/]

Patently, the script does not begin to describe the extent of the nudity or the type of physical contact required of Basinger. This type of uncertainty is exactly what the SAG agreement is designed to prevent.[8/]

3. Even if it were true that the industry routinely ignored SAG's requirements, that would not eviscerate them, nor preclude Basinger from insisting on their enforcement.

Under some invented "everybody does it" theory of legal liability (for which, not surprisingly, Main Line fails to cite a single authority), Main Line further urges that, because Held testified "the industry does not require a signed writing" (RB p. 16), this court should ignore the mandate of the collective bargaining agreement and the law of contracts and enforce a purported agreement that fails to comply with the collectively-bargained terms. It cannot.

The terms of a collective bargaining agreement are incorporated into and control contracts between parties bound by the collective bargaining agreement, even if the parties expressly agree to different terms. (That Way Production Co. v. Directors Guild of America (1979) 96 Cal.App.3d 960, 967 ["Failure to enforce the (collective bargaining) Agreement by sanctioning individual contracts in contravention thereof would render it meaningless"; enforcing directors guild collective bargaining agreement, rather than term parties negotiated].) Industry custom and practice cannot alter such mandatory contractual terms. (Peiser v. Mettler (1958) 50 Cal.2d 594, 610 ["(E)vidence relative to a purported custom and usage (which) would tend to vary or contradict the terms of the . . . agreement is . . . inadmissible and the witnesses' testimony concerning it is therefore not material"]; Santandrea v. Siltec Corp. (1976) 56 Cal.App.3d 525, 528, disapproved on other

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7/ Although the scene clearly calls for someone to be naked, it does not clearly specify Basinger as the person; indeed, the words "Ray, naked," suggest that "Ray," rather than Helena, was naked. In any event, "really going at it" gives no clue as to the type of physical contact required.

8/ As we show in section II. D. below, there was not even agreement on the script; indeed, Main Line admitted it was still revising the script when the execution draft was sent.

grounds, Baugess v. Paine (1978) 22 Cal.3d 626 [same].) Nor can an "expert" dictate how the law applies to a particular set of facts because that is a legal question for the court. (See, e.g. Downer v. Bramet (1984) 152 Cal.App.3d 837, 841-842 ["'The manner in which the law should apply to particular facts is a legal question and is not subject to expert opinion. . ."].)

Notwithstanding Main Line's wishful thinking, no industry is free, by custom and practice or otherwise, to ignore or disregard the mandate of a collective bargaining agreement. As the United States Supreme Court declared:

> "National labor policy has been built on the premise that by pooling their economic strength and acting through a labor organization freely chosen by the majority, the employees of an appropriate unit have the most effective means of bargaining for improvements in wages, hours, and working conditions. The policy therefore extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees." (N.L.R.B. v. Allis-Chalmers Mfg. Co. (1967) 388 U.S. 175, 180 [18 L.Ed.2d 1123, 1127, 87 S.Ct. 2001]; see That Way Production Co., supra, 96 Cal.App.3d at p. 964 [individual contracts must yield to "legal principles . . . which are designed to serve broader social and economic interests"].)

Main Line concedes the SAG collective bargaining agreement governed this case. Nevertheless, it asks this court to ignore its terms and enforce a purported agreement for Basinger to act in the nude in defiance of SAG rules mandating a writing defining what nudity and physical contact would be required in each nude scene. Neither Main Line nor the court can ignore SAG's mandate. Since nudity was a crucial issue--a "deal point"--on which no agreement conforming with SAG requirements was ever reached, there was no enforceable contract. (See Putnam v. Cameron (1954) 129 Cal.App.2d 89, 95 ["Where claim of a contract is made and one item is left uncertain in the memorandum of terms or in the discussion, the entire contract is inchoate and no one is bound thereby"].)

There being no evidence establishing the existence of an enforceable contract, Main Line failed to sustain its burden of proof. This, too, requires that the judgment be reversed with directions to enter judgment in defendants' favor. (See authorities discussed at AOB p. 26.)

C. There Was Also No Enforceable Written Contract Because All Objective Criteria, Including The Terms Of The Execution Draft Itself, Required A Signature And No Signature Was Ever Obtained.

1. The parties' objectively manifested intent conclusively establishes there could be no binding written agreement absent due execution.

Even if the SAG requirements could somehow be disregarded (they cannot be), there would still be no enforceable written contract. Where contracting parties objectively manifest an intent not to be bound until their agreement is reduced to writing and executed, there is no binding contract until that is done. (Smissaert v. Chiodo (1958) 163 Cal.App.2d 827, 830-831; Duran v. Duran (1983) 150 Cal.App.3d 176 [acceptance must be by signing when the parties contemplate a signed agreement]; Store Properties Inc. v. Neal (1945) 72 Cal.App.2d 112, 116 ["If a writing is viewed as the consummation of the negotiations there is no contract until the written draft is finally signed"].) This is governed by an objective standard. (Leo F. Piazza Paving Co. v. Bebek & Brkich (1956) 141 Cal.App.2d 226, 230.)

Here, the parties engaged in four months of negotiations, revising and exchanging multiple long-form drafts in an effort to agree on a draft that was mutually acceptable. It is undisputed that Wyman--Main Line's own attorney--accompanied every revised long-form draft with a letter stating that, if the terms were acceptable, he would prepare execution copies (Exs. 30, 34, 66); it is undisputed that Wyman did, in fact, prepare an execution draft and conveyed it to Philips for execution by Mighty Wind (Ex. 76); it is undisputed that every draft of the proposed contract carried signature lines (Exs. 34, 42, 49, 57, 66, 76); it is undisputed the material provisions relating to pay or play and escrow explicitly required signature (Ex. 76, p. 1, 3); it is undisputed that no contract was ever executed. Significantly, Main Line has never cited a single piece of evidence (and we have found none) that showed Mazzocone, Wyman, or any one else from Main Line ever was told or led to believe no signature would be necessary.

This uncontroverted objective evidence establishes as a matter of law that the parties did not intend to be bound until they signed. What else could the signature lines possibly have meant? (See Amer. Aero. Corp. v. Grand Cen. Aircraft Co. (1957) 155 Cal.App.2d 69, 81 [there was no enforceable written contract because "(i)t is manifest from the evidence that both parties understood that the proposed contract would not be effective until signed by both parties, else why would

(defendant) draft it with a number of duplicate copies, and why would (it) sign, and why did (its agents) ask to have it signed by (plaintiff) and returned?"]; C.L. Smith Co. v. Roger Ducharme, Inc. (1977) 65 Cal.App.3d 735, 742 [where the parties exchanged a series of writings resulting in preparation of a formal document which plaintiff signed but defendant did not, summary judgment that there was no binding contract was proper]; Beck v. American Health Group Internat., Inc. (1989) 211 Cal.App.3d 1555, 1562-1563 [where defendant sent letter outlining terms of agreement and advising that counsel would draft a contract if terms were acceptable, the letter was not a binding contract as a matter of law].)

2. Signature is the sine qua non of a written contract; without it, any agreement would necessarily be oral.

Citing Stephan v. Maloof (1969) 274 Cal.App.2d 843, 848 and Far West Services, Inc. v. Livingston (1984) 156 Cal.App.3d 931, 939, Main Line contends that, "as a matter of law, parties to a written contract need not execute the contract for it to become enforceable" and that "[a] written contract becomes enforceable simply when the parties agree upon its terms." (RB p. 17, fn. 12; emphasis added.) Not surprisingly, Main Line's own cases refute its argument.

Contrary to Main Line's argument, Stephan v. Maloof establishes that an unsigned written document cannot qualify as a written contract. Stephan held: "[T]he mere fact that a formal written agreement to the same effect [as an oral agreement] is to be prepared and signed does not alter the binding validity of the oral agreement." (274 Cal.App.2d at p. 848; emphasis added; see Columbia Pictures Corp. v. DeToth (1948) 87 Cal.App.2d 620, 629 [same].) Here, we have shown that there could be no oral contract because SAG requirements were never satisfied and that there could be no written contract not only for that reason but also because the execution draft required signature.

Main Line's other case, Far West Services, is equally unhelpful to it. In fact, it proves our point, establishing that an unsigned document cannot be enforceable as a written contract: "[T]he fact that a party to a contract has not signed the written document invalidates it only with regard to the statute of frauds and enforcing the agreement against that particular party." (156 Cal.App.3d at p. 939; emphasis added.) Here, exactly as in Far West Services, neither Basinger nor Mighty Wind ever signed any contract and, accordingly, there could be no enforceable written agreement.

Main Line is attempting to do precisely what its own authorities prohibit, namely, enforce a purported written agreement against parties who never signed. Neither Far West Services nor Stephan help Main Line establish there was an enforceable written contract. If anything, they establish just the opposite--that there could not possibly be a binding written contract in the absence of defendants' signatures.

3. The absence of a provision expressly stating the written agreement was not binding until signed is not determinative; here, all objective criteria required signature and material terms were expressly conditioned on signature.

Main Line urges the unsigned execution draft is enforceable as a written contract because "[n]o provision states that the agreement is not binding unless it is first executed." (RB p. 17.) As demonstrated above, all objective manifestations of the parties' intent conclusively establish that a signature was required in this case. But even if that were not so, specific material terms (i.e., the pay or play and escrow provisions) were expressly contingent on execution.

Main Line's argument was flatly rejected by the Ninth Circuit in Roth v. Garcia Marquez (9th Cir. 1991) 942 F.2d 617, as "simply too flimsy to stand." (At p. 626 [held, material term expressly conditioned on signature meant signature was condition precedent to entire contract].) Here, exactly as in Roth, two undeniably material terms--the pay or play and escrow provisions--were expressly conditioned on signature (Ex. 76, pp. 1, 3); thus, signature was a condition precedent to enforcement of the contract. Although Roth was cited and discussed in our opening brief (AOB pp. 22-23), Main Line fails to address it.

4. A past practice by one party with others cannot render enforceable a contract between two parties who never dealt before.

Without affording either analysis or citation of authority, Main Line argues the unsigned execution draft was enforceable because "[a]cting without a signed agreement . . . was in accordance with [Ms.] Basinger's own personal practice. . . . Consequently, Ms. Basinger can

hardly now protest that she believed that she had not agreed to act in 'Boxing Helena,' simply because she had not 'signed' a writing evidencing such agreement." (RB p. 17.)

We have searched in vain for authority which suggests that merely because a person voluntarily agreed with others to proceed without a formal written contract, that person is somehow bound to proceed in that same fashion with everyone else, presumably for eternity. This would amount to a form of contractual imprisonment--if a person ever proceeded informally, the law of contracts as to him would be discarded forever. This is not and cannot be the law.

Moreover, the record precludes any possibility that Main Line relied on Basinger's asserted past practice. The record establishes this was Main Line's first film and that neither defendant had ever previously dealt with Main Line. There was no evidence that, prior to or during the negotiations, Main Line even knew of defendants' purported past practice of making films without insisting on a signed contract. Nowhere did Main Line assert or prove it knew of, relied on, or was mislead by the asserted practice into believing that, notwithstanding the parties were exchanging and revising multiple drafts of a written contract expressly calling for signature and even though Main Line's counsel said it would send an "execution" draft for signature, no contract actually would need to be signed. Because Main Line failed to introduce a shred of evidence that it knew of or relied on this purported practice, it cannot now claim that defendants were somehow estopped to rely on the law of contracts or to deny they would require a signed contract. (See City of Highland v. County of San Bernardino (1992) 4 Cal.App.4th 1174, 1193 [without knowledge of or reliance on conduct, there can be no estoppel].)

### D. There Was Also No Binding Contract Because There Was No Agreement On Another Deal Point, The Script.

No binding contract was ever created for yet another reason: the parties never reached agreement on the script. When the execution draft (the document Main Line claims was the binding contract) was sent, it is undisputed the script was still being revised. (See AOB p. 24.)

It is undisputed that Basinger's approval of the script was another "deal point" (RT 702-703, 837, 1022-1024, Ex. 22); that on April 23 Philips sent Wyman her latest proposed draft of the long-form agreement, which, among other things, noted that "we still need specific escrow terms" (Ex. 57, p. 3) and redefined "producer's gross receipts" (Ex. 57, p. 4); that on May 6, before Wyman

responded to Philips' April 23 draft (Ex. 66), Main Line was notified that Basinger wanted changes in the script (RT 832, 1012-1013); and that Mazzocone agreed to revise the script in response to that request (RT 838; Ex. 662). Nevertheless, even though Mazzocone knew the script was not approved and was being revised and even though he knew the February 11 draft of the script was not acceptable to Basinger, Mazzocone nevertheless instructed Wyman to send out a proposed execution draft which incorrectly recited that Basinger approved the screenplay dated February 11, 1991. (RT 1023-1024, Ex. 76, p. 7.) Wyman's letter of May 31 (sent two days after the execution draft was sent) conceded that Mazzocone had agreed to revise the script and that Basinger was still reviewing the script changes. (Ex. 79.)

Relying on Wyman's testimony that Basinger previously "had approved the screenplay that was in her possession," Main Line asserts (without citation of a single authority) that Basinger's prior script approval precluded her from insisting on any further script revision and, therefore, bound Basinger to sign the execution draft. (RB p. 18; RT 521-522.) Main Line's position appears to be that, once parties agree on a single contract term (i.e., approval of the script), they are forever set in stone as to that term, even though agreement on all material terms has not yet been reached. That is not the law.

A contract is not final until all material terms have been settled. (Grove v. Grove Valve & Regulator Co. (1970) 4 Cal.App.3d 299, 312 ["California law is clear that there is no contract until there has been a meeting of the minds on all material points . . ."; held, where terms relating to compensation and licensing were unsettled, there was no contract]; Russell v. Union Oil Co. (1970) 7 Cal.App.3d 110, 114 [without agreement on all material terms, there can be no contract]; Smissaert, supra, 163 Cal.App.2d at p. 830 [contract results from agreement on all material terms].) Until then, all terms (even those previously agreed upon) are negotiable; indeed, until a binding contract is reached, either party would be free to walk away from the deal entirely: "When tentative subordinate agreements have been reached in the course of negotiations for a new agreement, it is always implied that they are made contingent upon the completion of the final contract." (Grove, supra, 4 Cal.App.3d at p. 312; Dillingham v. Dahlgreen (1921) 52 Cal.App. 322, 326, 329 ["To be final the agreement must extend to all terms. . ."].) In short, contrary to Main Line's unsupported contention, there is no such thing as piecemeal contract formation; no party is bound until there is agreement on all material terms.

Under the law, even if Basinger had previously approved the script, she was free to insist on further script changes until such time, if ever, as all material terms were settled and a binding contract formed. Here, Main Line's own evidence established that, when Main Line sent the execution draft--the document it claims was the binding contract--there was then no mutual agreement on the script, a material term. Thus, there was no contract.

E. As A Matter Of Law, Basinger Was Not And Could Not Have Been A Party To Any Written Contract.

Main Line ignores our argument (AOB p. 25) that, as a matter of law, a contract containing a signature line only for a corporation, with the word "by" appended next to the signing officer's name, conclusively establishes the individual was not a party to the contract. (Barrett v. Hammer Builders, Inc. (1961) 195 Cal.App.2d 305, 317 [contract signed "by" individual meant corporation, not individual, was the contracting party]; Carlesimo v. Schwebel (1948) 87 Cal.App.2d 482, 487 [appending "by" to signature shows signer is an agent of corporation, not individually liable].) Here, the signature lines on the execution draft, (and every prior draft) read Main Line "by" Mazzocone and Mighty Wind "by" Basinger. Thus, Basinger was not and could not have been a party to such contract.[9/]

This was expressly confirmed by Mazzocone, who admitted Main Line's contract was with Mighty Wind. (RT 780.) This was also confirmed by Wyman, who repeatedly referred to the "agreement between Main Line and Mighty Wind." (Exs. 34, 49, 66, 76.) The execution draft also reflected this understanding in multiple ways, including incorporation of a loanout agreement through which Mighty Wind would agree to loan Basinger to Main Line. (Ex. 76, pp. 1, 2, 13-20.)

Main Line does not cite any authority that would establish or even suggest the purported written contract was with Basinger. Main Line does not explain how its president's and attorney's uncontroverted admissions can be ignored, nor does it explain how the plain language of the contract or settled authority interpreting the legal effect of signature lines can be ignored. Main

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9/ Main Line has no difficulty grasping this concept as applied to itself; it alone filed this lawsuit even though Mazzocone's name, preceded with the word "by," appeared on the execution draft. (Ex. 76, p. 12.)

Line's silence does not make the issue go away. Under the law, Basinger was not a party to any contract.

## III. THE JUDGMENT SHOULD BE REVERSED BECAUSE THERE WERE MULTIPLE PREJUDICIAL INSTRUCTIONAL ERRORS.

### A. Contrary To Main Line's Contention, Instructional Error Is Not Reviewed On An Abuse Of Discretion Standard.

Main Line contends that the standard of review applicable to claims of instructional error is whether the trial court abused its discretion. (RB p. 34.) According to Main Line, a trial court has discretion to misinstruct the jury. That is not the law. A trial court is obligated to instruct the jury correctly regarding the governing law; it has no discretion to misinstruct the jury. (Blake v. E. Thompson Petroleum Repair Co. (1985) 170 Cal.App.3d 823, 834; Hurtado v. Statewide Home Loan Co. (1985) 167 Cal.App.3d 1019, 1024-1025, disapproved on other grounds, Shamblin v. Brattain (1988) 44 Cal.3d 474 [abuse of discretion standard of review is inappropriate when appellate court is as capable as trial court in deciding issue].)

On appeal, it is the reviewing court's duty to determine, as a matter of law, whether the instructions given were incorrect. (Agarwal v. Johnson (1979) 25 Cal.3d 932, 949 [appellate court's task is "to determine whether the instruction as given contain(s) an incorrect statement of law"]; Rivera v. Parma (1960) 54 Cal.2d 313, 317 [same].) In doing so, the court "must assume that the jury, had it been given proper instructions, might have drawn inferences more favorable to (the complaining party) and rendered a verdict in its favor on the issues as to which it was misinstructed." (Mock v. Michigan Millers Mutual Ins. Co. (1992) 4 Cal.App.4th 306, 322.) Moreover, when a trial court refuses to instruct on a party's theory of defense, the error is prejudicial per se. (Hasson v. Ford Motor Co. (1977) 19 Cal.3d 530, 548 ["(I)t is prejudicial error to refuse an instruction (when) defendant is thereby denied a basic theory of his defense"]; see also Phillips v. G.L. Truman Excavation Co. (1961) 55 Cal.2d 801, 806-807 [same].)[10/]

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10/ The case Main Line cites (Bruck v. Adams (1968) 259 Cal.App.2d 585) is inapplicable. It concerns review of a trial court's order granting a new trial, which is always reviewed under an abuse of discretion standard. (E.g. Mosesian v. Pennwalt Corp. (1987) 191 Cal.App.3d 851, 858.) Here, there was no new trial order; rather, the question is whether the judgment should be reversed

(continued...)

Viewed under the proper standard, the multiple instructional errors committed here were clearly prejudicial and compel reversal.

B. The Trial Court Gave Three Prejudicially Erroneous Jury Instructions Regarding The Vitally-Important Issue Of Contract Formation.

1. The trial court prejudicially erred in altering BAJI No. 10.65 and instructing the jury that preliminary negotiations may result in a binding contract when all material terms are merely "understood."

Our opening brief demonstrated the trial court prejudicially erred when it edited the standard BAJI Instruction No. 10.65 (which provides that preliminary negotiations do not result in a binding contract unless the parties understand and agree to all material terms), to make it read: "Parties may engage in preliminary negotiations which may result in a binding contract when all the material terms are definitely understood. . . ." (CT 1549; emphasis added; see AOB p. 28.) This revision is not, as Main Line implies (RB pp. 34-35), merely a minor or inconsequential variance from the standard BAJI instruction; rather, it is a profound and dramatic change in meaning, completely altering the intended emphasis of the BAJI instruction.

First, the BAJI instruction emphasizes that preliminary negotiations may not result in a binding contract unless there is both understanding and agreement as to all the material terms; however, the version given by the trial court shifted the emphasis to state just the opposite, namely, that preliminary negotiations may result in a binding contract if the material terms are merely understood.

Second, the BAJI instruction requires both understanding and agreement of all material terms if preliminary negotiations are to lead to a binding contract, while the trial court only required "understanding" of those terms. This was a clear violation of the fundamental rule that a contract cannot exist unless the parties "agree" on all material terms. (T.M. Cobb v. Superior Court (1984) 36 Cal.3d 273, 282 ["[M]utual consent of the parties is essential for a contract to exist"]; Civ. Code, §§ 1549, 1550, 1565.)

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10/(...continued)
because of instructional error. As demonstrated above, a completely different standard of review governs that question.

Main Line does not even address--and, thus, apparently concedes--the trial court's error in altering the instruction. Instead, Main Line merely suggests that, because the remainder of the instruction and several other instructions referred to "agreement," no harm occurred. (RB pp. 34-35.) Main Line's assertion is untenable. Neither of the remaining two paragraphs of the instruction deal with the issue of when preliminary negotiations blossom into a binding contract; they refer, instead, to completely different subjects, i.e., the effect of an express agreement to settle future terms and of an agreement to reduce a contract to writing.[11/] The only instruction given on the key issue of when preliminary negotiations may result in a binding contract erroneously told the jury that only an "understanding" of the terms (not agreement on the terms) is necessary. That specific instruction clearly controlled over the more general, unrelated passages. (LeMons v. Regents of University of California (1978) 21 Cal.3d 869, 878 ["[W]here two instructions are inconsistent, the more specific charge controls the general charge"; held, judgment reversed where one of two contributory negligence instructions was erroneous].)

Main Line's further argument (RB p. 35) that other instructions (CT 1544, 1547-1548) informed the jury that "agreement" was necessary does not lessen the error in this instruction; if anything, it magnifies the error because the erroneous instruction was the only instruction that dealt with the effect of preliminary negotiations, the central issue in this case. Using "agreed" in other instructions, but pointedly omitting that term in the one instruction specifically dealing with the issue of when preliminary negotiations may blossom into a binding contract, merely served to emphasize the false proposition that an "agreement" is unnecessary when preliminary negotiations are concerned. (See LeMons, supra, 21 Cal.3d at pp. 877-878 [error in one instruction cannot be cured by another because the jury may apply the erroneous one as written; held, judgment reversed where one correct and one incorrect contributory negligence instruction was given]; Maupin v. Wilding (1987) 192 Cal.App.3d 568, 577 [same].)

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11/ The remaining paragraphs read: "[W]here any of those terms are left for future determination and it is understood that the agreement is not to be deemed complete until they are settled, or where it is understood that the agreement is incomplete until reduced to writing and signed by the parties, no contract results until this is done. [¶] Where the parties have orally agreed on all the material terms . . . the mere fact that a formal signed agreement to the same effect is to be prepared and signed does not alter the binding effect of the oral agreement." (CT 1549; emphasis added.)

The error was grievously prejudicial. Had the jury been properly instructed, it might well have concluded--based, for example, on such evidence as Mazzocone's admission that script negotiations were continuing, the fact nudity issues were never resolved, and the fact the long-form draft called for signature but was never signed--that negotiations were still in progress and had not yet blossomed into a contract, even though the parties "understood" all material terms. Given that, the razor-thin 9-3 vote might well have fallen short of the nine juror constitutional minimum. (LeMons, supra, 21 Cal.3d at p. 876 [among factors considered in measuring prejudice is closeness of jury's vote].) The error in this instruction alone requires reversal. But there is more, much more.

2. The trial court prejudicially erred in instructing that industry custom and practice can be used to determine whether a contract exists and in refusing to give a correct instruction on that issue.

The prejudicial error in grossly truncating and altering the emphasis of BAJI No. 10.65 was further compounded by the equally erroneous and prejudicial instruction that the jury could consider industry custom and practice in determining whether a contract exists. (CT 1550.) This, of course, is not the law. (See Roskamp Manly Assoc., Inc. v. Davin Development & Investment Corp. (1986) 184 Cal.App.3d 513, 520 ["Although evidence of custom and usage may be introduced to interpret a contract, it may not be used to create one"]; see also AOB pp. 30-31.) Astonishingly, Main Line denies the court so instructed the jury. (RB p. 36.) But the language of the instruction is unambiguous and clearly belies Main Line's denial: "In determining whether or not a contract exists, you may consider all of the circumstances leading to the contract. . . . You may also consider the custom and practice of the industry. . . ." (CT 1550; emphasis added.)

Main Line next urges the court should accept its word (for it cites no supporting authority) that the instruction really concerned only "finalization" of a contract, a term which (it asserts) "is distinct from the existence of a contract." (RB p. 36.) Main Line "explains": "[I]n the entertainment industry, a written long-form contract is rarely signed; yet, in spite of the unsigned nature of long-form contracts, the industry practice is to consider such a contract as final--i.e., there are no further steps to be taken to complete the contract"; this, it asserts, is somehow different from saying that a contract "exists." (RB p. 36.) This is double-talk. What conceivable difference could

there be between saying a contract is "final" and saying that a contract "exists"? How could industry custom and practice permissibly establish a contract is "final" (i.e., is binding), but not that a contract "exists" (i.e., is binding)? The distinction is nonsensical.

Under the law, industry custom and practice may be introduced only to explain the terms of a contract (Code Civ. Proc., § 1856; Civ. Code, §§ 1646, 1647); it cannot be used to establish the parties reached a binding agreement, whether that agreement is described as one that "exists," or is "final," or is "formed." Here, the jury was improperly instructed it could accept evidence of industry custom and practice in determining whether a contract existed. The error (once again) went to the central issue in the case--contract formation. Reversal is required because, under the instruction, the jury improperly may have relied on custom and practice evidence in deciding that a contract existed.

3. The trial court prejudicially erred in instructing that Basinger was estopped to deny that she agreed to perform in Boxing Helena if she made any factual representation regarding any issue.

The trial court's multiple instructional errors on contract formation were further compounded by its prejudicially erroneous estoppel instruction. The court instructed that Basinger was estopped to deny that Basinger approved the script and agreed to act in Boxing Helena if it found Basinger made "a representations [sic] of fact. . . ." (CT 1554-1555; see AOB pp. 31-32.)

Again, Main Line's response is gibberish. It claims that "determination of whether the estoppel instruction was erroneous and prejudicial is unnecessary in light of the fact that the jury specifically found that a contract existed between the parties." (RB p. 36.) This is the worst sort of circular reasoning. First, by reason of the incomprehensible "and/or" special verdict, no one can say who the jury found to be a party to any contract. Moreover, the impropriety of the instruction cannot be explained away on the ground the jury found a contract existed because the jury may well have employed that very instruction to reach its conclusion that a contract existed. Under the erroneous instruction, the jury could have concluded that Basinger contracted to act in Boxing Helena solely because she told Lynch the script was well-written or "magical" (RT 198); or that she felt a kinship to the project (RT 200); or that she loved the screenplay (RT 239).

This error, too, was profoundly prejudicial. Both law and logic require that estoppel to deny a fact applies only to the fact represented (City of Highland, supra, 4 Cal.App.4th at p. 1193), not to other unrelated facts. An actor who misrepresents that he likes a script cannot be estopped (based on that misrepresentation) to deny he contracted to act in the movie. Here, Basinger was improperly precluded from denying the ultimate issue in this case (i.e., that she agreed to act in Boxing Helena) if the jury believed she made any representation of fact, however unrelated.[12/]

When the prejudicial error in giving the estoppel instruction is viewed in combination with the other instructional errors, each going to the central issue of contract formation, the combined prejudicial effect becomes overwhelming. Under the erroneous instructions, the jury may well have decided the central issue in the case--contract formation--on a slew of impermissible factors. Reversal is unquestionably required. But, once again, there is more.

### C. The Trial Court Prejudicially Erred In Refusing To Instruct The Jury That Each Defendant Was Entitled To Separate Consideration.

Where, as here, there are multiple defendants, each is entitled to separate consideration. (Campbell v. Southern Pacific Co. (1978) 22 Cal.3d 51, 58 [where "multiple defendants are involved . . . each defendant is entitled to instructions on, and separate consideration of, every defense available and applicable to it"].) Consistent with this principle, Basinger (an individual) and Mighty Wind (a corporation) asserted, as part of their respective theories of defense, that each was a separate person entitled to separate consideration on the issues whether each entered into and breached a contract; as a result, they requested the jury be instructed consistent with BAJI No. 15.02. (RT 1436-1449, 2651-2660.)

Main Line has not responded to this issue, hoping it will go away by burying it in a footnote, claiming it "warrants no comment in light of the trial court's finding that the two were

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12/ Main Line's attempt to focus on the remainder of the instruction in order to dodge the error does not work. Specifically, Main Line urges "the estoppel instruction specifically states that a 'reasonable' connection must exist between the factual representation made . . . and Main Line's reliance upon that representation." (RB p. 37.) This does not cure the error because the flaw in the instruction does not concern the element of reliance; the flaw is that the instruction failed to instruct that estoppel could only apply to the fact represented, not to other facts.

both parties to and were both obligated under the contracts, and the jury's verdict that both breached both agreements." (RB p. 33, fn. 21.) This dramatically misses the boat.

First, the trial court had no right to "find" which defendant was a party to the purported contract because that was a question of fact to be resolved by the jury. (Powell v. Bartmess (1956) 139 Cal.App.2d 394, 399 [in a case tried to the jury, it is not the judge's function to make factual findings]; United California Bank v. Maltzman (1974) 44 Cal.App.3d 41, 53 [determination of whether requirements exist for disregarding corporate entity is not a question of law].) Second, the jury never found that "both breached"; rather, the jury simply found that one "and/or" the other did so. (CT 1501-1506.) Third, the jury did not find "both breached both contracts"; it merely found that one "and/or" the other breached "a" contract. (CT 1503.)

Once again, the "one cannot breach without the other" mantra which Main Line concocted (RB pp. 4, 32, 33, fn. 21) affords it no assistance because a person can only breach a contract if he or she is a party to the contract (Gruenberg, supra, 9 Cal.3d at p. 576; Mayes, supra, 91 Cal.App.3d at pp. 76-77; Gold, supra, 178 Cal.App.2d at p. 519) and because proof of the elements of alter ego is required in order to overcome the presumption of separateness (e.g., Vasey, supra, 70 Cal.App.3d 742; Shafford, supra, 1119 Cal.App.2d 849; Fogelsong, supra, 621 F.2d 865; see discussion, supra, section I of this brief). Here, the trial court erroneously refused to instruct the jury that it must consider each defendant separately and it erroneously submitted a special verdict form that failed to require separate findings as to each defendant's liability; thus, it cannot be ascertained who the jury found was a party to and breached a contract. Main Line's mantra that "one could not breach without the other" accomplishes nothing more than to beg the decisive question.

Relying on the presumption of separateness, Basinger and Mighty Wind asserted they were separate persons entitled to separate consideration and they requested a jury instruction articulating that theory of defense. The trial court's refusal was flagrant, prejudicial error compelling reversal. (Hasson, supra, 19 Cal.3d at p. 548 ["(I)t is prejudicial error to refuse an instruction (when) defendant is thereby denied a basic theory of his defense"]; Phillips, supra, 55 Cal.2d at p. 806.)

## IV. THE DAMAGE AWARD IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE AND IS EXCESSIVE AS A MATTER OF LAW.

### A. The Judgment Must Be Reversed Because The Jury Returned A Legally Impermissible Gross Profit Award.

In our opening brief, we established by uncontroverted juror declarations and independent analysis that the jury's $7,421,694 compensatory damages award was necessarily for gross profits and was arrived at by awarding: $258,694 as "pre-production costs"; plus $4,163,000--the difference between foreign pre-sales of Boxing Helena when marketed with Basinger ($6,899,000) and when marketed with Fenn ($2,736,000); plus $3,000,000 reflecting the difference in value of the domestic distribution rights to the film with Basinger ($3,000,000) and with Fenn ($0). (AOB pp. 36-37; RT 296, 305, 806, 862-863, 1578, 2378.) These were gross figures; Main Line's own uncontroverted evidence, however, established the entire foreign pre-sales received for the film starring Basinger would constitute the budget to make the film and, thus, that that figure would necessarily be a deductible cost item. (RT 867.) This was also conceded in Main Line's brief. (RB p. 24-25.) Thus, after deducting the $6,899,000 budget, net profit could only have been realized from the $3,000,000 which Main Line expected to receive for domestic distribution of the Basinger film.[13/]

Main Line responds, not by denying that gross profits were awarded, but by claiming that juror declarations cannot be used to impeach a verdict unless they establish the jury resorted to its determination by chance or reached a quotient verdict. That is not the law:

1. The case Main Line cites for this proposition (People v. Resendez (1968) 260 Cal.App.2d 1, 10-11) has been overruled on that very point by People v. Hutchinson (1969) 71 Cal.2d 342, 350-351, which held that juror affidavits are admissible to prove any objective facts that constitute misconduct.

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13/ In discussing damages, Main Line tosses out a $10.6 million figure, which it characterizes as net revenues, and suggests it would support the jury's $7.4 million compensatory damage award. (RB pp. 24-25.) This is grossly misleading. Main Line reaches the $10.6 million figure simply by adding a claimed $7.6 million gross foreign presales figure (the figure actually was $6,899,000 (RT 296, 305, 806)) for the film marketed with Basinger with the $3 million gross for domestic presales of the Basinger film. (RB pp. 24-25.) However, when the budgeted cost of making the film is deducted, only $3 million from which net profits could have flowed remains.

2. Main Line ignores the fact that the Supreme Court recently held that, if a party fails to obtain a ruling on objections to inadmissible evidence, an appellate court "must view the objectionable evidence as having been admitted in evidence and therefore as part of the record." (Ann M., supra, 6 Cal.4th at p. 670, fn. 1.) Since Main Line failed to obtain a ruling on its motion to strike (CT 2199-2200; RT 2956, 2963-2964, 2981-2983, 2986), the question whether the declarations should have been admitted is not before this court. Under controlling Supreme Court authority, the juror declarations are before this court. They establish without contradiction that gross, not net, profits erroneously were awarded.

But even if the juror declarations were not considered, this court need not pretend it does not know how the jury reached its verdict when that is obvious from the evidence. Courts frequently analyze the elements that comprise a damage award to ensure they are proper. (See e.g. Mozzetti v. City of Brisbane (1977) 67 Cal.App.3d 565, 576-577 [reversing damages award where it was clear from the sum that the jury may have awarded duplicative damages].) Here, the award's elements, as evidenced by the peculiar damage numbers in evidence, are apparent on the face of the award; there is nothing which requires this court to close its eyes to reality and sanction a horribly unjust and legally impermissible award of gross profits.

To endorse Main Line's "blinders" argument would result in an immense miscarriage of justice. It was uncontroverted that Main Line's net profits were to flow solely from domestic distribution proceeds, $3 million. Under no circumstances is a $7.4 million figure supportable.

B. There Is No Other Substantial Evidence On Which The Jury's Grossly Excessive Damage Award Could Possibly Be Premised.

1. As a matter of law, any lost profits beyond the $3 million for domestic distribution of the Basinger film were speculative.

California law prohibits lost profits in entertainment ventures, such as movies, because they are inherently speculative. (See Lemat v. Barry (1969) 275 Cal.App.2d 671 [lost profits unavailable for basketball player's breach of contract because they were "speculative and uncertain and practically impossible to ascertain"]; Darmour Prod. Corp. v. H. M. Baruch Corp. (1933) 135 Cal.App. 351, 354 [producer denied lost profits because "they would seem to be highly speculative"] disapproved on other grounds I.J. Weinrot & Son, Inc. v. Jackson (1985) 40 Cal.3d

327, 336; Alder v. Drudis (1947) 30 Cal.2d 372, 382 [prospective profits were too speculative given uncertain commercial viability of machine to produce three dimensional motion pictures].)

Main Line does not address or attempt to distinguish any of these authorities. Instead, Main Line relies on Tamarind Lithography Workshop, Inc. v. Sanders (1983) 143 Cal.App.3d 571, 573, claiming it establishes that lost profit damages can be awarded. (RB p. 22.)[14/] Tamarind does not hold anything of the sort; it does not even concern the propriety of lost profits damages because those damages were not challenged in that case. (At p. 574 ["Since neither party is contesting the sufficiency of Sanders' $25,000 jury award for damages, the central issue thereupon becomes whether that award is necessarily preclusive of additional relief in the form of specific performance, i.e. that Sanders receive credit on all copies of the film"].) The passage Main Line cites only concerns whether the uncontested damage award was itself an adequate remedy or whether the plaintiff was also entitled to the additional remedy of specific performance. (At p. 577.)

Main Line also relies on GHK Associates v. Mayer Group (1990) 224 Cal.App.3d 856 which merely held that, where a plaintiff wrongfully was deprived of the right to participate in a condominium project developed by defendant, the trial court did not err in calculating lost net profits based on the profits the defendant actually earned on the project. (At pp. 873-874.) That case is inapplicable because in GHK there were demonstrable profits, while here there was no way to measure what the "profits" would have been.

### 2. As a matter of law, Wilde's testimony did not constitute substantial evidence of Main Line's lost-profit damages.

Our opening brief established there is no conceivable theory on which the $8.1 million damage award could be premised and that the testimony of Main Line's "expert," the economist Wilde, concerning a so-called "profit differential" analysis he invented did not qualify as substantial evidence because it was not based on any legally cognizable measure of damages. (AOB pp. 40-43.) Indeed, Wilde himself conceded as much, admitting that his analysis: (1) was merely an "economic theory" which had nothing to do with lost profits; (2) was based on gross revenues, not net profits; (3) was based on a venture--the making of a movie--that is inherently speculative;

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14/ Main Line's two New York cases are inconsistent with the California decisions cited above.

(4) was based on a comparison of the presumed performance of the unmade Basinger movie with the movie made with Fenn; and (5) was based on comparisons of Main Line with other businesses--large nationally known film companies--that were not proven to be comparable to Main Line. (AOB pp. 40-43.)

Main Line pretends these issues were never raised; it even goes so far as to deny (although the record establishes otherwise) that Wilde even made the improper comparisons. (RB p. 26.) Main Line also tries to disguise Wilde's legally deficient "profit differential" analysis by recharacterizing it as a "lost expectation" theory of recovery and then asks this court to affirm because the damages were "reasonable." What Main Line never confronts is that the underpinnings of its expert's damage analysis are legally deficient, based on elements the law does not recognize as compensable; thus, the testimony cannot rise to the dignity of substantial evidence. As explained in Pacific Gas & Electric Co. v. Zuckerman (1987) 189 Cal.App.3d 1113, 1135-1136:

> "The value of opinion evidence rests not in the conclusion reached but in the factors considered and the reasoning employed. Where an expert bases his conclusion upon assumptions that are not supported by the record, upon matters which are not reasonably relied upon by other experts, or upon factors which are speculative, remote or conjectural, then his conclusion has no evidentiary value. In those circumstances the expert's opinion cannot rise to the dignity of substantial evidence. When a trial court has accepted an expert's ultimate conclusion without critical consideration of his reasoning, and it appears the conclusion was based upon improper or unwarranted matters, then the judgment must be reversed for lack of substantial evidence." (Citations omitted; see Hyatt v. Sierra Boat Co. (1978) 79 Cal.App.3d 325, 338.)

The sufficiency of an expert's testimony presents a legal question on appeal. (Kyle v. United Services Automobile Assn. (1994) 24 Cal.App.4th 1632, 1645 ["(A)ppellant's claim of error challenges not the admissibility of the (expert) evidence, but its legal sufficiency, and in our review of a claim of insufficiency of the evidence (the expert witness's) personal legal opinions are not entitled to consideration. Issues of law are for the court. . ."].) Notwithstanding Main Line's protestations, the underpinnings of Wilde's testimony are contrary to innumerable principles of settled law, as we now further explain.

a. Main Line's claimed $5.1 million "minimum net profit differential" was based on legally impermissible factors.

Main Line attempts to establish that a "minimum profit differential" of $5.1 million would support the award. (RB pp. 23-25.) Although Main Line tries to clothe Wilde's testimony with pseudo-legal trappings, it ultimately boils down to this: "The project with Ms. Basinger nets $3 million to Main Line [for domestic distribution rights]; whereas the project with Ms. Fenn cost Main Line $2.1 million. Thus, in legal parlance, subtracting the net figures from each project establishes Ms. Fenn's project would have had to generate at least $5.1 million in additional revenues to place Main Line on equal footing with its expectation for returns on the project with Ms. Basinger." (RB p. 25.) If Main Line's words accomplish anything, they prove our point that the award is insupportable:

1. On its face, evidence that Main Line suffered $5.1 million in damages cannot possibly support a $7.4 million award. Thus, by Main Line's own reasoning, there is error of at least $2.3 million.

2. The record reveals, without contradiction, that Main Line did not lose, or even invest, $2.1 million in the Fenn film; rather, $1.6 million of that supposed "loss" was by a private party investing his own money, on whose behalf Main Line did not sue. (RT 2386.)[15/] Thus, even Main Line's $5.1 million figure is overstated by at least $1.6 million.

3. Under paragraphs 1 and 2 above, the damages claimed are overstated by $3.9 million, just for starters.

4. Wilde admitted he could not say whether Main Line actually lost $5.1 million in profits (RT 2101-2102); he further admitted that he was not testifying this figure reflected the net profits Main Line lost because Basinger was not in the movie (RT 2107-2108) and that "[t]here is a whole range of issues connected with lost profits calculations" that he (Wilde) did not apply in his calculations (RT 2114). Although Main Line now claims "subtracting the net figures from each project establishes that Ms. Fenn's project would have had to generate at least $5.1 million of additional net revenues to place Main Line on equal footing with its expectation for returns (i.e. lost

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15/ Main Line falsely claims the record showed it "borrowed" the $2.1 million (RB pp. 3, 25); Mazzocone unequivocally testified this was private investor money. (RT 2386.)

profits) on the project with Ms. Basinger" (RB p. 25), this is exactly what Wilde testified his $5.1 million number did not represent.

5. Wilde improperly compared the box office performance of the unproduced Boxing Helena starring Basinger with the produced Boxing Helena starring Fenn (RB p. 26), as Main Line concedes: "Dr. Wilde examined the actual historical performance of films starring Ms. Basinger and Ms. Fenn" and came up with a "ratio" of profitability based on the comparison. (RB pp. 26-27.) Comparing the film starring Basinger with that starring Fenn was impermissible because, if defendants were responsible for any damage to Main Line at all, they were responsible only for the damage which their conduct caused, namely, Main Line's inability to make and presumably profit from a film starring Basinger. Main Line's independent decision to proceed with the Fenn film and the economic consequences of that decision cannot be attributable to defendants' asserted breach and, thus, cannot legitimately serve as a component of the "profit differential" Wilde invented. (Nelson v. Reisner (1958) 51 Cal.2d 161, 171 [lost profits must be the natural and direct consequence of the breach to be recoverable].)[16/] Once the irrelevant $2.1 million Fenn portion of Wilde's "profit differential" analysis is removed, all that is left is the $3 million portion attributable to the Basinger project. This is a far cry from the $8.1 million judgment and from the $5.1 million "minimum profit differential."

b. Main Line's claimed $9.7 million "maximum profit differential" was based on legally impermissible factors.

Equally meritless is Main Line's assertion that Wilde's testimony as to "maximum expectation damages" of $9.7 million (RB p. 26) supports the judgment. To reach his "maximum

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16/ Main Line claims that making the film with Fenn (and going several million dollars in debt to do so) somehow constituted mitigation of its damages. (RB p. 25, fn. 18.) It did not. First, mitigation of damages is a defensive concept that permits the defendant to show the plaintiff failed to reduce his damages (Guerrieri v. Severini (1958) 51 Cal.2d 12, 23); it is not a tool which a plaintiff may use to increase his damages.

Second, mitigation concerns reasonable efforts to reduce the loss; it encompasses neither the duty nor the right to make expenditures disproportionate to the loss or those which are beyond the plaintiff's means. (Horne v. Peckham (1979) 97 Cal.App.3d 404, 418 [plaintiff reasonably abandoned legal efforts to gain favorable tax ruling because of the expense and uncertainty of result].)

profit differential," Wilde took the total gross domestic presale revenue and the total gross foreign presale revenue of numerous prominent U.S. movie studios, such as Disney, and used these figures to create a ratio to determine whether the domestic presales of such studios accurately reflected the "values" of their films. (RT 2090-2095, 2122.) Wilde then applied that ratio to Boxing Helena and concluded the $3 million domestic presale for the film starring Basinger was "too low" so he "scaled it up" to equal the foreign presales. (RT 2096.) Wilde erroneously believed the Basinger foreign presales (actually $6.8 million) were $7.6 million (RT 2096) and he decided the domestic presales should have been the same, so--with a quick stroke of the pen--he added the $4.6 million difference ($7.6 million - $3 million = $4.6 million) to his $5.1 million "minimum profit differential," reaching a total of $9.7 million. This mumbo jumbo cannot possibly support the judgment:

1. As noted, Wilde admitted all his "profit differential" numbers constituted nothing more than an economic theory, completely unrelated to lost profits. (RT 2083, 2087, 2101-2102, 2107-2108, 2133-2136.) Given this admission, his $9.7 million figure cannot be used to support something it admittedly is not.

2. As with his "minimum profit differential," Wilde's "maximum profit differential" improperly compared the Basinger and Fenn films, thus improperly charging defendants for the Fenn film's loss. (Nelson, supra, 51 Cal.2d at p. 171.)

3. Although Main Line asserts Wilde did not compare Main Line with nationally established studios such as Disney (RB p. 26), he did. (RT 2090.) Wilde's thesis that the $3 million domestic presale for Basinger was "too low" and should be "scaled up" $4.6 million was based explicitly on a comparison of the gross revenue earned by films released by nationally known studios with the domestic gross presales figures of those studios. (RT 2090, 2117.) Neither the business nor the revenues of these nationally-known, established studios were ever proven to be comparable in any way to those of independent, first-time filmmaker Main Line. Accordingly, the revenues the studios earned could not be used as a permissible basis for establishing damages in this case. (Pacific Gas & Electric Co., supra, 189 Cal.App.3d at pp. 1128-1134 [reversing because expert on land value based his computation, in part, on the value of dissimilar properties]; Berge v. International Harvester Co. (1983) 142 Cal.App.3d 152, 163 [a plaintiff can rely on data from other enterprises only if he shows the other businesses are similar and operate under the same conditions].)

4. The comparison with national studios also fails because the numbers Wilde used to invent his "ratio" came exclusively from the gross, not net, revenues of those studios. (RT 2090, 2122.) Even if the businesses were proven similar (they were not), there is no evidence that a ratio based on gross revenues would accurately reflect what net revenues might be, yet net revenue is the only proper measure of damages. (Kuffel v. Seaside Oil Co. (1970) 11 Cal.App.3d 354, 366.)

Wilde's testimony was not earthbound. By his own admissions, it had nothing to do with the criteria (i.e., lost profits) which govern legally-cognizable theories of damages. It cannot support the judgment in this case. As one court recently cautioned:

> "'The expert witness is the only kind of witness who is permitted to reflect, opine, and pontificate, in language as conclusory as he may wish. . . . [¶] Once we recognize the expert witness for what he is, an unusually privileged interloper, it becomes apparent why we must limit just how far the interloping may go. A witness cut loose from time-tested rules of evidence to engage in purely personal, idiosyncratic speculation offends legal tradition quite as much as the tradition of science. Unleashing such an expert in court is not just unfair, it is inimical to the pursuit of truth. The expert whose testimony is not firmly anchored in some broader body of objective learning is just another lawyer, masquerading as a pundit.'" (People v. Johnson (1993) 19 Cal.App.4th 778, 789-790 quoting Huber, Galileo's Revenge: Junk Science in the Courtroom (2d ed. 1993) p. 204.)

No matter how it is viewed, the so-called "expert" evidence Main Line proffered here does not even begin to support the gargantuan $8.1 million judgment (comprised almost entirely of impermissible gross profits) that was entered in this case.

### 3. The preproduction cost award was not supported by substantial evidence.

In one of the few of our arguments that actually is controlled by the substantial evidence standard of review, we established in our opening brief that the $258,593.93 in claimed "preproduction" costs (a figure the jury rounded up to $258,694) was unsupported by substantial evidence because Main Line never proved a causal connection between defendants' asserted breach

and the cost damages claimed. (AOB pp. 39-40.) Instead, Mazzocone simply summarily testified that Main Line incurred such costs and proffered an exhibit that purported to detail them. (RT 862-863; Ex. 91.) The exhibit, however, merely listed charges for goods and services that included routine overhead items for rent, office supplies, telephone bills and tax-return preparation fees through at least August of 1992, long after Main Line knew Basinger would not appear in the movie, long after Main Line had selected Fenn to star in the film, and long after this litigation was underway.

Main Line claims we have "misread" the evidence, asserting the entire $258,594 in preproduction costs were costs that Main Line incurred while preparing to film Boxing Helena with Basinger, but that it was unable to pay until after it was clear Basinger would not appear in the movie. (RB pp. 19-20.) Exhibit 91 itself, however, belies that characterization. For example, it reveals rental charges of $5,000 per month from June 1991 (when the negotiations at issue here ended) through at least March 1992. (Ex. 91, pp. 29, 31, 32, 34, 35, 36, 41, 42.) There is no conceivable way that rent for almost a year after the negotiations fell through can legitimately be characterized as "preproduction" charges incurred before, and merely paid after, the talks ended. There is not an iota of truth to Main Line's assertion that we have "misread" Mazzocone's testimony and that all the charges on Exhibit 91 were limited to costs incurred before the deal fell through.

Apparently realizing there is clearly no substantial evidence to support the $258,964 the jury awarded for "preproduction" costs, Main Line alternatively suggests it also incurred $600,000 in "preproduction" costs by "becoming liable to" Ed Harris in the "approximate amount of $600,000." (RB p. 20.) That does not help Main Line support its award of preproduction costs for multiple reasons:

1. The jury did not award $600,000; rather, it awarded only the costs listed on Exhibit 91 and gross profits. (CT 1677, 1688.)

2. The evidence conclusively established that Harris did not withdraw from his oral agreement to act in Boxing Helena because Basinger would not be his co-star; the parties stipulated that Harris remained committed to the project even after it was clear Basinger would not star in the film (RT 1971) and on September 18, 1991--three months after Main Line knew it could not reach an agreement for Basinger's services--Mazzocone wrote that "Ed [Harris] is still totally committed in [sic] rendering acting services in Boxing Helena." (Ex. 706.)

3. Main Line did not claim it paid Harris $600,000; it merely asserted it believed it was "liable" to him. Remote, contingent or uncertain liabilities cannot be recovered as damages. (O'Neil v. Spillane (1975) 45 Cal.App.3d 147, 160 ["(T)he plaintiff is required to have sustained actual damages from the particular injury of which he complains before he can be compensated for its infliction"]; Ventura County Humane Society v. Holloway (1974) 40 Cal.App.3d 897, 907 ["the mere possibility or even probability that damage will result from wrongful conduct does not render it actionable"]; Frustruck v. City of Fairfax (1963) 212 Cal.App.2d 345, 368 ["(E)ven where damages are recoverable for prospective detriment, the occurrence of such detriment must be shown with such a degree of probability as amounts to a reasonable certainty . . ."].)

Without question, the $258,694 in "pre-production" costs is unsupported by substantial evidence. That portion of the award must also be reversed.

## V. THE TRIAL COURT PREJUDICIALLY ERRED IN DENYING DEFENDANTS' MOTION TO TAX COSTS.

### A. Entitlement To Attorney's Fees And Costs Is Purely Statutory; The Trial Court Violated The Statute.

Main Line contends the trial court's award of attorney's fees and costs cannot be overturned "unless there is a clear showing of abuse of discretion." (RB pp. 27, 30.) Under this view, a trial court has discretion to violate a statute. (Ibid.) This is preposterous. In fact, a court never has such discretion.

While it is true the amount of attorney's fees and costs properly awarded are left to the trial court's sound discretion (e.g. Neiderer v. Ferreira (1987) 189 Cal.App.3d 1485, 1507), the question of a party's entitlement to such fees and costs in the first place is governed by statute. (Reynolds Metals Co. v. Alperson (1979) 25 Cal.3d 124, 127 ["unless authorized by either statute or agreement, attorney's fees ordinarily are not recoverable as costs"]; Folsom v. Butte County Assn. of Governments (1982) 32 Cal.3d 668, 677 [right to costs is purely statutory]; Ladas v. California State Auto. Assn. (1993) 19 Cal.App.4th 761, 774 ["because the right to costs is governed strictly by statute . . . a court has no discretion to award costs not statutorily authorized"].) The question whether a statute permits recovery of attorney's fees or costs is a legal issue subject to independent review on appeal. (Bussey v. Affleck (1990) 225 Cal.App.3d 1162, 1165 [where trial court

concluded costs were prohibited as a matter of law, Court of Appeal would "independently assess that legal conclusion"]; see Burden v. Snowden (1992) 2 Cal.4th 556, 562 [interpretation of statute is question of law for independent determination].) Contrary to Main Line's assertion, the cost statutes, not the trial court's discretion, exclusively govern whether the attorney's fees and cost awards were proper here.

B. As A Matter Of Law, Main Line Was Not Entitled To Recover Attorney's Fees.

1. Contrary to Main Line's assertion, defendants timely objected to Main Line's failure to file a noticed motion for attorney's fees.

Misrepresenting the record, Main Line asserts that defendants failed to object when it requested attorney's fees via a memorandum of costs, rather than through the statutorily-required noticed motion and, therefore, any error in utilizing the improper procedure was waived. (RB p. 27.) Once again, the record belies Main Line's contention. In defendants' motion to tax costs, under a heading entitled "Main Line Is Not Entitled To Attorney's Fees Without A Noticed Motion," defendants expressly raised this issue with the trial court. (CT 1898-1899.)[17/]

2. Defendants are entitled to enforce their statutory right to a noticed motion without need to show prejudice.

Main Line next urges (again without citation of any authority) that defendants must show prejudice before the attorney's fees award can be reversed. (RB p. 28.) This precise contention was flatly rejected in Russell v. Trans Pacific Group, Inc., supra, 19 Cal.App.4th at p. 1717.

In Russell, the prevailing party urged that "the trial court should disregard noncompliance if the opposing party is not prejudiced." (At p. 1726.) Noting the mandatory statutory language,

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17/ Main Line further claims the trial court instructed it to seek attorney's fees by way of a memorandum of costs (RB p. 27), but it fails to cite where in the record that purported instruction can be found. Even if the court did so, however, Russell v. Trans Pacific Group, Inc. (1993) 19 Cal.App.4th 1717, Nazemi v. Tseng (1992) 5 Cal.App.4th 1633, 1640-1641 and Bankes v. Lucas (1992) 9 Cal.App.4th 365, 369-372, expressly hold that a trial court lacks discretion to disregard the cost statutes.

the Court of Appeal held that failure to comply with the requirement that there be a noticed motion can be relieved only if the party seeking attorney's fees files a motion for relief from default under Code of Civil Procedure section 473. (Russell, supra, 19 Cal.App.4th at p. 1728 ["[T]he trial court does not have discretion to disregard the statutory requirement that a claim for contractual attorney fees must be made by timely written motion. . . . [T]he trial court may not disregard noncompliance with the procedural requirements for claiming attorney fees but may grant relief under section 473"].)

Main Line did not bother to file a section 473 motion even though failure to comply with the mandatory noticed-motion procedure was explicitly called to its attention in the trial court. (CT 1898-1899.) Main Line deliberately chose to proceed in violation of the statute and the attorney's fees award it reaped in violation of the statute must be reversed.

### 3. Contrary to Main Line's contention, defendants are not estopped to complain of the attorney's fees award.

Main Line urges defendants are estopped from asserting that the indemnity clause in the execution draft did not authorize attorney's fees. (RB p. 28.) In Myers, this court held that merely requesting attorney's fees in a cross-complaint "is not sufficient to create an estoppel where [the party] would not actually have been entitled to attorney's fees under the contract . . ." (Myers, supra, 13 Cal.App.4th at p. 962, fn. 12; emphasis in original.) Main Line attempts to distinguish Myers by arguing that, here, defendants somehow "successfully established" their right to attorney's fees, rather than simply seeking them. (RB p. 28.)[18/]

We are at a loss to discern the basis on which Main Line could honestly maintain that defendants successfully established a right to attorney's fees, since defendants' cross-complaint was dismissed and, indisputably, they were not awarded attorney's fees. (CT 2195-2196.) In any

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18/ The only record reference Main Line cites to support this assertion is its own attorney's declaration, which purported to reference an unreported conference in which defendants allegedly argued they were entitled to attorney's fees and the trial court assertedly "acceded to defendants' position" and allowed some unidentified statement concerning attorney's fees to be presented to the jury. (CT 2101-2102.) None of these purported events appear in the record; indeed, the record reflects the jury was expressly instructed not to consider attorney's fees. (CT 1507.) In any event, neither Mighty Wind nor Basinger was awarded any attorney's fees in this case.

event, Myers was not based on some phantom and meaningless distinction between requesting attorney's fees in a cross-complaint (which Myers held would not trigger an estoppel) and requesting them during argument to the court. Myers held that, even though a complaining party himself seeks attorney's fees, he will not be estopped to urge that attorney's fees improperly were awarded; the test is not estoppel, but whether the prevailing party actually was entitled to recover the fees under the provision in question. (Myers, supra, 13 Cal.App.4th at p. 962, fn. 12.) Under Myers, Main Line was not entitled to such fees.

4. *Myers* and other authorities conclusively establish that Main Line was not entitled to recover attorney's fees under the indemnity clause appearing in the execution draft.

Under Myers, clauses which state that one party to a contract will "indemnify" and "hold harmless" the other party merely obligate the indemnitor to reimburse the indemnitee for damages the indemnitee becomes obligated to pay to third persons; such clauses are not attorney's fees clauses under Civil Code section 1717 and, thus, do not require one party to pay the attorney's fees of the other in an action between the two. (13 Cal.App.4th at pp. 969, 973.)

The clause upon which Main Line sought and recovered attorney's fees in this case clearly was an indemnity clause governed by Myers' holding. It stated: " . . . Employer [Mighty Wind] shall indemnify and hold harmless Producer . . . from any damage or expenses, including reasonable attorneys' fees, which may be suffered by any of them by reason of any claim by Artist for compensation, or any breach or failure by Employer or Artist to perform all representations, warranties and agreements herein contained." (Ex. 76, pp. 19-20, emphasis added; CT 33-34, 2091-2092.)[19/]

Main Line attempts to shift focus away from the controlling "indemnify and hold harmless" language that Myers found conclusive and urges that the Myers indemnity clauses are distinguishable because the clause here mentioned attorney's fees and the Myers clauses did not.

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19/ Main Line relies on Citizens Suburban Co. v. Rosemont Dev. Co. (1966) 244 Cal.App.2d 666, 683, as authority for the proposition that an indemnity clause permits recovery of attorney's fees in an action on a contract (RB p. 28), a case which this court chose not to follow in Myers. (13 Cal.App.4th at 972.)

(RB p. 30.) Main Line has simply selectively edited the relevant portions of the Myers clauses to suggest--falsely--that they did not refer to attorney's fees. As in the present case, however, each of the Myers clauses expressly referred to attorney's fees. (13 Cal.App.4th at pp. 963, 965-966.)

The purported attorney's fees clause in this case is indistinguishable from those which Myers concluded did not support an attorney's fees award in breach of contract litigation between parties to the contract. Here, exactly as in Myers, the $456,702.46 attorney's fees award must be reversed.

5. Even if the indemnity clause could somehow be construed as permitting attorney's fees, it does not apply to and could not bind Basinger.

Main Line does not even attempt to refute our additional argument that, under no circumstances, could attorney's fees be recoverable from Basinger. (AOB p. 46.) Unquestionably, the clause, which specifically stated that "Employer" (Mighty Wind) would indemnify the Producer (Main Line) (Ex. 76, p. 19), has no application to Basinger. Main Line has provided no basis upon which this court should apply that clause in a manner other than written.

C. Costs Awarded In Direct Violation Of Code Of Civil Procedure Section 1033.5, Subdivision (b), Must Be Reversed.

The attorney's fees award was not the only indefensible cost award; other costs awarded were equally improper. As shown in our opening brief (AOB pp. 47-48), the trial court improperly awarded $198,206.34 in costs for fees of experts not ordered by the court, research, postage, telephone, fax, and photocopying charges and transcripts, even though section 1033.5, subdivision (b), explicitly precludes such recovery.

Relying on Bussey v. Affleck, supra, 225 Cal.App.3d at p. 1162, which reasoned that costs prohibited by section 1033.5, subdivision (b), could be recovered under section 1033.5, subdivision (a)(10), as "attorney's fees authorized by statute" if the contract provides for payments of costs or expenses to the prevailing party (at p. 1166-1167), Main Line urges the trial court had discretion to ignore subdivision (b) of section 1033.5. As even Main Line acknowledges, however, Bussey

stands alone. Several more recent cases ignore its holding (e.g. Ladas, supra, 19 Cal.App.4th 761; Russell, supra, 19 Cal.App.4th 1717); and the most recent case (Ripley v. Pappadopoulos (1994) 23 Cal.App.4th 1616) expressly disagrees with it.

In Ripley, the Court of Appeal, Third District, faulted Bussey for ignoring the express statutory prohibition against awarding expert witness fees and explained that Bussey's justification for doing so--to make the prevailing party whole--articulated policy considerations applicable to the Legislature, not to the courts. (At p. 1625-1628.) Ripley applied the statute as written to conclude that expert witness fees, as well as copying expenses, Federal Express and postage charges, and telecopy/fax expenditures, cannot be awarded as costs. (At p. 1628.)

Main Line denigrates Ripley on the ground it "ignores the discretion that the Legislature provided the trial courts to award costs not specifically enumerated by statute." (RB p. 31, fn. 20.) This is insupportable. The Legislature only permitted the trial court to exercise its discretion to award costs that are not mentioned in the statute. (See Ladas, supra, 19 Cal.App.4th at p. 774 ["An item not specifically allowable under (Code Civ. Proc., § 1033.5) subdivision (a) nor prohibited under subdivision (b) may nevertheless be recoverable in the discretion of the court . . ."].) It did not endow trial courts with discretion to ignore subdivision (b) of the statute and award costs which are expressly prohibited.

In sum, attorney's fees totalling $456,702.46 and other costs totalling $198,206.34 clearly violate statutory law. Main Line has not demonstrated otherwise. The judgment permitting such fees and costs must be reversed.

## VI. THE JUDGMENT SHOULD BE REVERSED BECAUSE OF JUROR MISCONDUCT.

Finally, our opening brief established that uncontroverted juror declarations, which must be considered because Main Line failed to obtain a ruling on its motion to strike (Ann M., supra, 6 Cal.4th at p. 670, fn. 1),[20/] conclusively demonstrated that the jury engaged in misconduct in two separate respects--by disregarding the trial court's instruction to award net, not gross, damages and

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20/ Main Line simply notes the trial court "could have" disregarded the juror declarations (RB pp. 37-38) however, under the Supreme Court's directive in Ann M. (a decision which Main Line chooses to ignore) "could have" is not good enough. Main Line did not obtain a ruling on its motion to strike.

Another issue also compels reversal with directions--Main Line's failure to establish there was any enforceable oral or written contract. There was never any writing which satisfied the requirements of the SAG collective bargaining agreement and, as a matter of law, the parties' objective manifestations of intent conclusively established there could be no enforceable written contract without signature, which admittedly was never obtained.

Reversal is also required because there were multiple prejudicial errors in instructing and refusing to instruct the jury on such key issues as contract formation and the fundamental proposition that each defendant was entitled to separate consideration; the damage award improperly included recovery of gross, rather than net, profits and is not otherwise supportable under any legally cognizable theory; there was jury misconduct; and the award of attorney's fees and costs was precluded by governing statutory and decisional law.

The judgment in this case is terminally infected with prejudicial error. There are no circumstances under which it properly can stand. Reversal clearly is mandated.

Dated: August 1, 1994

Respectfully submitted,

GREINES, MARTIN, STEIN & RICHLAND
IRVING H. GREINES
ROXANNE HUDDLESTON

KATTEN MUCHIN ZAVIS & WEITZMAN
HOWARD L. WEITZMAN
MARK A WOOSTER
E. RANDOL SCHOENBERG

By_____
Irving H. Greines

By_____
Roxanne Huddleston

Attorneys for Defendants and Appellants KIM BASINGER and MIGHTY WIND PRODUCTIONS, INC.