

No._____

In The
SUPREME COURT OF THE UNITED STATES

MARON PICTURES LTD.,
Petitioner,

v.

SAM EIGEN et al.,
Respondents,

On Petition for Writ of Certiorari to the California
Court of Appeal for the Second Appellate District

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. How can any state court make conclusions in relation to motion picture rights without referring to the Copyright Act to make a determination?
2. Pursuant to 17 U.S.C. §301(a), if “*all legal or equitable rights*” that a plaintiff asserts under state law are “*rights that are equivalent*” to those protected “within the *general scope of copyright* as specified by section 106” then doesn’t the work involved fall within the “*subject matter*” of the Copyright Act?
3. How can the State of California stop a Copyright Owner from receiving bi-annual accounting and reporting as legally required by Federal Copyright Law (17 U.S.C §119(b)), and stop him receiving his royalties owed?
4. How can the State of California forfeit a Copyright Owner of his rights pursuant to 17 U.S.C. 106, thus stopping him from exploiting his copyright protected work in the remaining global territories pursuant to 17 U.S.C. 106(3), which is constitutionally protected under The Copyright Act of 1976 and under The Berne Convention Implementation Act of 1988?

5. If a court's determination infringes a Copyright protected work as in this case, and precedent cases across all Circuits make the secondary infringer liable for 'Contributory Copyright Infringement' if they "[k]n[e]w, or ha[d] reason to know" of direct infringement, then does this make the State of California and/or the judges involved in the previous hearings liable for 'Contributory Copyright Infringement'?

PARTIES TO PROCEEDING

1. Maron Pictures Ltd., Plaintiff and Appellant;
2. Sam Eigen, Defendant and Respondent;
3. Mainsail LLC, Defendant and Respondent;
4. Shoreline Entertainment Inc., Defendant and Respondent;

COMPANY DISCLOSURE STATEMENT

Maron Pictures Ltd. has no parent company. Maron Pictures Ltd. is owned by Mark Mahon, who is a sole proprietor, administrator, sole beneficiary and the only creditor of Maron Pictures Ltd. Mark Mahon is also the sole owner and Copyright holder of the motion picture, 'Strength and Honour' registered in the U.S. Copyright Office, registration no. PA 1-642-297. Mark Mahon is also the registered Copyright owner of the screenplay registered in the U.S. Copyright Office, registration no. TXul-289-556. Mark Mahon's ownership rights in this matter also fall under the protection of Title 17, United States Code and of The Berne Convention Implementation Act of 1988.

LIST OF PROCEEDINGS IN STATE COURT
(listed in descending order)

California Supreme Court, Case No. S254768, Maron Pictures v. Eigen, Petition for Review & publication request denied, 05/15/2019.

Second Appellate District, Case No. B280738, Maron Pictures Ltd. v. Sam Eigen et al., Opinion filed, Affirmed, 02/15/2019.

Los Angeles County Superior Court, Case No. SC120432, Maron Pictures v. Sam Eigen et al., Order granting Motion for Summary Judgment, 12/09/2016.

Los Angeles County Superior Court, Case No. SC120432, Maron Pictures v. Sam Eigen et al., Order granting Summary Adjudication in part, 02/10/2016.

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PETITION FOR WRIT OF CERTIORARI

Maron Pictures Ltd. petitions for a writ of certiorari to review a decision in the Court of Appeal of the State of California for the Second Appellate District.

OPINION BELOW

The decision of the Second Appellate District is reported as *Maron Pictures Ltd. v. Eigen*, B280738 (Cal. Ct. App. Feb. 15, 2019). The court's decision is ordered "not to be published in the official reports." The judges who acted on the appeal are Maria E. Stratton, Tricia A. Bigelow and Elizabeth A. Grimes.

JURISDICTION

The Court of Appeal affirmed a judgment of the Superior Court of Los Angeles County and entered its decision on February 15, 2019. On March 5, 2019 it denied a timely filed petition for rehearing and transfer to Federal jurisdiction. On May 15, 2019 the Supreme Court of California denied a timely filed petition for review and request for an order directing publication of the Court of Appeal's opinion. This Court's jurisdiction is invoked under 28 U.S.C. §1257(a) having timely filed this petition for a writ of certiorari within ninety days.

INTERNATIONAL PROVISIONS, STATUTES AND REGULATIONS AT ISSUE

The Berne Convention Implementation Act of 1988 provides, in part:

Sec. 1 – Short Title and References to Title 17, United States Code.

(a) SHORT TITLE. – This Act, may be cited as the "Berne

Convention Implementation Act of 1988".

(b) REFERENCES TO TITLE 17, UNITED STATES CODE.

— Whenever in this Act an amendment or repeal is expressed in terms of an amendment to or a repeal of a section or other provision, the reference shall be considered to be made to a section or other provision of title 17, United States Code.

Sec. 2 – Declarations.

The Congress makes the following declarations:

(2) The obligations of the United States under the Berne Convention may be performed only pursuant to appropriate domestic law.

(3) The amendments made by this Act, together with the law as it exists on the date of the enactment of this Act, satisfy the obligations of the United States in adhering to the Berne Convention and no further rights or interests shall be recognized or created for that purpose.

Sec. 3

(b)(2) to object to any distortion, mutilation, or other modification of, or other derogatory action in relation to, the work, that would prejudice the author's honor or reputation.

17 U.S.C. §102(a) provides:

Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories:

- (1) literary works;
- (2) musical works, including any accompanying words;
- (3) dramatic works, including any accompanying music;

- (4) pantomimes and choreographic works;
- (5) pictorial pictures and other audiovisual works;
- (6) motion pictures and other audiovisual works;
- (7) sound recordings; and
- (8) architectural works.

17 U.S.C. §103(a) provides:

The subject matter of copyright as specified by section 102 includes compilations and derivative works, but protection for a work employing preexisting material in which copyright subsists does not extend to any part of the work in which such material has been used unlawfully.

17 U.S.C. §106 provides:

Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

- (1) to reproduce the copyrighted works in copies or phonorecords;
- (2) to prepare derivative works based upon the copyrighted work;
- (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
- (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion

picture or other audiovisual work, to display the copyrighted work publicly; and

(6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

17 U.S.C. §106A(a)(3)(A) provides:

[T]o prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation, and any intentional distortion, mutilation, or modification of that work is a violation of that right, and

17 U.S.C. §106A(a)(3)(B) provides:

[T]o prevent any destruction of a work of recognized stature, and any intentional or grossly negligent destruction of that work is a violation of that right.

17 U.S.C. §106A(b) provides, in part:

Scope and Exercise of Rights. - Only the author of a work of visual art has the rights conferred by subsection (a) in the work[.]

17 U.S.C. § 119 (b)(1)(A) provides, in part:

[A] statement of account, covering the preceding 6-month period[.]

17 U.S.C. § 119 (b)(1)(B) provides, in part:

[A] royalty fee payable to copyright owners pursuant to paragraph (4) for that 6-month period[.]

17 U.S.C. § 122 (a)(1)(C)(ii) provides:

[A] distributor that has contracted with the satellite carrier for direct or indirect delivery of the secondary transmission to the public.

17 U.S.C. § 201(d) provides:

(1) The ownership of a copyright may be transferred in whole or in part by any means of conveyance or by operation of law, and may be bequeathed by will or pass

as personal property by the applicable laws of intestate succession.

(2) Any of the exclusive rights comprised in a copyright, including any subdivision of any of the rights specified by section 106, may be transferred as provided by clause (1) and owned separately. The owner of any particular exclusive right is entitled, to the extent of that right, to all of the protection and remedies accorded to the copyright owner by this title.

17 U.S.C. § 301(a) provides:

(a) On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103, whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.

17 U.S.C. § 501 (a) provides:

Anyone who violates any of the exclusive rights of the copyright owner as provided by sections 106 through 122 or of the author as provided in section 106(A)(a) ... is an infringer of the copyright or right of the author, as the case may be. For purposes of this chapter (other than section 506), any reference to copyright shall be deemed to include the rights conferred by section 106A(a). As used in this subsection, the term "anyone" includes any State, any instrumentality of a State, and any officer or employee of a State or instrumentality of a State acting in his or her official capacity. Any State, and any such instrumentality, officer, or employee, shall

be subject to the provisions of this title in the same manner and to the same extent as any nongovernmental entity.

17 U.S.C. § 506 (a)(1)(B) provides:

[B]y the reproduction or distribution, including by electronic means, during any 180-day period, of 1 or more copies or phonorecords of 1 or more copyrighted works, which have a total retail value of more than \$1,000;

28 U.S.C. § 1257(a) provides:

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

28 U.S.C. § 1338(a) provides, in part:

(a) The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents, plant variety protection, copyrights and trademarks. No State court shall have jurisdiction over any claim for relief arising under any Act of Congress relating to patents, plant variety protection, or copyrights. For purposes of this subsection, the term "State" includes any State of the United States[.]

28 U.S.C. § 4001(a)(1) provides:

In the case of a transfer of copyright ownership under United States law in a motion picture (as the terms

“transfer of copyright ownership” and “motion picture” are defined in section 101 of title 17) that is produced subject to 1 or more collective bargaining agreements negotiated under the laws of the United States, if the transfer is executed on or after the effective date of this chapter and is not limited to public performance rights, the transfer instrument shall be deemed to incorporate the assumption agreements applicable to the copyright ownership being transferred that are required by the applicable collective bargaining agreement, and the transferee shall be subject to the obligations under each such assumption agreement to make residual payments and provide related notices, accruing after the effective date of the transfer and applicable to the exploitation of the rights transferred, and any remedies under each such assumption agreement for breach of those obligations, as those obligations and remedies are set forth in the applicable collective bargaining agreement, if—

(A) the transferee knows or has reason to know at the time of the transfer that such collective bargaining agreement was or will be applicable to the motion picture;

California Civil Code § 1442 provides:

CONDITIONS INVOLVING FORFEITURE, HOW CONSTRUED.

A condition involving a forfeiture must be strictly interpreted against the party for whose benefit it is created.

California Civil Code § 3513 provides, in part:

[A] law established for a public reason cannot be contravened by a private agreement.

California Rule of Court 8.155(b) provides:

(b) Omissions

- (1) If a clerk or reporter omits a required or designated portion of the record, a party may serve and file a notice in superior court specifying the omitted portion and requesting that it be prepared, certified, and sent to the reviewing court. The party must serve a copy of the notice on the reviewing court.
- (2) The clerk or reporter must comply with a notice under (1) within 10 days after it is filed. If the clerk or reporter fails to comply, the party may serve and file a motion to augment under (a), attaching a copy of the notice.

STATEMENT OF THE CASE

A. Facts Giving Rise To This Case

In April, 2009, the parties entered into a “sole and exclusive” distribution contract titled “SAA” for fifteen (15) years in “all media” constructed by Respondents, Shoreline Entertainment, with regard to the distribution of the award-winning motion picture, Strength and Honour (the “Picture”). (5 CT:1015-35.)¹

Petitioner is the registered Copyright owner of the screenplay having registration no. TXul-289-556 at the U.S. Copyright Office (6 CT:1269, MTA pp. 198) and registered writer, producer, feature director

¹ Cites to “CT” are to the Clerk’s Transcript in the California Court of Appeal proceeding in the case, No. B280738; cities to “Op.” are to the California Court of Appeal Opinion, No. B280738; cites to “MTA” are to Appellant’s Motion to Augment in the case, No. B280738; cites to “R.T.P.O.” are to Mark Mahon’s Request To Publish Opinion in this case, No. B280738.

and owner of the Copyright having registration no. PA 1-642-297 at the U.S. Copyright Office. (6 CT:1269, MTA pp. 197.)

The contract specified that “[Respondents] shall receive a ***flat fee of forty thousand dollars (\$40,000)*** in sales expenses and administration fees directly from the first Gross Proceeds” and “... ***fifteen percent (15%) of revenues generated*** ... by [Respondents] on behalf of [Petitioner] in connection with the Show.” ***Petitioner would be entitled to all remaining proceeds and revenues but was not paid one cent.*** (5 CT:1016.)

In January 2010, Respondents commercially released the film with illicit product covers and trailer, blatantly infringing on Petitioner’s copyright. (6 CT:1261, MTA pp. 82; 6 CT:1269, MTA pp. 184.) After learning of this Petitioner engaged the services of an attorney from L.A. because Petitioner had provided Respondents with an ‘exclusive’ product cover and trailer that displayed his motion picture as the award-winning movie it is, as part of his ‘deliverables.’ (6 CT:1261, MTA pp.82; 6 CT:1269, MTA pp. 183, 185-186.)

On January 30th, 2010, after countless written requests, Petitioner then formally instructed Respondents “to ‘cease and desist’ from distributing” his copyright protected motion picture (6CT:1269, MTA pp. 197-198), which he warned “is doing untold damage to [his] product and people’s reputations.”

Petitioner also instructed Respondents to remove the product in “any place where the product’s images or trailers is listed for sale.” (6 CT: 1261, MTA pp. 82.)

On January 31st, 2010, Petitioner wrote to Respondents again and stated “I repeat, you are in breach of our contract and the contracts in place with [Petitioner] and Michael Madsen. Remove all product until the matter is resolved, as failure to do so will result in [Petitioner] seeking substantial damages and costs from [Respondents].” (6 CT:1269, MTA pp. 187.)

With Respondents notified of the initial breach and failure to cure the breach within the contract’s sixty-day time restraint, Petitioner was then forced through his former attorney to file a demand for arbitration on October 6, 2010, approximately 9 months after learning of the issues in dispute. (2CT:320-26.) This demand, titled “Notice of Arbitration [Amended],” sought damages for breach of contract, fraud, breach of the implied covenant of good faith and fair dealing, conspiracy, and negligence, and fell well within the contractually-shortened one-year limitation period of the SAA. *Id.*

This filed demand for arbitration satisfied the contractual obligation of “bring[ing] any action, suit or proceeding” because it provided Respondents with notice of their breach, aligned with the mandatory arbitration clause of the contract (5 CT:1025, ¶23), and served the broader mutual intent of the parties

for speedy dispute resolution. (5 CT:1024, ¶17.3.) Petitioner subsequently filed two additional demands for arbitration, the last of which was dated October 14, 2010. (2 CT:327-38.)

On October 22, 2010, **Respondents asked** Petitioner through counsel if he would agree to “[a] formal but non-binding mediation?” and then stated “[Respondents] would like to find a way to resolve this dispute in a way that both parties can feel satisfied and **[Respondents] believe the best way to do that is to avoid all the hassle and expense of arbitration.**” (2 CT:341.)

On November 16, 2010, Respondents picked a mediator and emailed Petitioner’s former counsel stating “[h]ere is the mediator we used before <http://www.derin.com>. (2 CT:350.)

On December 6, 2010, Petitioner’s counsel further agreed to the mediator that was recommended and engaged by Respondent Eigen. (2CT:345.)

On “February 3, 2011, Benjamin Anderson of Ropers, Majeski, Kohn, Bentley formally wrote to [Petitioner’s] former attorney on behalf of Respondents, and confirmed that “mediation is a viable path” to resolve the matter. Despite **asking** [Petitioner] **not to proceed** with the arbitration and to do mediation instead, which [Petitioner] agreed to do, Respondents had their attorneys then write to [Petitioner’s] former attorney [February 10, 2011]

after committing to mediation stating that their client would be “unavailable to participate in mediation until after May 27th,” 2011.” (R.T.P.O., p.3., p.12., p.14.)

The “arbitration was [then] closed on mutual consent to save on costs “[Respondents] to avoid all the hassle and expense of arbitration.” (2CT:341)], as mediation had been mutually agreed at Respondents request and Respondents’ attorney’s confirmation of mediation via formal letter on February 3, 2011, [and confirming again on February 10, 2011] but then making themselves unavailable until June ’11 at the earliest.” (R.T.P.O., p.3., p.12., p.14.)

“During the months that followed after June [2011], Respondents’ attorneys deceived [Petitioner’s] attorney as he tried to schedule numerous dates via calls to the agreed upon mediation, which Respondents had requested.” (R.T.P.O., p.3.)

“On March 20, 2012, Maron Pictures wrote to Mainsail [directly, as no mediation date was forthcoming] formally demanding an accounting. On April 1, 2012, Mainsail replied it “no longer [had] a business arrangement” with Maron Pictures and had “nothing further to add.” On June 5, 2012, Maron Pictures replied that it would now “address all [their] issues directly through the litigation route.” (Op. at 5; Appx. p.18a.)

“The record does not contain any information about Maron Pictures’s activities between June 5,

2012 and March 2013. On March 22, 2013, Maron Pictures filed this lawsuit.” (Op. at 5; Appx. p.18a.) However, faced with having to get substantial legal fees together on short notice due to the unforeseen deceptive conduct of Respondents, and the untimely death of Petitioner’s 24 year old sister, he ***did file his action*** ten months later, and less than the one year contractual limitation requirement. (MTA pp. 59 - 80.)

B. The Superior Court Proceedings

“The original complaint asserted causes of action for declaratory relief, fraud, rescission, breach of contract, negligent misrepresentation, breach of fiduciary duty and for an accounting.” (Op. at 5; Appx. p. 18a, p. 19a.)

On February 10, 2016, Respondents’ first “Motion for Summary Adjudication [wa]s GRANTED as to all claims except for [Respondents’] violation of para. 12.2’s accounting obligation.” (3CT:610, Appx. p. 60a.) (Minute Order Attached hereto as Appendix H.)

“After the trial court granted summary adjudication, Maron Pictures filed a first amended complaint which asserted causes of action for declaratory relief, breach of contract, accounting, and conversion.” (Op. at 5, 6; Appx. p. 19a.)

The court trial commenced on June 27, 2016 and the court ruled that the filmmaker never completed delivery of the movie, meaning that the

Agreement was never fully executed, but that Respondents were nonetheless entitled to keep all of the profits from their distribution and licensing of that movie, ***as delivered by Petitioner***. The trial court then refused to permit Petitioner to cancel the Agreement by its terms, not because it never came into force, but because – notwithstanding the violations the trial court expressly found, there were no violations. However, “Maron Pictures was able to deliver sufficient materials for Mainsail to begin licensing activities and, in fact, license the film in various countries resulting in revenues being earned.” (Op. at 25; Appx. p. 43a.)

Respondents successfully distributed the motion picture ***as delivered*** to over 41 countries around the world [as per licensing agreements provided during discovery], received revenue but refused to share the proceeds as required by the Agreement, and then claimed only for the first time during the trial to have never received the very ‘motion picture’ at issue. The court found that it is undisputed that “[Respondents] entered into several licensing agreements for the film[.]” (Op. at 4; Appx. p. 16a.)

“Maron Pictures did proffer a certificate of copyright registration ... [a]lthough Maron Pictures claims in its opening brief that its trial counsel “instructed the court” that Maron Pictures was entitled to the full protection of Federal Copyright

Law, in the absence of a reporter's transcript there is nothing in the record to support this claim." (Op. at 5; Appx. p. 19a.)

The **court also noted**, "it is undisputed that no accounting statements provided for by Paragraph 12.2 of the SAA were ever given to Maron Pictures, nor has Maron Pictures received any revenue from [M]ainsail as a result of the licensing revenue it did receive." (Op. at 25; Appx. p. 43a.)

On October 21, 2016 Petitioner flew in from Ireland and appeared in court with his former attorney, at his request, so he could be relieved as counsel due to a breakdown in the relationship. The lower court granted the attorney's Motion to withdraw as counsel, even though Petitioner had yet to arrange other counsel. (7 CT:1529.)

After the court granted the attorney's motion to withdraw, the Court instructed Petitioner that it was unlawful for an entity to make an appearance without an attorney, so Petitioner asked the court if he could have the second motion for summary judgment moved as he had only just been made aware of it the previous day and had to return to Europe but the court refused, stating the "Motion for Summary Judgment set for DECEMBER 9, 2016 is to remain." (7 CT:1529.)

Thus, requiring Petitioner to obtain new counsel capable of learning everything on a complex file and preparing an opposition to a summary

judgment motion all in less than five weeks, materially prejudicing the Petitioner's ability to litigate the case. Furthermore, Petitioner was unable to locate counsel to take on the matter that quickly. Despite this, on December 9, 2016 the court granted Respondents' second motion for summary judgment, due to lack of evidence on the First, Second, Third and Fourth Causes of Action of this summary judgment on the basis that "there [wa]s no triable issue of material fact against the moving [Respondents] and the undisputed evidence shows [Petitioner] cannot establish their claims against [Respondents]." (7CT:1532.)

C. The Appellate Court Proceedings

On or about February 16, 2017, a Notice of Appeal was lodged with the appellate court. On February 15, 2019, the appellate court's Opinion was filed. (Attached hereto as Appendix F.)

The Opinion states "[i]n Maron Pictures's attempts to show error on appeal, Maron Pictures refers repeatedly to various provisions of Federal Copyright Law (17 U.S.C. §§ 106, 106A, 122, 501, 502, 506). Maron Pictures did not mention these provisions in its complaint, in opposition to summary judgment, or in its trial brief. Maron Pictures did proffer a certificate of copyright registration as an exhibit at the trial, but it was not admitted into evidence." (Op. at 5; Appx. p. 19a.) However, this claim that the certificate of copyright registration

was not admitted into evidence is unsupported by the record. (6CT:1269, 1270.)

The district's Opinion also states “[a]lthough the parties designated the trial exhibits as part of the record on appeal, the clerk of the superior court was unable to include those exhibits.” (Op. at 26; Appx. p. 45a.) The trial Court not only lost the original exhibits that were supposed to be part of the record, but refused to add the copies Petitioner retained, contrary to Rule of Court 8.155(b), which is why Petitioner had to file a motion to augment.

The appellate division then granted defendants' motion to augment but denied Petitioner's request to augment the record, with the exception of “the original complaint in this matter ... and a copy of trial exhibit 329, attached to the Mahon Declaration as exhibit 10.” (Op. at 27; Appx. p. 45a.)

Of the 203 pages of evidence in Petitioner's motion to augment, Respondents judicially noticed 5 pages, trial exhibits 254, 327, 331, 333 and 338, which were admitted into evidence. (6CT:1258; 1261.) “The remaining trial exhibits attached to the Mahon declaration appear to have been marked and introduced at trial, but not admitted into evidence.” (Op. at 27; Appx. p. 45a.) However, there is nothing in the record to support that any objections were made to any of the trial exhibits except for a single objection to exhibit 316, which was admitted.

(6CT:1261.) Further, every exhibit in Petitioner's motion to augment was introduced in evidence, marked for identification, used by the parties and treated as evidence. (6CT: 1253-1262, 1269-1270.)

Furthermore, the appellate division also refused Petitioner's request to augment the record with a correct copy of the 'First Amended Complaint.' (MTA pp. 12 through p. 57.) The correct 'First Amended Complaint' which was originally filed on 06/08/16 had a 'Film Audit Report' and a 'Film Proceeds Report' attached summarizing funds that ***are due to Petitioner, the Copyright Owner.*** "The Low-Case Film Proceeds calculation was determined by reviewing the distribution statements, deal memos, and royalty accounting reports provided [during discovery] by the Licensor and the [Respondent]." (MTA pp. 56.) The "***Film Audit Report finds that the film has generated gross revenue of \$2,852,000 between 2009 and 2015.***" (MTA pp. 57.) "***The Low-Case calculation [of royalties earned] totals \$428,115.***" (MTA pp. 56.)

On or about February 28, 2019, Kimora Pope substituted in as counsel and filed a Request for Rehearing and transfer to Federal jurisdiction.

On March 5, 2019, the Court of Appeal denied the request for rehearing. (Attached hereto as Appendix E, p. 11a.)

On March 5, 2019, Mark Mahon filed a request to publish the opinion.

On March 5, 2019, the Court of Appeal issued a memorandum to the Supreme Court regarding its position that the opinion did not meet criteria for publication specified in Rule 8.1105. (Attached hereto as Appendix D, p. 8a.)

On March 8, 2019, Appellant filed a petition to transfer the case.

On March 8, 2019, the Court of Appeal denied the petition to transfer. (Attached hereto as Appendix C, p. 6a.)

On March 11, 2019, Appellant filed a petition for transfer of appellate division case.

On March 14, 2019, the Court denied the petition for transfer of appellate division case. (Attached hereto as Appendix B, p. 4a.)

On or about March 22, 2019, Appellant filed a petition for review under Rule 8.500 to the Supreme Court of California.

On May 15, 2019, the petition for review was denied and the request for an order directing publication of the opinion was denied. (Attached hereto as Appendix A, p. 2a.)

**REASONS WHY CERTIORARI SHOULD BE
GRANTED**

**I. THERE IS AN OBVIOUS CONFLICT OF
AUTHORITY IN THE QUESTIONS
PRESENTED**

A. The Decision Below Conflicts With Previous Decisions On The First, Second and Ninth Circuits.

The causes of action in Petitioner's original Complaint included declaratory relief, fraud, rescission, breach of contract, negligent misrepresentation, breach of fiduciary duty and accounting.

However, on February 10, 2016, Respondents' first "Motion for Summary Adjudication [wa]s GRANTED as to all claims except for [Respondents'] violation of para. 12.2's accounting obligation." (3CT:610., Appx. p. 60a.) Petitioner respectfully submits that the presiding Judge was fully aware the matter involved a dispute over a motion picture and Respondents' "Distribution Agreement" as the Judge correctly referred to it as same. (3CT: 610, 614, 618; Appx. p. 61a, 65a, 71a.) She also acknowledged Petitioner had an "arbitration claim filed on 10/6/10 with the Independent Film & Television Alliance, which alleged the same claims pled in this action." (3CT: 611, Appx. p. 62a.)

However, the Copyright Act expressly preempts "all legal and equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106." 17 U.S.C. § 301. The Ninth Circuit has applied the following two-prong test:

A state law cause of action is preempted by the Copyright Act if two elements are present. First, the rights that a plaintiff asserts under state law must be "rights that are equivalent" to those protected by the Copyright Act. 17 U.S.C. § 301(a); Second, the work involved must fall within the "subject matter" of the Copyright Act as set forth in 17 U.S.C. §§ 102 and 103.

Kodadek v. MTV Networks, Inc., 152 F.3d 1209, 1212 (9th Cir. 1998) (citing 1 Nimmer, § 1.01[B] at 1-11) (citations omitted). *Montz v. Pilgrim Films*, 649 F.3d 975, 982 (9th Cir. 2011); (holding same) *see also* *Laws v. Sony Music Entm't, Inc.*, 448 F.3d 1134, 1137 (9th Cir. 2006).

Under the first prong of the preemption test, the court should have determined whether the declaratory relief, the claim for fraud, rescission, breach of contract, negligent misrepresentation, breach of fiduciary duty and accounting protected rights were equivalent to those protected by the Copyright Act. Petitioner respectfully submits that this test is easily passed as the 'Statement of the Case' in its original complaint states "On or about April 16, 2009 Plaintiff Maron Pictures, LLC entered into a Distribution Agreement with Mainsail for the distribution of a film produced by Plaintiff Maron Pictures entitled "Strength and Honor"." (MTA pp. 63.) Petitioner easily passed this test.

Further, "[i]n order not to be equivalent, the right under state law must have an 'extra element'

that `changes the nature of the action so that it is qualitatively different from a copyright infringement claim.' *Xerox Corp. v. Apple Computer, Inc.*, 734 F. Supp. 1542, 1550 (N.D. Cal. 1990) (quoting *Mayer v. Josiah Wedgwood and Sons, Ltd.*, 601 F. Supp. 1523, 1535 (S.D.N.Y. 1985)).

Under the second prong of the analysis, the court should have determined whether Petitioner's works fell within the subject matter of copyright that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106. Under 17 U.S.C. §102(a) provides that Copyright protection subsists in works fixed in any tangible medium. Works of authorship include the following categories:

- (1) literary works;
- (2) musical works, including any accompanying words;
- (3) dramatic works, including any accompanying music;
- (4) pantomimes and choreographic works;
- (5) pictorial pictures and other audiovisual works;
- (6) motion pictures and other audiovisual works;
- (7) sound recordings; and
- (8) architectural works.

In relation to 17 U.S.C. §106, the words "distribution agreement" were used twelve (12) times in the initial Complaint, "distribution of the film" were used four (4) times and the word "distributors"

was used thirteen (13) times. Again, this prong is easily met. (MTA pp. 59 through 80.) As both prongs are met with respect to its claims, the court should have found all Petitioner's claims are preempted by the Copyright Act.

Further, because Petitioner sought Rescission of the Agreement in its Third Cause of Action (MTA pp. 71) “[the court] would be required to determine [his] ownership rights by reference to the Copyright Act.” *Santa-Rosa v. Combo Record*, 471 F.3d 224, 227 (1st Cir. 2006). Petitioner submits that because Petitioner “desire[d] a judicial determination of its rights and duties that the Distribution Agreement has been materially breached” (MTA pp. 69.) then the court would have been required to make its determination of his rights by reference to the Copyright Act. Petitioner further submits that all causes of action in the complaint, one through seven, required the court to make its determinations by reference to the Copyright Act. Petitioner respectfully submits that the judge should have preempted the case pursuant to 17 U.S.C. 301(a) and 28 U.S.C. 1338(a) as “[n]o State court shall have jurisdiction over any claim for relief arising under any Act of Congress relating to patents, plant variety protection, or copyrights.” Further, “a law established for a public reason cannot be contravened by a private agreement.” (Cal. Civ. Code § 3513.) Moreover, the court's ruling also set

incorrect parameters for all the other wrong determinations that followed.

B. Federal Copyright Law and The Second, Third, Fourth, Ninth and Tenth Circuits Have Well Established Precedents.

“Maron Pictures filed a first amended complaint which asserted causes of action for declaratory relief, breach of contract, accounting, and conversion.” (Op. at 5, 6; Appx. p. 19a.)

Again, pursuant to 17 U.S.C. § 301 “all legal and equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106” are preempted. Petitioner submits that the declaratory relief sought, the claim for breach of contract, accounting and conversion are rights that were equivalent to those protected by the Copyright Act. *Kodadek v. MTV Networks, Inc.*, 152 F.3d 1209, 1212 (9th Cir. 1998); *X17, Inc. v. Lavandeira*, 563 F. Supp. 2d 1102, 1105 (C.D. Cal. 2007)(same); *Goldberg v. Cameron*, 482 F. Supp. 2d 1136, 1151 (N.D. Cal. 2007)(same); *Grosso v. Miramax Film Corp.*, 383 F.3d 965, 968 (9th Cir. 2004); *EHAT v. TANNER*, 780 F.2d 876, 877 (10th Cir. 1986); *Rosciszewski v. Arete Associates, Inc.*, 1 F.3d 225, 229 (4th Cir. 1993). Furthermore, Petitioners declaratory relief “desire[d] a judicial determination of **its rights**” (MTA pp. 69) and “that Mainsail’s breach of its obligation entitled Maron

Pictures to terminate or rescind the SAA.” (Op. at 24; Appx. p. 42a.)

“Maron Pictures did proffer a certificate of copyright registration as an exhibit at the trial, but it was not admitted into evidence ... Although Maron Pictures claims in its opening brief that its trial counsel “instructed the court” that Maron Pictures was entitled to the full protection of Federal Copyright Law, in the absence of a reporter’s transcript there is nothing in the record to support this claim.” (Op. at 5; Appx. p. 19a.) Petitioner submits that there is nothing in the record to support that the “certificate of copyright registration...was not admitted into evidence” or that Respondents even objected to this evidence. Moreover, it was used at trial and this is an indisputable fact. (6 CT:1269, MTA pp. 197-198.) Further, a reporter’s transcript is not needed to support this claim, as there is *legal procedure* that should have been followed once it was produced. "A certificate of registration from the United States Register of Copyrights constitutes *prima facie* evidence of the valid ownership of a copyright". *Hamil Am. Inc. v. GFI*, 193 F.3d 92, 98 (2d Cir. 1999) (citations omitted); see also *Folio Impressions, Inc. v. Byer California*, 937 F.2d 759, 763 (2d Cir. 1991) (same); *Fonar Corp. v. Domenick*, 105 F.3d 99, 104 (2d Cir. 1997) (same). *Urbont v. Sony Music Entm't*, 831 F.3d 80, 88 (2d Cir. 2016) (Holding that “Production of a certificate of

registration made before or within five years after first publication of the work constitutes prima facie evidence of the validity of the copyright.” Furthermore, “[a] certificate of copyright registration is prima facie evidence that the copyright is valid.” *Fonar Corporation v. Domenick*, 105 F.3d 99, 104 (2d Cir. 1997). Moreover, “[p]ossession of a registration certificate creates a rebuttable presumption that the work in question is copyrightable.” *Whimsicality, Inc. v. Rubie's Costume Co., Inc.*, 891 F.2d 452, 455 (2d Cir. 1989). However, Petitioner’s proffer of its certificate of copyright registration thus shifts to Respondents the burden of proving the invalidity of the copyright, see *Hasbro Bradley, Inc. v. Sparkle Toys, Inc.*, 780 F.2d 189, 192 (2d Cir. 1985); *Fonar Corporation v. Domenick*, 105 F.3d 99, 104 (2d Cir. 1997)(same); and ***there the burden rests***, unless the presumptions are rebutted.

Respondents ***offered no evidence or proof at trial*** to overcome this presumption. Thus, the trial court erred by not preempting Petitioner’s claims to Federal jurisdiction and incorrectly found in favor of Respondents as they openly admitted to infringement without consequence. (Op. generally at p. 25. through p. 31; Appx. p. 43a. through p. 50a.)

Title 28 U.S.C. § 1338(a) provides, in pertinent part, for original and exclusive federal district court jurisdiction over any civil action arising from an act of Congress relating to copyrights. “(federal courts

have subject matter jurisdiction over matters "arising under any Act of Congress relating to patents, plant variety protection, copyrights and trade-marks")." *Scandinavian Satellite System, AS v. Prime TV Ltd.*, 291 F.3d 839, 842 (D.C. Cir. 2002) Whilst Petitioner accepts that his first lawyer filed the matter in State court, once the certificate of copyright registration was presented to the court, this required the court to preempt the action under the Federal Copyright Act of 1976, 17 U.S.C. § 101 et seq. ("Copyright Act"). The Copyright Act expressly provides for exclusive Federal jurisdiction over any action involving Copyright. 17 U.S.C. § 106. Preemption is present when Federal law regulates an area that Congress intended to be exclusively occupied by the Federal government. "When federal legislation is comprehensive, then it is assumed that the area is preempted." *Worth v. Universal Pictures, Inc.*, 5 F. Supp. 2d 816, 820 (C.D. Cal. 1997)

Petitioner's First Amended Complaint outlined four state law claims for relief. In order to remove this action, federal law must be found to so preempt the state law claims that they are actually considered federal claims. The court determines whether or not preemption applies to the state law claims by discerning Congressional intent. Schwarzer et al., *Federal Civil Procedure Before Trial* 2A-15 (1997)

Preemption allows a claim to be removed and adjudicated in federal court. Removal is proper over preempted claims in which "Congress clearly manifested an intent to convert state law claims into federal-question-claims." *Holman v. Laulo-Rowe Agency*, 994 F.2d 666, 668 (9th Cir. 1993). "[The] certificate of registration from the United States Register of Copyrights constitute[d] *prima facie* evidence of the valid ownership of a copyright" and the matter should have been preempted by the court. *Hamil Am. Inc. v. GFI*, 193 F.3d 92, 98 (2d Cir. 1999)

In relation to the breach of contract claim, "a breach of contract claim is preempted if it is merely based on allegations that the defendant did something that the copyright laws reserve exclusively to the plaintiff (such as unauthorized reproduction, performance, distribution, or display)." *Am. Movie Classic v. Turner Entertainment*, 922 F. Supp. 926, 931 (S.D.N.Y. 1996) Respondents' distributed his motion picture worldwide with unauthorized and illicit covers, which were never globally withdrawn as per Petitioner's demand.

Daboub v. Gibbons, 42 F.3d 285, 288 (5th Cir. 1995) – (Holding that the conversion claim was preempted where the plaintiffs alleged that the defendants improperly copied, distributed, and performed their copyrighted work and "[t]he

Copyright Act expressly preempts all causes of action falling within its scope, with a few exceptions.”)

Further, “it is virtually axiomatic that the public interest can only be served by upholding copyright protections and correspondingly, preventing the misappropriation of skills, creative energies, and resources which are invested in the protected work.” *Warner Bros. Entm’t, Inc. v. WTV Sys.*, 824 F.Supp.2d 1003, 1015 (C.D. Cal. 2011) (citing *Apple Computer, Inc. v. Franklin Computer Corp.*, 714 F.2d 1240, 1255 (3rd Cir. 1983)); see also *Disney Enters., Inc. v. VidAngel, Inc.*, 224 F. Supp. 3d 957, 978 (C.D. Cal. 2016)

“The Court notes that the public interest is also served by upholding the rights of copyright owners, “[o]therwise, the rationale for protecting copyright, that of encouraging creativity, would be undermined.”” *Video Pipeline, Inc. v. Buena Vista Home Entert., Inc.*, 192 F. Supp. 2d 321, 347 (D.N.J. 2002) (citing from *Apple Computer v. Franklin Computer Corp.*, 714 F.2d 1240, 1253 (3d Cir. 1983))

Furthermore “where creative energies, money, and effort were undoubtedly put forth in these endeavors of full-length motion pictures, the public interest favors the protection of copyright, and the concomitant encouragement of individual creativity and ingenuity.” *Video Pipeline, Inc. v. Buena Vista Home Entert., Inc.*, 192 F. Supp. 2d 321 (D.N.J. 2002).

Needless to say, courts also observe that a knowing infringer **cannot** be "permitted to construct its business around its infringement." *Apple Computer, Inc. v. Franklin Computer Corp.*, 714 F.2d 1240, 1255 (3rd Cir. 1983); *Worlds of Wonder v. Veritel Learning Sys.*, 658 F. Supp. 351, 357 (N.D. Tex. 1986) (holding same)

II. THE DECISION MAKES THE SECOND APPELLATE DISTRICT LIABLE FOR CONTRIBUTORY COPYRIGHT INFRINGEMENT

A. The Second Appellate District's Decision Infringes Petitioner's Copyright, Which Is Contrary To 17 U.S.C. § 501.

"Contributory infringement originates in tort law and stems from the notion that one who directly contributes to another's infringement should be held accountable." *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 264 (9th Cir. 1996). "[O]ne who, with knowledge of the infringing activity, induced, causes or materially contributes to the infringing conduct of another, may be held liable as a 'contributory' infringer." *Id.*, quoting *Gershwin Publishing Corp. v. Columbia Artists Management, Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971). An individual may be liable for contributory infringement even where she does not have actual knowledge of the infringing activity, but should have reason to know of the infringing

conduct. *Cable/Home Comm. Corp. v. Network Prods., Inc.*, 902 F.2d 829, 845-46 (11th Cir. 1990); *Microsoft Corp. v. EEE Business Inc.*, 555 F. Supp. 2d 1051, 1059 (N.D. Cal. 2008) (same). “Put differently, liability exists if the [party] engages in “personal conduct that encourages or assists the infringement.” *A M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1020 (9th Cir. 2001) (citing *Matthew Bender Co. v. West Publ'g Co.*, 158 F.3d 693, 706 (2d Cir. 1998)).

Petitioner’s Opening Brief submitted to the Second Appellate District also reiterated to the Court that “over seven years after a very specific formal demand was issued by Appellant to the Respondents “to ‘cease and desist’ from distributing” his work for blatantly infringing Appellant’s copyrights (6CT:1269, MTA pp. 197-198), and to remove all product from “any place where the product images or trailers [wa]s listed for sale,” it is still available in the global marketplace, in violation of Appellant’s exclusive rights. 6 CT:1259, MTA pp. 82, 6 CT:1256, MTA pp. 132-135; 6 CT:1256, MTA pp. 157-160; 6CT:1256, MTA pp. 162-165; 6 CT:1256, MTA pp. 137; 6 CT:1258, MTA pp.130. These ‘exclusive’ rights are owned by Mark Mahon and Maron Pictures’, were never assigned to the Respondents and are protected under 17 U.S.C. §106A (a)(3)(A), 17 U.S.C. §106A (a)(3)(B) and under the Berne Convention Implementation Act of 1988, Section 3 (b) and

Section 3 (b)(2)." (Opening Brief p. 32.) Petitioner respectfully submits that because the trial court and appellate court were made aware of this and have not dealt with the issues presented, each judge has separately engaged in "personal conduct that encourages or assists the infringement." *A M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1020 (9th Cir. 2001)

Petitioner also made the court aware that "[f]urther evidence was submitted in relation to the Revenue tracking of the Picture up to 2015. (6 CT:1256, MTA pp. 139, 145, 149.) Appellant also admitted into evidence a 'Film Audit Report' as certified by James W. Huddleston of Global Media Rights, showing the Picture generated gross revenue of \$2,852,000 up to 2015 (6 CT:1256, MTA pp. 157-160) and a 'Film Proceeds Report' that showed Respondents earned revenue on the Low-Case of the Film Proceeds Report, where the "calculation totals \$428,115.00" up to 2015, as certified by James W. Huddleston of Global Media Rights. 6CT:1256, MTA pp. 162-165; 7 CT:1388-91." (Opening Brief p. 31, p. 32.)

However, appellate district's Opinion states "[a]lthough the parties designated the trial exhibits as part of the record on appeal, the clerk of the superior court was unable to include those exhibits." (Op. at 26; Appx. p. 45a.) The trial Court not only lost the original exhibits that were supposed to be

part of the record, but refused to add the copies Petitioner retained for them, contrary to Rule of Court 8.155(b), which is why Petitioner had to file a motion to augment.

The trial court also never provided the record on appeal with the correct ‘First Amended Complaint’ which was filed in Santa Monica Courthouse on 06/08/16. In a show of extreme prejudice to Petitioner, the appellate division then refused the vast majority of Petitioner’s request to augment the record, which included a correct copy of the ‘First Amended Complaint’ (R.T.P.O., p. 16. through p. 61.) that is marked as exhibit 1 in its motion to augment. (MTA pp. 12 - 57.)

The correct ‘First Amended Complaint’ had a ‘Film Audit Report’ and a ‘Film Proceeds Report’ attached summarizing funds that are due to Petitioner, the Copyright Owner. “The Low-Case Film Proceeds calculation was determined by reviewing the distribution statements, deal memos, and royalty accounting reports provided by the Licensor and the [Respondent].” (MTA pp. 56.) The “Film Audit Report finds that the film has generated gross revenue of \$2,852,000 between 2009 and 2015.” (MTA pp. 57.) “The Low-Case calculation totals \$428,115.” (MTA pp. 56.) Further, the very evidence at issue was also introduced, (Exhibits 342 and 343) (6CT:1256, MTA pp 157-160, 162-165) presented to

the court during Petitioner's testimony, were identified, marked at trial and used by the parties.

The appellate court also acknowledged that the motion picture "was shown in Europe during the years 2014 to 2016, and contends defendants must have earned revenue from those showings. We must treat this as a claim that there is clear error on the face of the record. We do not see such error. Although Maron Pictures offered several exhibits which it contends list showings of its film since 2010 (exhibits 316 and 318-322), only one page of exhibit 316 was admitted into evidence. Exhibit 316, cited by the trial court, shows 13 showings on Turner Classic Movies (TCM) in Europe from 2014 to 2016. It is not clear from the record on appeal whether defendants had any agreement with TCM, the channel which showed Maron Pictures's film: none of the licensing agreements in the record refers to TCM or appears to cover Europe." (Op. at p. 30, p. 31; Appx. p. 49a, p. 50a.) However, the only objection Respondents made to exhibits during the trial was to Exhibit 316, which was previously admitted, heard and argued but still admitted. (6CT:1261.) Further, the correct 'First Amended Complaint' had a 'Film Audit Report' and a 'Film Proceeds Report' attached summarizing funds that are due to Petitioner, the Copyright Owner, which the appellate court denied. Petitioner respectfully submits that because appellate court denied it, then this means that they

had to review it to make a determination, so *they are aware of the infringements still taking place*. Further, appellate division acknowledged “[w]hile it is undisputed Maron Pictures delivered enough items to enable defendants to license the film and earn revenue from the licensing, it was not clear error on the face of the record for the court to find nondelivery.” (Op. at 28; Appx. p. 46a.) Petitioner submits that the court could not find nondelivery because *delivery was completed*. Respondents also presented *no evidence to the contrary*. Numerous exhibits of evidence were presented by Petitioner, identified, marked at trial, and used by the parties. (6CT:1253 - 1262, 1269 - 1270.) The evidence unambiguously showed that his motion picture continued to be released and shown throughout the world through the time of trial (and even now). (MTA pp. 84-128, 141-155, 157-160, 162-165, 167, 190-192; 6 CT:1258, 1269, 1275.)

Consol. Lumber Co. v. Frew, (1916) 32 Cal. App. 118, 122 (holding that where the record showed that certain exhibits were introduced in evidence and marked for identification, and treated as evidence, that shows that they were admitted in evidence, and not merely offered for identification); *Dodson v. Greuner*, (1938) 28 Cal. App. 2d 418, 423 (same); *Reed v. Reed* (1954) 128 Cal.App.2d 786, 790–791 (holding that “It is well established ... that when a document has been considered by the court and the

parties as being in evidence, the fact that no formal offer in evidence was made will not exclude it from consideration as part of the record on appeal.); *Miller v. Superior Court*, (2002) 101 Cal. App. 4th 728, 742, (same). Petitioner again respectfully submits that the superior court and appellate district **were made aware of this** and have not dealt with any of its issues presented. Furthermore, contributory copyright infringement requires that the secondary infringer "[k]now, or have reason to know" of direct infringement. *Adobe Systems Incorporated v. Canus Productions, Inc.*, 173 F. Supp. 2d 1044, 1048 (C.D. Cal. 2001); *Cable/Home Communication Corp. v. Network Prods., Inc.*, 902 F.2d 829, 845-46 n. 29 (11th Cir. 1990)(same); *Religious Tech. Ctr. v. Netcom On-Line Communication Servs., Inc.*, 907 F. Supp. 1361, 1374 (N.D.Cal. 1995) (framing issue as "whether [defendant] knew or should have known of" the infringing activities).

**B. The Second Appellate District's
Decision Stops Petitioner Receiving
It's Bi-Annual Accounting and
Reporting Contrary To 17 U.S.C. §
119(b).**

"The trial court's ruling resulted in Maron Pictures having no contractual right to receive periodic accounting statements from defendants. Maron Pictures still has a contractual right to obtain financial information from defendants. Paragraph

12.1 of the SAA requires defendants to keep books and records using generally accepted accounting procedures; the duty is not contingent on Maron Pictures's completion of delivery. Paragraph 12.7 permits Maron Pictures to audit those books once a year; this right is not conditioned on delivery completion. Thus, the trial court ruling did not result in Maron Pictures having no access to financial information about its film's licensing, it merely shifted the cost and initiative from defendants to Maron Pictures." (Op. at p. 28, p. 29; Appx. p. 47a.)

However, the opinion failed to address that Petitioner had hired an expert witness, James Huddleston, who conducted an audit titled '***Film Audit Report***' and '***Film Proceeds Report***.' (R.T.P.O., p.54 - p.61.) His findings are very definitive, "[t]he Low-Case Film Proceeds calculation was determined by reviewing the distribution statements, deal memos, and royalty accounting reports provided [during discovery] by the Licensor and the [Respondent]." (R.T.P.O., p. 60.) "The Low-Case calculation [of royalties earned] totals \$428,115." (R.T.P.O., p. 60.) His reports also determined that Respondents received \$285,410 in minimum guarantee advances (R.T.P.O., p. 60.) from license agreements only provided during legal discovery. So, ***an audit was conducted up until 2015.***

Furthermore, the trial court and appellate district **does stop** Petitioner from receiving it's bi-annual accounting and reporting, as required by Federal Copyright Law and their decision is contrary to 17 U.S.C. § 119 (b)(1)(A) which states "a statement of account, covering the preceding 6-month period" and as codified under 17 U.S.C. § 119 (b)(1)(B) "a royalty fee payable to copyright owners pursuant to paragraph (4) for that 6-month period" which is a constitutional requirement. Also, "[t]he Copyright Act exclusively governs a claim when: (1) the particular work to which the claim is being applied falls within the type of works protected by the Copyright Act under 17 U.S.C. §§ 102 and 103, and (2) the claim seeks to vindicate legal or equitable rights that are equivalent to one of the bundle of exclusive rights already protected by copyright law under 17 U.S.C. § 106. See 17 U.S.C. § 301(a) ... The general scope requirement is satisfied only when the state-created right may be abridged by an act that would, by itself, infringe one of the exclusive rights provided by federal copyright law... In other words, the state law claim must involve acts of reproduction, adaptation, performance, distribution or display. *See 17 U.S.C. §106;*" *Briarpatch Ltd. v. Phoenix Pictures, Inc.*, 373 F.3d 296, 305 (2d Cir. 2004). Further, "[a]n action for an accounting is derived from a "common nucleus of operative fact" as Plaintiff's other preempted copyright claims." *Worth v. Universal*

Pictures, Inc., 5 F. Supp. 2d 816, 823 (C.D. Cal. 1997). Moreover, “claims for conversion or misappropriation and for an accounting are preempted by the Copyright Act.” *Brian Jonestown Massacre v. Davies*, Case No. 13-cv-04005 NC, at 6 (N.D. Cal. Aug. 18, 2014). The public also has a strong interest in “preserv[ing] the integrity of the copyright laws which seek to encourage individual effort and creativity by granting valuable enforceable rights.” *Atari, Inc. v. North American Philips Consumer Electronics Corp.*, 672 F.2d 607, 620 (7th Cir. 1982)

The appellate division’s opinion also noted “Maron Pictures argues on appeal that it did not become aware ‘of all of the relevant facts until December 2014’ when it received ‘incomplete and inaccurate accounting statements.’ The issue was relevant to the accounting claim and was considered during the trial.” (Op. at 20; Appx. p. 36a.) However, the appellate division also acknowledged “[t]he court added “it is undisputed that no accounting statements provided for by Paragraph 12.2 of the SAA were ever given to Maron Pictures, nor has Maron Pictures received any revenue from [M]ainsail as a result of the licensing revenue it did receive.”” (Op. at 25; Appx. p. 43a.) These facts were brought up at trial and were supported by the evidence presented too but were clearly not considered by the court. “The [Respondent] has provided the

[Petitioner] with incomplete and inaccurate accounting statements that provide more questions than answers. At no time has the [Respondent] furnished the [Petitioner] with a comprehensive accounting of the Film.” (R.T.P.O., p. 59.) “More specifically, as to accrual, ‘once properly pleaded, belated discovery is a question of fact.’” *Nguyen v. W. Digital Corp.*, 229 Cal. App. 4th 1522, 1552 (Cal. Ct. App. 2014)

The appellate district continued, “[f]or purposes of the summary judgment motion, Maron Pictures did not dispute defendants’ statement of fact that Maron Pictures was aware of its claim on October 6, 2010.” (Op. at 20; Appx. p. 36a.) However, (a) Petitioner could not have responded to respondents’ statement of fact for the summary judgment motion which was set for hearing on December 9, 2016, when he was told by the court on October 21, 2016 that it is unlawful for an entity to make an appearance without an attorney, after the trial court granted Petitioner’s counsel’s motion to withdraw as counsel on the same day and refused to move the summary judgment hearing date which Petitioner was only made aware of the previous day; (b) Petitioner was never served or shown any statement of fact document by respondents that were presented to the trial court for the summary judgment motion or hearing. The appellate district was also made aware of this fact via an attached

signed declaration of Mark Mahon to Petitioner's 'petition for rehearing and transfer to Federal jurisdiction' on 03/01/2019 that was denied on March 5, 2019 (Appx. p. 11a.), through an attached signed declaration of Mark Mahon to his 'petition to transfer' on March 8, 2019, which was denied on the same day (Appx. p. 6a.) and through an attached signed declaration of Mark Mahon to his 'petition for transfer of appellate division case' filed on 03/11/2019 that was also denied by appellate division on March 14, 2019. (Appx. p. 4a.)

**C. The Second Appellate District's
Decision Forfeits Petitioner Of His
Personal Property, His Rights and
Moral Rights, Which Are
Constitutionally Protected Under The
"Copyright Act" of 1976 Pursuant to
International Provisions As Legislated
For By Congress Under 'The Berne
Convention Implementation Act of
1988.'**

"Maron Pictures also contends the court's ruling is wrong because the law abhors a forfeiture. It is not entirely clear what Maron Pictures believes has been forfeited ... To the extent Maron Pictures contends the court's ruling means it lost all rights to the film forever, Maron Pictures is mistaken. The trial court simply found that the specific breach of contract posited by Maron Pictures as a basis for

terminating the SAA did not occur and therefore Maron Pictures had no right to terminate the SAA on that basis.” (Op. at p.28, p. 29; Appx. p. 47a, p. 48a.) However, the “breach of contract claim is preempted... [as] the defendant did something that the copyright laws reserve exclusively to the plaintiff (such as unauthorized reproduction, performance, distribution, or display).” *Am. Movie Classic v. Turner Entertainment*, 922 F. Supp. 926, 931 (S.D.N.Y. 1996).

Further, the Grant of Rights ¶1.1 of the “transfer instrument” provided by Respondents is very clear and outlines the rights assigned. ¶1.1 states “[Petitioner] grants to [Respondents] throughout the Territory the sole and exclusive right, license and privilege to license to distribute, as agent for and on behalf of the [Petitioner], the Show identified in item A of the Deal Terms section of this Agreement. This Grant of Rights shall also include the right to license the Show in all media, now known or hereinafter devised, including, but not limited to, theatrical, home video (including videocassette and videodisc), television (including free, satellite, cable, pay, pay-per-view and video on demand), cruise ships, airliners, the Internet and wide area computer networks such as the World Wide Web, in all languages and versions of the Show (the “License”).” (5CT:1018.)

Petitioner's unsettled royalties and distribution rights **have been forfeited**. Petitioner assigned "sole and exclusive" worldwide distribution rights, except Ireland and North America, to Respondents for fifteen (15) years in "all media". (5CT:1018.) Petitioner's right to assign these rights to another distributor to exploit all outstanding and remaining international territories have been forfeited and have been for the last several years too, ***plus the value lost by this***. Furthermore, the court and appellate district were made aware that Petitioner's "copyright protected film is still being commercially exploited by major global corporations around the world even today, (MTA pp. 84-128, 141-155, 157-165, 190-192, 6 CT:1256, 1258, 1269), including but not limited to Apple, Amazon, Google, EOne, You Tube, to name a few, despite Respondents contending that the film was never delivered to them ... it [has] never being withdrawn from the global marketplace, it continues to infringe Appellant's exclusive rights under 17 U.S.C. § 106A (a)(3)(A), 17 U.S.C. §106A (a)(3)(B) and The Berne Convention Implementation Act of 1988, Section 3 (b) and Section 3 (b)(2), (6 CT: 1269, MTA p. 183), as the Respondents did not "cease and desist" as per their specific "letter from Maron Pictures on January 29th, 2010.'" (Opening Brief p. 36.) However, it is well established that courts have "interpreted the knowledge requirement for contributory copyright

infringement to include both those with *actual knowledge* and those who *have reason to know* of direct infringement.” *Ellison v. Robertson*, 357 F.3d 1072, 1076 (9th Cir. 2004) (citing *A M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1019 (9th Cir. 2001)). Petitioner respectfully submits that the court and appellate district have “*actual knowledge*” and “*have reason to know* of direct infringement.”

The appellate court’s decision also continues to violate Petitioner’s rights never assigned to Respondents under their agreement. (17 U.S.C. §§ 106(1), 106(2), 106(4), 106(5), 106(6), 106A). The scope of the Grant of Rights ¶1.1 assigned to Respondents is clearly defined in the SAA. (5CT:1018.) Further, this right is also defined under Federal Copyright Law (17 U.S.C. 106 (3)) which states “to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;”

However, pursuant to 17 U.S.C. 201 (d)(2) ‘Transfer of Ownership’ it states “[a]ny of the exclusive rights comprised in a copyright, including any subdivision of any of the rights specified by section 106, may be transferred as provided by clause (1) and owned separately. The owner of any particular exclusive right is entitled, to the extent of that right, to all of the protection and remedies accorded to the copyright owner by this title.” *Warner Bros., Inc. v. Wilkinson*, 533 F. Supp. 105 (D. Utah

1981) (Holding that “The right to transfer or license copyrighted material for use by others under sections 106 and 201 *et seq.* of the Copyright Act has never encompassed a right to transfer the work at all times and at all places free and clear of all regulation; it has meant that the copyright owner has the exclusive right to transfer the material for a consideration to others.”; *Orson, Inc. v. Miramax Film Corp.*, 189 F.3d 377, 386 (3d Cir. 1999)

Accordingly, the court’s ruling and appellate division’s decision forfeits Petitioner from commercially using his property under 17 U.S.C. §§ 106(1), 106(2), 106(3), 106(4), 106(5), 106(6) and violates Petitioner’s rights under 17 U.S.C. §§ 106(1), 106(2), 106(4), 106(5), 106(6), 106A, which were never assigned to Respondents. Petitioner also submits that the court ignored judiciary and judicial procedure pursuant to 28 U.S.C. § 4001(a)(1) when making their determinations, which addresses “[a]ssumption of contractual obligations related to transfers of rights in motion pictures.”

“To the extent Maron Pictures contends the court’s ruling means it lost all rights to the film forever, Maron Pictures is mistaken. The trial court simply found that the specific breach of contract posited by Maron Pictures as a basis for terminating the SAA did not occur and therefore Maron Pictures had no right to terminate the SAA on that basis.” (Op. at p. 29; Appx. p. 48a.) Petitioner submits that

the court has forfeited him of his right to assign his distribution rights, plus revenues lost by this.

However, pursuant to 17 U.S.C. § 501 (a) “Anyone who violates any of the exclusive rights of the copyright owner as provided by sections 106 through 122 or of the author as provided in section 106(A)(a) ... is an infringer of the copyright or right of the author, as the case may be. For purposes of this chapter (other than section 506), any reference to copyright shall be deemed to include the rights conferred by section 106A(a). As used in this subsection, the term “**anyone**” includes any **State**, any instrumentality of a State, and **any officer or employee of a State** or instrumentality of a State **acting in his or her official capacity**. Any **State**, and any such instrumentality, **officer, or employee, shall be subject to the provisions of this title in the same manner and to the same extent as any nongovernmental entity**.” Accordingly, Petitioner submits the current ruling as it stands; the State of California and the judges who were working on behalf of the State in this matter are now liable for Contributory Copyright Infringement for “conduct that encourages or assists the infringement.” *A M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1020 (9th Cir. 2001) (citing *Matthew Bender Co. v. West Publ'g Co.*, 158 F.3d 693, 706 (2d Cir. 1998).

III. THE SECOND APPELLATE DISTRICT'S RULING IS INCORRECT

Finally, the questions merit review because the Second Appellate District's ruling forfeits petitioner of his "personal property" pursuant to 17 U.S.C. §201(d)(1) and of rights to his Copyright protected motion picture which still continues to be performed around the world.

Furthermore, the law abhors a forfeiture. (Cal. Civ. Code, § 1442; *Ballard v. MacCallum*. (1940) 15 Cal. 2d 439, 444 [109 P.2d 692].). A forfeiture is a total loss of a right or a thing because of the failure to do something as required. In fairness and good conscience, a court of equity will refuse to permit an unreasonable forfeiture and has particularly strong application to the ownership of property, an interest for which the law shows great respect. Title to property should never be lost for a trivial reason. Accordingly, Petitioner also submits the court's existing forfeiture is a violation of 17 U.S.C. §301(a) as other than the Copyright owner, "***no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.***"

In addition – particularly absent binding circuit precedent that supports the second appellate district's decision, contrary precedent cases across all circuits clearly establish that contributory copyright

infringement requires that the secondary infringer "[k]now, or have reason to know" of direct infringement. *Adobe Systems Incorporated v. Canus Productions, Inc.*, 173 F. Supp. 2d 1044, 1048 (C.D. Cal. 2001); *Cable/Home Communication Corp. v. Network Prods., Inc.*, 902 F.2d 829, 845-46 n. 29 (11th Cir. 1990)(same). Since the appellate district's decision acknowledges that Petitioner "refer[red] repeatedly to various provisions of Federal Copyright Law (17 U.S.C. §§ 106, 106A, 122, 501, 502, 506) ... [and] Maron Pictures did proffer a certificate of copyright registration as an exhibit at trial" (Op. at 5; Appx. p. 18a.) then the district court "[k]n[e]w, or ha[d] reason to know" of direct infringement and "one who directly contributes to another's infringement should be held accountable." *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 264 (9th Cir. 1996).

CONCLUSION

This Petition for Writ of Certiorari should be granted. The Court may wish to consider summary reversal of the decision of the Second Appellate District and remand the matter as it deems appropriate.

Respectfully submitted,

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July 5, 2019

APPENDICES

1a

APPENDIX A

2a

Court of Appeal, Second Appellate District, Division
Eight - No. B280738

DATE: May 15, 2019

S254768

IN THE SUPREME COURT OF CALIFORNIA

En Banc

MARON PICTURES LTD., Plaintiff and Appellant,

v.

SAM EIGEN et al., Defendants and Respondents

The petition for review is denied.

The request for an order directing publication of the
opinion is denied.

CANTIL-SAKAUYE

Chief Justice

3a

APPENDIX B

4a

IN THE COURT OF APPEAL OF THE STATE OF
CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION: 8

DATE: March 14, 2019

MARON PICTURES LTD T/A MARON PICTURES
LLC et al.,
Plaintiffs and Appellants,
v.
SAM EIGEN et al.,
Defendants and Respondents.

B280738
Los Angeles County Super. Ct. No. SC120432

THE COURT:

Petition for transfer of appellate division case filed on
March 11, 2019, is denied.

cc: Kimora R. Pope
Annie Rian
Richard Charnley
File

5a

APPENDIX C

IN THE COURT OF APPEAL OF THE STATE OF
CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION: 8

DATE: March 8, 2019

MARON PICTURES LTD T/A MARON PICTURES
LLC et al.,
Plaintiffs and Appellants,
v.
SAM EIGEN et al.,
Defendants and Respondents.

B280738
Los Angeles County Super. Ct. No. SC120432

THE COURT:

Appellant's petition to transfer is denied.

STRATTON, ACTING P.J.

Acting Presiding Justice

7a

APPENDIX D

IN THE COURT OF APPEAL OF THE STATE OF
CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

MEMORANDUM

TO: THE SUPREME COURT OF THE STATE
OF CALIFORNIA

FROM: PRESIDING JUSTICE TRICIA BIGELOW
ASSOCIATE JUSTICE ELIZABETH A.
GRIMES
ASSOCIATE JUSTICE MARIA STRATTON

DATE: March 5, 2019

RE: RECOMMENDATION TO DENY REQUEST
FOR PUBLICATION
Compliance with California Rules of Court,
rule 8.1120
Maron Pictures Ltd. v. Sam Eigen et al. –
B280738;
(Super. Ct. No.: SC120432)
Opinion filed February 15, 2019

Attached is a copy of the opinion filed in the above
case, not certified for publication. Also attached is a
copy of a letter dated March 4, 2019, from Mark
Mahon, a non party, requesting publication of this

9a

opinion.

It is the view of this court that the issues involved are not such that the opinion meets the criteria for publication specified in rule 8.1105. This was the original view of the members of the panel participating in the opinion, and after reexamination and reconsideration of the matter of publication, we still consider that view to be valid. Therefore, pursuant to rule 8.1120, this court is referring the matter to the Supreme Court in the above context.

Attachments

cc: All Parties

10a

APPENDIX E

IN THE COURT OF APPEAL OF THE STATE OF
CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION: 8

DATE: March 5, 2019

MARON PICTURES LTD T/A MARON PICTURES
LLC et al.,
Plaintiffs and Appellants,
v.
SAM EIGEN et al.,
Defendants and Respondents.

B280738
Los Angeles County Super. Ct. No. SC120432

THE COURT:*

Petition for rehearing is denied.

*

BIGELOW, P.J. GRIMES, J. STRATTON, J.

12a

APPENDIX F

Filed 2/15/19 Maron Pictures Ltd. V. Eigen CA2/8

**NOT TO BE PUBLISHED IN THE OFFICIAL
REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF
CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

MARON PICTURES LTD., Plaintiff and Appellant, v. SAM EIGEN et al., Defendants and Respondents.	B280738 (Los Angeles County Super. Ct. No. SC120432)
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APPEAL from a judgment of the Superior
Court of Los Angeles County, H. Chester Horn, Jr.,
Judge. Affirmed.

The Law Office of Suzanne Raina Natbony,
Suzanne R. Natbony; Freeman Freeman & Smiley
and Jeffrey M. Jensen for Plaintiff and Appellant.

Charnley Rian, Richard L. Charnley and Annie
Rian for Defendants and Respondents.

INTRODUCTION

This is a dispute between the owner of a film and the agent hired to license and distribute the film. Plaintiff and appellant Maron Pictures Ltd. entered into a Sales Agency Agreement (SAA) with defendant and respondent Mainsail, LLC to license and distribute Maron Pictures's film *Strength and Honour*. Disputes arose between the parties within a few months of executing the SAA, but Maron Pictures did not file this action until four years later. Maron Pictures's action named respondents Mainsail, Mainsail's Director of Distribution Sam Eigen, and Shoreline Entertainment, Inc., as defendants.¹ The

¹ The SAA is, on its face, between Mainsail and Maron Pictures. Maron Pictures alleged Eigen was the acting agent and principal owner of both Mainsail and Shoreline and that both corporations were the alter egos of Eigen. The three were often referred to collectively in the trial court and sometimes in the pleadings in this court. Generally, we also refer to the three collectively; by doing so, we do not intend to imply the existence of any relationships between or among them.

trial court adjudicated the action in three separate phases. First, it granted summary adjudication in favor of defendants on most of Maron Pictures's claims on the ground the claims were barred by a one-year limitations period set out in the SAA. Then, the court held a bench trial on two surviving equitable claims, and found Maron Pictures had neither established a basis for declaratory relief based on the contractual accounting provisions nor shown it was entitled to an equitable accounting. Finally, the court granted defendants' motion for summary judgment on the remaining claims.

Maron Pictures claims the trial court erred in all three phases of the adjudication of its claims. Maron Pictures argues summary adjudication was improper because the SAA's contractual limitations period was in practice only a notice provision, and even if there were a limitations period, its claims involved periodic obligations and so remained viable under the continuous accrual doctrine. Maron Pictures also contends defendants should have been equitably estopped from asserting the limitations provision.

As to the court trial, Maron Pictures contends the court erred in finding defendants have not received any revenue from the film. Maron Pictures also contends the court's final summary judgment order must be reversed because the court abused its discretion when it permitted Maron Pictures's

counsel to withdraw and then declined to continue the hearing on the summary judgment motion so that Maron Pictures could retain new counsel. We affirm the trial court's judgment.

BACKGROUND

Mark Mahon is the president and managing member of Maron Pictures Ltd., doing business as Maron Pictures, LLC, a single member LLC. He wrote, produced, directed, and financed the film Strength and Honour. Mahon was not an established filmmaker when he made Strength and Honour and he has claimed throughout this action that he used his life savings to make it. The film has been shown at film festivals worldwide and has won awards.

In April 2009, Maron Pictures entered into the SAA with Mainsail. The SSA gave Mainsail the exclusive right to distribute the film worldwide. Maron Pictures was required to "deliver" film and video elements to Mainsail within two weeks of the date of the SSA. Mainsail in turn would deliver the film and its elements to entities who would broadcast the film, show it in theaters, or sell it in DVD format.

After signing the SSA, defendants repeatedly notified Maron Pictures that its delivery was incomplete. Even after defendants entered into several licensing agreements for the film, defendants continued to view Maron Pictures's delivery as incomplete. Maron Pictures took the position delivery was complete by September 17, 2009, with

the exception of an errors and omissions insurance policy it was obligated to purchase under the agreement. Maron Pictures contends defendants then agreed to purchase the insurance and subtract the cost from Maron Pictures's revenues from the film's distribution.

In January 2010, defendants released the film in some locations. Maron Pictures believed the trailers, covers, and "one sheets" used by defendants violated the terms of the SAA. Primarily, Maron Pictures believed the unauthorized items were a breach of its agreement with one of the film's leading actors. On January 22, 2010, after defendants failed to respond to Maron Pictures's requests to change the trailers, covers, and one sheets, Maron Pictures sent a "cease and desist" letter to defendants, instructing them to stop "distributing" the film.

On October 6, 2010, Maron Pictures filed a demand for arbitration, as required by the SAA. Defendants responded by suggesting mediation. By December 2010, the parties agreed on a mediator, but defendants never agreed to a date for mediation. In April 2011, Maron Pictures elected not to proceed with arbitration rather than pay the necessary fees to the arbitrator to get the process started. On April 21, 2011, the arbitrator closed its arbitration file.

The record does not contain information about the parties' activities between April 2011 and March 2012. Almost a year passed since the arbitration was

formally abandoned. On March 20, 2012, Maron Pictures wrote to Mainsail formally demanding an accounting. On April 1, 2012, Mainsail replied it “no longer [had] a business arrangement” with Maron Pictures and had “nothing further to add.” On June 5, 2012, Maron Pictures replied that it would now “address all our issues directly through the litigation route.”

The record does not contain any information about Maron Pictures’s activities between June 5, 2012 and March 2013. On March 22, 2013, Maron Pictures filed this lawsuit. The original complaint asserted causes of action for declaratory relief, fraud, rescission, breach of contract, negligent misrepresentation, breach of fiduciary duty and for

an accounting.² After the trial court granted summary adjudication, Maron Pictures filed a first amended complaint which asserted causes of action for declaratory relief, breach of contract, accounting, and conversion.

DISCUSSION

I. Order Granting Summary Adjudication on the Initial Complaint

Defendants moved for summary judgment on the ground Maron Pictures's claims were barred by the contractually agreed-upon limitations period of one year set out in the SSA. Defendants submitted as undisputed facts that the SAA "contains a one-year limitations period for bringing claims arising

² In Maron Pictures's attempts to show error on appeal, Maron Pictures refers repeatedly to various provisions of Federal Copyright Law (17 U.S.C. §§ 106, 106A, 122, 501, 502, 506). Maron Pictures did not mention these provisions in its complaint, in opposition to summary judgment, or in its trial brief. Maron Pictures did proffer a certificate of copyright registration as an exhibit at the trial, but it was not admitted into evidence. Maron Pictures did not provide a reporter's transcript on appeal and there is nothing in the record which shows the purpose of that exhibit. Although Maron Pictures claims in its opening brief that its trial counsel "instructed the court" that Maron Pictures was entitled to the full protection of Federal Copyright Law, in the absence of a reporter's transcript there is nothing in the record to support this claim. Accordingly, Maron Pictures may not raise Federal Copyright Law for the first time on appeal.

from the Agreement" and Maron Pictures was aware of the claims in this lawsuit no later than October 6, 2010, when it submitted its demand for arbitration. Maron Pictures agreed these facts were undisputed. Defendants also stated as an undisputed fact that the SAA's one-year limitations period expired on October 6, 2011, more than one year before the action was filed on March 22, 2013. Maron Pictures disputed this fact. It contended: (1) the limitations provision in the contract was satisfied by Maron Pictures's timely filing of a demand for arbitration in October 2010; (2) defendants were estopped from asserting the limitations provision because, by suggesting mediation, they induced Maron Pictures to end the arbitration proceedings and postpone litigation; and (3) the continuous accrual doctrine resulted in all claims being timely.

The trial court found (1) the limitations provision of the SAA barred claims arising more than one year before the complaint was filed; (2) defendants were not estopped from asserting the limitations provision by their offers to mediate the dispute; and (3) the continuous accrual doctrine permitted Maron Pictures to bring a claim based only on defendants' failure to provide an accounting within one year prior to the filing of the action. We consider each ruling in turn below.

A. Standard of Review for Summary Judgment

A party may move for summary judgment in an action or proceeding if it is contended the action has no merit or there is no defense to the action or proceeding, or may move for summary adjudication as to one or more causes of action within an action. (Code Civ. Proc., § 437c, subds. (a)(1) & (f)(1).) The motion must be accompanied by a separate statement of facts and “*all* material facts must be set forth in the separate statement. “This is the Golden Rule of Summary Adjudication: if it is not set forth in the separate statement, *it does not exist.*”” (*North Coast Business Park v. Nielsen Construction Co.* (1993) 17 Cal.App.4th 22, 30–31.)

“ ‘Because this case comes before us after the trial court granted a motion for summary judgment, we take the facts from the record that was before the trial court when it ruled on that motion. [Citation.] “‘We review the trial court’s decision *de novo*, considering all the evidence set forth in the moving and opposing papers except that to which objections were made and sustained.’” [Citation.] We liberally construe the evidence in support of the party opposing summary judgment and resolve doubts concerning the evidence in favor of that party.’” (*Lonicki v. Sutter Health Central* (2008) 43 Cal.4th 201, 206.)

“ ‘[I]t is the appellant’s responsibility to affirmatively demonstrate error and, therefore, to point out the triable issues the appellant claims are

present by citation to the record and any supporting authority. In other words, review is limited to issues which have been adequately raised and briefed.' " *(Claudio v. Regents of the University of California* (2005) 134 Cal.App.4th 224, 230.)

B. Scope of the Contractual Limitations Provision

In support of their contention that the one-year period expired on October 6, 2011, defendants relied on the SAA and the arbitration documents. Defendants contended the filing of the arbitration demand on October 6, 2010, showed Maron Pictures was aware of its claims on that date, thereby starting the one-year limitations period. Maron Pictures contended the SAA required only that an "action" be commenced within one year of knowledge and that the filing of the arbitration demand "satisfied, rather than commenced, the one-year limitations period" making timely in any forum all further actions based on the claims. Although Maron Pictures cited documents and declarations as evidence the expiration date was disputed, none of those items contained any extrinsic evidence about the meaning of the limitations period, or Maron Pictures's intent when it agreed to the one-year limitations period set

out in the SAA.³ Instead, Maron Pictures's argument was based on the language of the provision itself.

Paragraph 17.3 of the SSA provides in full:

“Licensor shall not be entitled to bring any action, suit or proceeding of any nature against Sales Agent or its licensees, whether at law or in equity or otherwise, based upon or arising from in whole or in part any claim that Sales Agent or its licensees has in any way violated this Agreement, unless the action is brought within one (1) year from the date on which Licensor knew or should have known, in the exercise of reasonable diligence, of the facts giving rise to this claim.”

Maron Pictures contended the language to “bring an action, suit or proceeding” within one year was satisfied by the mere “filing [of] a demand for arbitration” within that time frame. Maron Pictures claimed defendants, who drafted the SAA, “chose to use the broad language ‘bring an action, suit or proceeding’ when [they] could have easily specified additional requirements.” On appeal, Maron Pictures clarified its “additional requirements” claim,

³ In its separate statement of facts, Maron Pictures pointed to the following evidence to dispute the expiration date of October 6, 2011: Wander declaration (¶¶4, 11–14), Mahon declaration (¶¶7-11), exhibit 3 (pp. 21, 27), exhibit 9 (p. 88), and for some causes of action exhibit 2 (p. 7).

arguing “the contract does not give further instructions on what must occur [after filing a notice of arbitration], or discuss the effect of withdrawal of an arbitration demand, or in any way limit future rights to file.” Maron Pictures contended it complied with the spirit of the contract because its demand “notified Defendants, in a timely manner, of [Maron Pictures’s] complaints and requested a speedy, cost-effective solution as required by the contract.”

Maron Pictures also claimed that even if defendants’ interpretation of the limitations provision were deemed reasonable, Maron Pictures’s interpretation is “the most reasonable under the circumstances” and so must be accepted under Paragraph 19.4 of the SAA which requires any ambiguity in the SAA to “be resolved by applying the most reasonable interpretation under the circumstances, giving full consideration to the intentions of the parties at the date the Agreement was signed.”

The court’s statement of decision on this issue reads: “[Maron Pictures] argues that the timeliness of the 10/6/10 arbitration claim can somehow be attributed [to] this civil action.” “There is simply no basis in ¶17.3 to find that the filing of the arbitration claim on 10/6/10 somehow renders this action timely. There is nothing in the language of ¶17.3 limiting its application to the ‘first’ action suit or proceeding filed by [Maron Pictures], or to arbitration claims. ¶17.3

applies to ‘any action, suit or proceeding of any nature.’ [Maron Pictures] fails to provide any logical explanation for [its] claim that the arbitration claim somehow renders this action timely.”

We review the trial court’s decision de novo, and conclude the SAA does not provide that the mere filing of a demand for arbitration, later withdrawn, renders all subsequent actions timely.

“The rules governing the role of the court in interpreting a written instrument are well established. The interpretation of a contract is a judicial function. [Citation.] In engaging in this function, the trial court ‘give[s] effect to the mutual intention of the parties as it existed’ at the time the contract was executed. (Civ. Code, § 1636.) Ordinarily, the objective intent of the contracting parties is a legal question determined solely by reference to the contract’s terms. (Civ. Code, § 1639 [‘[w]hen a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible. . .’]; Civ. Code, § 1638 [the ‘language of a contract is to govern its interpretation. . .’].)’ (*Wolf v. Walt Disney Pictures & Television* (2008) 162 Cal.App.4th 1107, 1125–1126.) The words of the contract are to be understood “in their ordinary and popular sense” unless “used by the parties in a technical sense, or unless a special meaning is given to them by usage.” (Civ. Code, § 1644.) The “whole of [the] contract is to be taken

together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other.” (Civ. Code, § 1641.) Thus, if the meaning a layperson would ascribe to contract language is not ambiguous, we apply that meaning. (*Mountain Air Enterprises, LLC v. Sundowner Towers, LLC* (2017) 3 Cal.5th 744, 752.)

Paragraph 17.3 of the SAA provides at its core: “Licensor shall not be entitled to bring any action, suit, or proceeding of any nature . . . based upon . . . any claim that Sales Agent . . . violated this Agreement, unless the action is brought within one (1) year from the date on which Licensor knew . . . of the facts giving rise to the claim.” Maron Pictures, of course, is the licensor, and Mainsail the sales agent.

Maron Pictures contends the phrase “bring an action” in this context must be understood in its ordinary and popular sense, which Maron Pictures claims is “to commence or start a proceeding” and nothing more. In Maron Pictures’s view, the meaning of the phrase shows its purpose is to require notice of a party’s complaints and request for a speedy solution. Once this initial notice is given, Maron Pictures contends, all subsequent actions are timely.

First, the word “action” is defined as “an ordinary proceeding in a court of justice by which one party prosecutes another for the declaration, enforcement, or protection of a right, the redress or

prevention of a wrong, or the punishment of a public offense.” (Code Civ. Proc., § 22; *Mountain Air Enterprises, LLC v. Sundowner Towers, LLC, supra*, 3 Cal.5th at p. 752.) By its definition, “action” cannot be equated to an arbitration that does not occur in a “court of justice.” Moreover, “action” is also generally considered synonymous with “suit.” (*Nassif v. Municipal Court* (1989) 214 Cal.App.3d 1294, 1298.)

Second, the word “proceeding” is not defined in the Code of Civil Procedure. “‘Proceeding’ has different meanings in different contexts. Narrowly, it means an action or remedy before a court.

[Citations.] [¶] Broadly, it means ‘All the steps or measures adopted in the prosecution or defense of an action.’” (*Zellerino v. Brown* (1991) 235 Cal.App.3d 1097, 1105.) “The word ‘proceeding’ or ‘proceedings’ in its general sense refers to the form and manner of conducting judicial business before a court or judicial officer. [Citations.] It may also refer to a mere procedural step that is part of the larger action or special proceeding. [Citation.]” (*Lister v. Superior Court* (1979) 98 Cal.App.3d 64, 70.)

Building on the narrow definition set out above, we note that arbitrations are generally not judicial business conducted before a court or judicial officer. Indeed, contractual arbitration is in no sense a “trial of a cause before a judicial tribunal. . . .” (*Snyder v. Superior Court* (1937) 24 Cal.App.2d 263, 267; see also *Brock v. Kaiser Foundation Hospitals*

(1992) 10 Cal.App.4th 1790, 1795.) And, paragraph 23 of the SSA under scrutiny here requires that arbitration be conducted not by a court or judicial officer, but “under the auspices of the IFTA.”⁴

Notwithstanding our holding under the narrow definition, under the broad definitions set out in *Zellerino* and *Lister*, can we find that a demand for arbitration under the SSA is a proceeding, to wit, a “step[]or measure[] adopted in the prosecution or defense of an action,” or a “mere procedural step that is part of the larger action or special proceeding”? We hold the answer is “no.” The arbitration called for in paragraph 23 of the SSA is binding (“The intent of this Agreement is that the parties shall be able to resolve any disputes expeditiously through binding arbitration without risking becoming liable for the other party’s costs, legal fees, and expenses in connection with the arbitration.”). The intent of

⁴ IFTA stands for Independent Film & Television Alliance which administers arbitration proceedings in the entertainment industry. Its arbitrators, who are lawyers, claim experience in independent film and television finance, production, and distribution. (See Hoffman & Gendron, *Judicial Review of Arbitration Awards After Cable Connection: Towards a Due Process Model*, UCLA Entertainment Law Review, 17 UCLA Ent. L.Rev. 1, 10.) We note that paragraph 23 requires binding arbitration. The record in this appeal suggests that the parties waived that provision of the SSA and proceeded to litigate the action filed in the superior court.

binding arbitration is to preclude, if possible, litigation of an action before a judicial officer. It is not part of a “larger action” nor is it adopted in the prosecution or defense of an action. It is separate and apart, as it should be, from any underlying or future civil action. As separate and apart, it cannot be a “proceeding” under the broader definition. To effectuate the intent of the SSA, we read “proceeding” as synonymous with “action” and “suit.”

Further, even if the arbitration demand satisfied the one-year limitations period, it did not completely erase the provision. The limitations period of the SSA leads us to conclude that the parties did not believe that the demand for arbitration would leave an open-ended limitations period. In the context of satisfying a limitations period, the phrase “bring an action” means not merely to “commence” an action within a defined period of time, but also to maintain that action. Thus, if an action is timely commenced, it remains timely as long as the action is pending. If, however, that action is dismissed, any new action based on the same claims is subject to the statute of limitations that applied to the first action. (See, e.g., *Thomas v. Gilliland* (2002) 95 Cal.App.4th 427.) Maron Pictures allowed its demand for arbitration to lapse as of April 21, 2011. It did not renew its demand for arbitration or file a civil action until March 22, 2013, about two

years later. Allowing the arbitration demand to lapse brought the parties back to their original positions under paragraph 17.3. The claims are barred.

Finally, we must also consider the expressed intent of the parties concerning dispute resolution, as set forth in paragraph 23: “The Intent of this Agreement is that the parties shall be able to resolve any disputes expeditiously through binding arbitration” Maron Pictures’s interpretation of the limitations provision would permit the licensor to drag out resolution of disputes indefinitely, by filing a notice of arbitration and dismissing, then waiting as long as it wanted to bring another action. This is the exact opposite of the expeditious resolution of disputes the parties intended.

The provisions of the SAA as a whole confirm paragraph 17.3 required Maron Pictures to bring and maintain a civil action within one year of knowledge of the violation on which the action is based.

C. Estoppel

Maron Pictures also disputed defendants’ October 6, 2011 limitations date by stating as a fact that Maron Pictures “reasonably relied upon Defendants’ statements insincerely representing an interest in participating in alternative dispute resolution in a meaningful way. Due to [Maron Pictures’s] reliance, [Maron Pictures] delayed filing suit and thus suffered injury.” Maron Pictures cited the declarations of its President Mark Mahon and its

counsel Perry Wander, and written correspondence between the two parties as evidence of this reliance.

The relevant communications between Maron Pictures and defendants on the topic of mediation are brief. In October 2010, counsel for Maron Pictures proposed a pre-arbitration settlement conference. Eigen responded by proposing “non-binding mediation.” In December 2010, Maron Pictures agreed to use the mediator suggested by defendants. The parties agreed to a date of February 2 for mediation. On January 11, 2011, however, defendants’ counsel indicated he could not participate in mediation until mid-April. Maron Pictures’s counsel replied that mid-April 2011 was too far out and stated, “if we can’t reschedule this mediation sooner, I suspect my marching orders will be to file suit immediately. This is not what the parties had agreed to.” Maron Pictures’s counsel proposed February 28, 2011, for the mediation date. On January 24, 2011, defendants’ counsel replied they could not set a date “until we have more information at our disposal. [¶] As I mentioned, we will be in better shape next week.” There is no further correspondence in the record between the parties

discussing a date for mediation.⁵ Maron Pictures did not pay the required arbitration fees, and the arbitration file was closed on April 21, 2011.

Mark Mahon stated in his declaration that “Eigen falsely represented an interest in meaningfully participating in a pre-arbitration settlement conference and sandbagged us for two years with misleading emails and phone conversations.” Mahon provided no details of any communications from Eigen on this topic. Wander, counsel for Maron Pictures, stated in his declaration that in 2012 he “realized Defendants had never been seriously interested in meaningfully participating in any settlement conference or alternative dispute

⁵ On appeal, Maron Pictures contends, without citation to the record, that defendants’ attorneys wrote to Maron Pictures’s attorney on some unspecified date stating Eigen would be unavailable to participate in mediation until after May 27, 2011. Assuming this claim is supported by the record, it does not change our analysis. Maron Pictures does not claim that it received any mediation-related correspondence after that date.

It is not our task to search the record for these documents. We note that these communications were not identified as evidence in Maron Pictures’s separate statement of facts or attached as exhibits to the declarations filed in support of Maron Pictures’s opposition to summary adjudication. Thus, even if we could locate them in the record, we could not consider them. (See *North Coast Business Park v. Nielsen Construction Co.*, *supra*, 17 Cal.App.4th at pp. 30–31.)

resolution and [Maron Pictures] had been sandbagged.” Wander stated he “reasonably relied on Defendant Eigen’s statements alleging an interest in participating in a pre-arbitration settlement conference. My reliance was reasonable as Defendant Eigen and I, and Defendant’s counsel and I, had a good relationship prior to my realization that they had sandbagged both my client and I.” Wander also declared that his “reliance on Defendant’s misleading communications was the reason I delayed filing suit.” Wander did not provide details of any communications from defendants after January 2011.

The trial court found: [Maron Pictures] fails to present any evidence that Defendants acted in a way to misled [Maron Pictures] into believing that this action would be timely or would not be barred by the limitations period under ¶17.3 of the Distribution Agreement. [Maron Pictures] testifies that it did not aggressively pursue the 10/6/10 arbitration agreement because Defendants expressed a willingness to mediate after the arbitration claim was filed. See Decl. of P. Wander, ¶¶ 13-19. Between January 6 and 10, 2011, Defendants indicated intent to proceed with ADR. *Id.* Thereafter, Defendants failed to cooperate in setting a time for ADR. [Maron Pictures’s] last attempt to schedule ADR with Defendants was in April 2011. *Id.* Thus, the trial court concluded, “[Maron Pictures] was fully aware of Defendants’ non-

responsiveness to ADR for nearly four months. Despite this knowledge, [Maron Pictures] did not pay the arbitration fees or did not ask for an extension. [Maron Pictures] simply let the file close on the arbitration. . . . [¶] . . . [T]he arbitration was closed on 4/21/11. [Maron Pictures] had nearly six months for [it] to either timely file a new arbitration claim or the instant civil action. Instead, [Maron Pictures] waited until 3/22/13, almost two years later, to file this civil action. Again, [Maron Pictures] simply fails to provide any logical connection between its decision to wait until 3/22/13 to file this action and Defendants' unresponsiveness to mediation attempts between January and April 2011."

A defendant may be equitably estopped from asserting a statutory or contractual limitations period as a defense if the defendant's act or omission caused the plaintiff to refrain from filing a timely suit and the plaintiff's reliance on the defendant's conduct was reasonable. (*Lantzy v. Centex Homes* (2003) 31 Cal.4th 363, 384–385 (*Lantzy*).) The defendant need not intend to deceive the plaintiff to give rise to an equitable estoppel. (*Id.* at p. 384.)

Equitable estoppel applies “ ‘ ‘only after the limitations period has run and addresses . . . the circumstances in which a party will be estopped from asserting the statute of limitations as a defense to an admittedly untimely action because his conduct has induced another into forbearing suit within the

applicable limitations period.”’ [Citation.]” (*Lantzy, supra*, 31 Cal.4th at p. 383.) Thus, equitable estoppel does not apply if the defendant’s representations are shown to be false before the limitations period expires. (See *id.* at p. 384.)

Where the facts are undisputed, the existence of an equitable estoppel is a question of law. (*Platt Pacific, Inc. v. Andelson* (1993) 6 Cal.4th 307, 319 [application of equitable estoppel is ordinarily a question of fact; however, it is properly resolved as a matter of law when only “one inference may reasonably be drawn” from the material facts].)

After independently reviewing the record, we conclude reliance by Maron Pictures on defendants’ conduct after May 2011 was not reasonable as a matter of law. Here, as the trial court found, it was undisputed that, after the end of January 2011, defendants did not cooperate in attempts to schedule mediation. Maron Pictures’s counsel twice indicated that if mediation could not be scheduled in a timely manner, Maron Pictures would file a lawsuit. As noted above, in January 2011, Maron Pictures’s counsel told defendants’ counsel if mediation could not be rescheduled sooner than mid-April, “I suspect my marching orders will be to file suit immediately. This is not what the parties had agreed to.” Defendants’ counsel did not respond. On April 21, 2011, the arbitration file closed.

On April 26, 2011, Maron Pictures’s counsel

copied defendants' counsel on an email to the proposed mediator which stated: "My client is still interested in mediation. His partners have finally raised my retainer and I expect I will be filing a lawsuit against all parties on my return from Paris after May 9, 2011." Defendants did not respond.

Defendants' repeated conduct of postponing the mediation, followed by a lack of response to Maron Pictures's communications clearly showed defendants' representations about participating in mediation were not sincere, and defendants had no further intention to participate in mediation or another form of alternate dispute resolution.

Defendants' insincerity was thus apparent by the end of January 2011, well before the contractual limitations period expired. Equitable estoppel does not apply as a matter of law.⁶

⁶ The application of equitable estoppel also requires a plaintiff to proceed diligently once the truth is revealed. (*Lantzy, supra*, 31 Cal.4th at p. 384.) Maron Pictures offers no explanation for its decision to wait almost two years after its last failed attempt to schedule mediation before filing this action. As a matter of law, inactivity is not diligence.

Maron Pictures argues on appeal that it did not become aware "of all of the relevant facts until December 2014" when it received "incomplete and inaccurate accounting statements." This issue was relevant to the accounting claim and was considered during the court trial. For purposes of the summary judgment motion, Maron Pictures did not dispute defendants' statement of fact that Maron Pictures was aware of its claims on October 6, 2010.

D. Continuous Accrual

It was undisputed the SAA required defendants to provide a periodic accounting when certain conditions were met. It is also undisputed defendants had never provided Maron Pictures with such an accounting. Maron Pictures argued each period which passed without an accounting constituted a new breach of the SAA, and so restarted the limitations period on all of Maron Pictures's claims.

The trial court agreed with Maron Pictures in part. The court found: “[Maron Pictures] raises a triable issue of material fact as to whether ¶17.3 bars the claims based [on] Defendants’ failure to provide biannual accountings.” The court explained this action “was filed on 3/22/13 and any claims based on the failure to provide accounting from 3/22/12 onward are not time barred by the 1-year limitations period under ¶17.3.”

Maron Pictures claims the court’s ruling is too narrow, and the continuous accrual doctrine should have been applied to all of its claims dating back to the beginning of the SAA. Maron Pictures has misunderstood the continuous accrual doctrine, confusing it with the limitations period under the

continuing violation doctrine.⁷ Under the doctrine of continuous accrual, “a series of wrongs or injuries may be viewed as each triggering its own limitations period, such that a suit for relief may be partially time-barred as to older events but timely as to those within the applicable limitations period.” (*Aryeh v. Canon Business Solutions, Inc.* (2013) 55 Cal.4th 1185, 1192 (*Aryeh*).) In contrast, “[t]he continuing violation doctrine aggregates a series of wrongs or injuries for purposes of the statute of limitations, treating the limitations period as accruing for all of them upon commission or sufferance of the last of them.” (*Ibid.*) Thus, while “the continuing violation doctrine . . . renders an entire course of conduct

⁷ Maron Pictures uses the phrase “continuous accrual” on appeal, but its memorandum of points and authorities in opposition to summary judgment does not use the phrase “continuous accrual” or “continuing violation,” and does not contain legal citations to either doctrine. Maron Pictures argued that “each passing period wherein Defendants did not provide an accounting constituted a new material breach of the contract.” That is a description of the continuous accrual doctrine; that doctrine applies to “separate, recurring invasions of the same right.” (*Aryeh, supra*, 55 Cal.4th at p. 1198.) In contrast, the continuing violation doctrine applies to “injuries [which] are the product of a series of small harms, any one of which may not be actionable on its own” or “where ‘some or all of the component acts might not be individually actionable’ and the plaintiff ‘may not yet recognize’ the acts ‘as part of a pattern.’” (*Id.* at pp. 1197–1198.)

actionable, the theory of continuous accrual supports recovery only for damages arising from those breaches falling within the limitations period.” (*Id.* at p. 1199.)

After independently reviewing the record, we reach the same conclusion as the trial court. The accounting obligation is a recurring one, and each breach of that obligation has its own individual limitations period. Breaches of the periodic accounting obligation which occurred more than a year before this action was filed are time-barred; those occurring on or after that date are not.

II. Court Trial

After granting summary adjudication as to most of Maron Pictures’s claims, the trial court ordered: “The First Cause of Action for Declaratory Relief, as it pertains to the remaining claim for violation of the SAA, and the Seventh Cause of Action for Accounting are equitable claims and are bifurcated from the remaining issues. [¶] Accordingly, this action will be tried in the following manner: [¶] 1. The Court will try the equitable claims on June 27, 2016. [¶] 2. The remaining issues, if there are any after the Court’s

determination of the equitable claims, will be tried before a jury on a later date.”⁸

Following a four-day trial, the court issued a proposed statement of decision, which states in pertinent part: Maron Pictures “seeks a declaration of [its] right to terminate the [SAA] for an alleged breach of the defendants’ obligation to account to [Maron Pictures] for revenues earned from the distribution and sale of the film. [Maron Pictures] also seeks an accounting for all revenues earned under the SAA, including an accounting of monies allegedly owed to [it] by the defendants as a result of various distribution contracts Mainsail entered into pursuant to the SAA.” We consider each claim separately.

A. The Record on Appeal Limits the Scope of Review

“[I]t is settled that: ‘A judgment or order of the lower court is *presumed correct*. All

⁸ On June 27, 2016, the court trial began, in a different department than the one where defendants’ motion for summary judgment was heard. The minute order states: “Court and counsel confer regarding clarification of the trial issues as to Phase I of the trial that this Court will hear this date.” Maron Pictures has elected to proceed on appeal without a reporter’s transcript and so there are no details of this conference in the record. The record shows the court did try the two equitable claims, and found there were no issues remaining after that trial.

intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown. This is not only a general principle of appellate practice but an ingredient of the constitutional doctrine of reversible error.’” (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) It is the appellant’s burden on appeal to produce a record “ ‘which overcomes the presumption of validity favoring [the] judgment.’” (*Webman v. Little Co. of Mary Hospital* (1995) 39 Cal.App.4th 592, 595.)

Maron Pictures has elected to proceed on appeal without a reporter’s transcript. The presumption of correctness “ ‘has special significance when . . . the appeal is based upon the clerk’s transcript.’ [Citation.] ‘It is elementary and fundamental that on a clerk’s transcript appeal the appellate court must conclusively presume that the evidence is ample to sustain the findings’” (*National Secretarial Service, Inc. v. Froehlich* (1989) 210 Cal.App.3d 510, 521-522.) Our review is limited to determining whether any error “appears on the

face of the record.” (*Id.* at p. 521; see Cal. Rules of Court, rule 8.163).⁹

Unless an error appears on the face of the record, an appellant’s “[f]ailure to provide an adequate record on an issue requires that the issue be resolved against [appellant].” (*Foust v. San Jose Construction Co., Inc.* (2011) 198 Cal.App.4th 181, 187; see *Wagner v. Wagner* (2008) 162 Cal.App.4th 249, 259 [“The absence of a record concerning what actually occurred at the hearing precludes a determination that the court abused its discretion.”].)

B. Declaratory Relief - Contractual Accounting Obligation

Maron Pictures’s declaratory relief claim was based on defendants’ admitted failure to provide Maron Pictures with periodic accounting statements showing revenue generated by the film; Maron Pictures alleged the SAA required such statements. Maron Pictures sought a declaration that Mainsail’s breach of its obligation entitled Maron Pictures to terminate or rescind the SAA.

The trial court found “Paragraph 12.2 obligated Mainsail to provide Maron Pictures with

⁹ California Rules of Court, rule 8.163 provides: “The reviewing court will presume that the record in an appeal includes all matters material to deciding the issues raised. If the appeal proceeds without a reporter’s transcript, this presumption applies only if the claimed error appears on the face of the record.”

‘statements of Gross Proceeds’ only after delivery was complete.” The court also found “Maron Pictures delivered some but not all of the items required by the delivery Schedule. It is simply not disputed Maron Pictures could not, and did not, make complete delivery as required by the Delivery Schedule. [Testimony of Mark Mahon and Sam Eigen.] However, Maron Pictures was able to deliver sufficient materials for Mainsail to begin licensing activities and, in fact, license the film in various countries resulting in revenues being earned.”

The court also found Mainsail stopped all licensing activities “when it received a ‘cease and desist’ letter from Maron Pictures on January [22], 2010. [Exh. 254.] As of March 12, 2010, Mainsail had received \$224,541 in Minimum Guarantees from its licensing activities, and had earned Gross Proceeds of \$123,671. [Exh. 269-M00120.] The film was still being shown in some countries during the years 2014 through 2016. [Exh. 316.] However, Mainsail introduced evidence that it had received no funds related to the film during those years or since calendar year 2010. [Exhs. 205, 206, 207, 208, 209, and 210.]” The court added “it is undisputed that no accounting statements provided for by Paragraph 12.2 of the SAA were ever given to Maron Pictures, nor has Maron Pictures received any revenue from [M]ainsail as a result of the licensing revenue it did receive.”

The court then ruled: "To establish a claim for declaratory relief, [Maron Pictures] needs to show that there is some uncertainty with respect to the parties' obligation under the SAA that requires the Court to resolve. Here, Maron Pictures makes no such claim. Instead, it asks the court to determine that Mainsail failed to provide required accountings, so that Maron Pictures may terminate the SAA under the provisions of Paragraph 18.1. However, the Court may not rewrite the parties' agreement. [Culbertson v. Cizek (1964) 225 Cal.App.2d 451.]

Maron Pictures[s] contention that Mainsail violated the SAA hinges on its claim that it, in fact, made complete Delivery within the meaning of Paragraph 12.2. Maron Pictures failed to prove that critical fact. The Court finds that Maron Pictures has failed to establish by a [preponderance] of the evidence that Mainsail violated the terms of the SAA. Accordingly, Maron Pictures had not established a basis for the declaration it seeks."

Maron Pictures contends substantial evidence does not support the trial court's finding it never completed delivery. Maron Pictures elected to proceed without a reporter's transcript of the trial and so we conclusively presume there is substantial evidence to support the trial court's findings. This presumption is particularly appropriate here, where the trial court expressly relied on the trial testimony of Sam Eigen and Mark Mahon, testimony that is not

part of the record on appeal due to the absence of a reporter's transcript.

Nevertheless, the result would be the same if we set aside the presumption and looked at the trial exhibits in the record.¹⁰ Although there is disagreement and confusion on appeal about the

¹⁰ Although the parties designated the trial exhibits as part of the record on appeal, the clerk of the superior court was unable to include those exhibits. The parties filed motions to augment pursuant to California Rules of Court, rule 8.841, which permits the parties to file a motion to augment under such circumstances. We grant defendants' motion to augment the record with documents they declare are the missing trial exhibits. Maron Pictures does not dispute the accuracy of defendants' compilation.

We grant Maron Pictures's request to augment the record with (1) a copy of the original complaint in this matter, attached to the Mahon declaration as exhibit 2 and (2) a copy of trial exhibit 329, attached to the Mahon Declaration as exhibit 10. We deny the remainder of Maron Pictures's motion to augment. trial exhibits 254, 327, 331, 333 and 338 have been judicially noticed in defendants' motion to augment. Mahon states that the documents attached to his declaration as exhibit 1 were "filed" as exhibit 200 at trial. The minute orders for trial do not show that any exhibit numbered 200 was introduced and marked for identification at trial. The remaining trial exhibits attached to the Mahon declaration appear to have been marked and introduced at trial, but not admitted into evidence. We note that defendants' exhibit 269 was admitted into evidence; Maron Pictures's duplicatively-marked exhibit 269 was not admitted into evidence. In the absence of a reporter's transcript, we are unable to review the trial court's rulings excluding Maron Pictures's exhibits, and so those exhibits have no relevance on appeal.

exhibits offered and admitted at the court trial, a series of emails sent from various employees of defendants and from Eigen, repeatedly state Maron Pictures has not delivered items on the delivery schedule. In responsive emails, Maron Pictures disputes some of these claims, but not all. It is, for example, undisputed that Maron Pictures failed to provide errors and omissions insurance. Maron Pictures presented to the contrary. In the absence of a reporter's transcript, there is nothing to show Maron Pictures raised the issue of substantial compliance in the trial court, and we treat the issue as forfeited.

Even if we considered Maron Pictures's claim of substantial compliance, Maron Pictures would not prevail. While it is undisputed Maron Pictures delivered enough items to enable defendants to license the film and earn revenue from the licensing, it was not clear error on the face of the record for the court to find nondelivery.

The extent of Maron Pictures's compliance cannot be determined from the face of the record on appeal.¹¹ Defendants' ability to satisfy the requirements of *some* distributors in the absence of

¹¹ Paragraph 15.4.1 of the SAA gives the sales agent the right to furnish any undelivered items and to recover the costs from licensor. There is evidence that defendants did so, at least in part.

complete delivery by Maron Pictures does not show defendants were able to satisfy the requirements of all distributors, or even most distributors. To the contrary, it is clear defendants were not able to meet the requirements of key distributors. For example, in a November 28, 2009 email from Eigen to Maron Pictures, Eigen confirms “E1” is no longer planning to do a theatrical release due to Maron Pictures’s late delivery of required elements.

Maron Pictures also contends the court’s ruling is wrong because the law abhors a forfeiture. It is not entirely clear what Maron Pictures believes has been forfeited. The trial court’s ruling resulted in Maron Pictures having no contractual right to receive periodic accounting statements from defendants. Maron Pictures still has a contractual right to obtain financial information from defendants. Paragraph 12.1 of the SAA requires defendants to keep books and records using generally accepted accounting procedures; the duty is not contingent on Maron Pictures’s completion of delivery. Paragraph 12.7 permits Maron Pictures to audit those books once a year; this right is not conditioned on delivery completion. Thus, the trial court ruling did not result in Maron Pictures having no access to financial information about its film’s licensing, it merely shifted the cost and initiative from defendants to Maron Pictures.

To the extent Maron Pictures contends the court's ruling means it lost all rights to the film forever, Maron Pictures is mistaken. The trial court simply found that the specific breach of contract posited by Maron Pictures as a basis for terminating the SAA did not occur and therefore Maron Pictures had no right to terminate the SAA on that basis.

C. Equitable Accounting

Maron Pictures's second claim was for an equitable accounting. The court found Maron Pictures's claims were limited to revenues received by defendants after March 22, 2012. The court found Maron Pictures had failed to produce any evidence showing defendants received any licensing revenue related to Maron Pictures's film after March 2010. The court concluded Maron Pictures "has failed to establish that it is entitled to any accounting from the defendants."

In its reply brief, Maron Pictures contends the trial court erred in finding it was not entitled to an accounting because it failed to show the film generated any revenues.¹² Maron Pictures points out the SAA calls for accounting statements even when there is no revenue. The trial court made this finding

¹² Although Courts of Appeal do not usually consider arguments made for the first time in an appellant's reply brief, Maron Pictures makes this argument in response to contentions in defendants' brief and so we consider it.

as part of the equitable indemnity claim, not the breach of contract claim.

A plaintiff bringing a cause of action for an equitable accounting has the burden of showing “some balance is due the plaintiff that can only be ascertained by an accounting.” (*Teselle v.*

McLoughlin (2009) 173 Cal.App.4th 156, 179.) Thus, the trial court did not err in placing the burden on Maron Pictures to show a balance was due. We conclusively presume there is substantial evidence to support the trial court’s finding that Maron Pictures did not meet that burden.

The result would be the same, however, if we set aside the presumption and looked at the documentary evidence in the record. Here, it was undisputed Maron Pictures sent defendants a cease and desist letter in January 2010. An accounting statement shows that as of March 2010, gross proceeds had been earned under several of the distribution agreements which were entered into before the cease and desist letter; that statement also shows none of these proceeds were payable to Maron Pictures. Defendants produced evidence they had not received any funds related to Maron Pictures’s film since 2010.

Maron Pictures points to evidence its film was shown in Europe during the years 2014 to 2016, and contends defendants must have earned revenue from those showings. We must treat this as a claim that

there is clear error on the face of the record. We do not see such error. Although Maron Pictures offered several exhibits which it contends list showings of its film since 2010 (exhibits 316 and 318-322), only one page of exhibit 316 was admitted into evidence.

Exhibit 316, cited by the trial court, shows 13 showings on Turner Classic Movies (TCM) in Europe from 2014 to 2016. It is not clear from the record on appeal whether defendants had any agreement with TCM, the channel which showed Maron Pictures's film: none of the licensing agreements in the record refers to TCM or appears to cover Europe. There is no evidence in the record to support even an inference that defendants must have received revenue from those showings, and thus nothing to show clear error in the trial court's findings.¹³

¹³ Further, the distribution agreements in the record contain provisions for guaranteed minimum revenue which required payment no later than when the film was delivered to the distributors. Revenue received by a distributor from any particular showing of the film could have been retained by the distributor as an offset against the guaranteed minimum payment made to Mainsail in 2009 or 2010.

III. Motion for Summary Judgment on the First Amended Complaint

Maron Pictures contends the trial court should not have granted counsel's motion to withdraw from the case before Maron Pictures had time to find a new attorney and should not have denied Maron Pictures's informal request for a continuance of defendants' motion for summary judgment. Maron Pictures claims it was unable to find substitute counsel in time to oppose the motion for summary judgment, and the trial court's grant of the motion was therefore improper.

We review an order granting a withdrawal motion for an abuse of discretion. (*Manfredi & Levine v. Superior Court* (1998) 66 Cal.App.4th 1128, 1133; *Mandell v. Superior Court* (1977) 67 Cal.App.3d 1, 4.) We see no abuse of discretion in the court's ruling.

Wander, Maron Pictures's counsel, moved to be relieved, alleging there had been a complete breakdown of the attorney-client relationship. His declaration filed in support of the motion shows such a breakdown. Wander declared Mahon had "threatened" him after the court issued its proposed statement of decision on July 7, 2016, and also after Wander advised Mahon to settle. Wander also referred to a July 18, 2016 communication sent directly from Mahon to the trial court, which consisted of a letter, a proposed statement of decision

and a copy of the Strength and Honour DVD. There was also a “fee dispute.” Wander believed it was not in the interest of either the client or the attorney to continue such a relationship.

Maron Pictures contends the trial court should nonetheless have required Wander to continue his representation until Maron Pictures found another attorney, because a corporation may not represent itself. Maron Pictures is mistaken.

“The ban on corporate self-representation does not prevent a court from granting a motion to withdraw as attorney of record, even if it leaves the corporation without representation. Such an order puts pressure on the corporation to obtain new counsel, or risk forfeiting important rights through nonrepresentation. (*Ferruzzo v. Superior Court* (1980) 104 Cal.App.3d 501, 504.)” (*Gamet v. Blanchard* (2001) 91 Cal.App.4th 1276, 1284, fn. 5.)

Here, Wander mailed a copy of the motion to withdraw to Maron Pictures at the address in Ireland used on the July 18 letter and “confirmed the address with the Irish Companies Registration Office online.” On September 7, 2016, Wander filed a substitution of attorney form that showed Maron Pictures representing itself. The document shows someone signed the document on behalf of Maron Pictures and consented to the substitution.

On September 14, 2016, the court denied Wander’s motion to be relieved as counsel, on the

ground the moving papers did not demonstrate proper service on the client, a foreign national. Wander was ordered to either show proper proof of service on the client or provide a substitution of counsel statement that identified new counsel for Maron Pictures. The court noted Maron Pictures could not represent itself.

On October 21, 2016, the trial court granted Wander's motion to be relieved. Mahon was present in court, and the court advised him it is unlawful for a business entity to make appearances without an attorney. Maron Pictures had more than a month to obtain counsel before the October 21 hearing, but did not do so. We recognize Mahon, Maron Pictures's representative, lived in Ireland, but he would still have been able to search for lawyers in California. Thus, putting some pressure on Maron Pictures to find new counsel was appropriate.

After granting Wander's motion to withdraw, the court also stated defendants' motion for summary judgment would remain set for December 9, 2016. Maron Pictures claims the court should have granted his informal request for a continuance beyond December 9.

We review a trial court's denial of a request for a continuance of a motion for summary judgment for an abuse of discretion. (*Cooksey v. Alexakis* (2004) 123 Cal.App.4th 246, 254.)

Maron Pictures had another six weeks to obtain counsel before the December 9 hearing. Even assuming for the sake of argument that a new attorney could not have prepared an adequate opposition to the summary judgment motion in that time frame, a newly retained attorney could have formally requested a continuance of the summary judgment motion. By December 9, Maron Pictures had not obtained an attorney for even the limited purpose of making a formal request for a continuance.

Moreover, Maron Pictures has not shown it suffered prejudice from the denial of the continuance. Maron Pictures has not shown it had a viable basis for opposing the summary judgment motion. Maron Pictures argues it could have raised federal copyright claims in response to the motion. Raising a claim under Federal Copyright Law would, at a minimum, have required amending its complaint, and it is highly unlikely such an amendment would have been permitted at such a late date. Maron Pictures also argues it could have presented evidence the film was still being commercially exploited around the globe. Maron Pictures had already lost on that issue at the court trial.

The trial court did not abuse its discretion in permitting Wander to withdraw as counsel or in denying Maron Pictures's informal request for a continuance. Maron Pictures did not obtain counsel

in the more than two months between the filing of Wander motion to withdraw and the hearing on defendants' summary judgment motion, and has offered no explanation other than Mahon's residence in Ireland to explain this failure. The trial court did not err in granting defendants' unopposed motion for summary judgment.

DISPOSITION

The judgment is affirmed. Respondents are awarded costs on appeal.

STRATTON, J.

We concur:

BIGELOW, P. J.

GRIMES, J.

APPENDIX G

SUPERIOR COURT OF THE STATE OF
CALIFORNIA

COUNTY OF LOS ANGELES

MARON PICTURES LLC.,	CASE NO. SC120432
Plaintiff,	<i>Hon. Chester Horn Jr.</i> <i>Dept. WE-I</i>
v.	JUDGMENT
SAM EIGEN, AN INDIVIDUAL, MAINSAIL ENTERTAINMENT, INC., SHORELINE ENTERTAINMENT, INC., AND DOES 1-20,	
Defendants.	

This action came before the Court on December 9, 2016, for ruling on Defendants' Motion for Summary Judgment or in the Alternative, Summary Adjudication ("the Defendants' Motion"). Defendants Mainsail, LLC (erroneously sued herein as Mainsail Entertainment, Inc.), Shoreline Entertainment, Inc., and Sam Eigen appeared through their counsel Richard L. Charnley of

Charnley Rian LLP. Plaintiff was not represented by counsel.

Having GRANTED the Defendants' Motion as to all claims and finding that Defendants are entitled to judgment as a matter of law on all claims in Plaintiff's complaint, NOW THEREFORE IT IS ORDERED, ADJUDGED AND DECREED:

That Plaintiff shall take nothing by way of its complaint, that JUDGMENT is granted in favor of Mainsail, LLC, Shoreline Entertainment, Inc., Sam Eigen, and each of them, on all of Plaintiff's claims, that and Defendants, if appropriate, shall have and recover their attorney fees and costs of suit against Plaintiff, in support of which Defendants shall file a Memorandum of Costs and appropriate post-trial motions.

December 9, 2016

H. CHESTER HORN, JR.
Hon. Chester Horn, Jr.,
Judge Superior Court

APPENDIX H

60a

**SUPERIOR COURT OF CALIFORNIA, COUNTY
OF LOS ANGELES**

DATE: 02/10/16

HONORABLE LISA HART COLE

8:30 am SC120432 Plaintiff
Counsel PERRY WANDER
MARON PICTURES
VS
SAM EIGEN ET. AL. Defendant
Counsel RICHARD CHARNLEY

*RECUSAL BY JUDGE C. KARLEN
PLTF. 170.6 BECKLOFF

NATURE OF PROCEEDINGS:

DEFENDANTS SAM EIGEN, MAINSAIL
ENTERTAINMENT INC. AND SHORELINE
ENTERTAINMENT INC. MOTION FOR SUMMARY
JUDGMENT OR IN THE ALTERNATIVE
SUMMARY ADJUDICATION AS TO THE FIRST,
SECOND, THIRD, FOURTH, FIFTH, SIXTH, AND
SEVENTH CAUSES OF ACTION;

Matter is called for hearing.

Defendants' Motion for Summary Judgment is
DENIED.

Defendant's Motion for Summary Adjudication is
GRANTED as to all claims except for Defendants'
violation of para.12.2's accounting obligation. The
undisputed facts establish that Plaintiff's claims

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based on breaches of ¶¶3.1, 5.1, 7.11, 8 and 17.1 are time barred. Adjudication is granted as to those claims.

ANALYSIS: Defendants move for summary judgment on grounds that Plaintiff's claims are time-barred under 1-year limitations period set forth under ¶17.3 of the parties' Distribution Agreement. ¶17.3 states: "[Plaintiff] shall not be entitled to bring any action, suit or proceeding of any nature against [Defendant Mainsail] or its licensees, whether at law or in equity or otherwise, based upon or arising from in whole or in part any claim that [Defendant Mainsail] or its licensees has in any way violated this Agreement, unless the action is brought within one (1) year from the date on which [Plaintiff] knew or should have known, in the exercise of reasonable diligence, of the facts giving rise to the claim."

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Defendants rely upon Plaintiff's arbitration claim filed on 10/6/10 with the Independent Film & Television Alliance, which alleged the same claims pled in this action. See Defendants' SSUMF No. 2. Plaintiff failed to follow through with this arbitration claim when it did not pay the arbitration fees or seek a further extension of time. Id. at No. 5. Based on these facts, Defendant argues Plaintiff clearly knew of its claims as of 10/6/10 and Plaintiff had to bring any legal action within a year of that date, 10/6/11.

In response, Plaintiff does not dispute that 1-year limitations period is valid, that the 10/6/10 arbitration claim alleged the exact same claims here or that Plaintiff failed to pursue the arbitration, which was dismissed on 4/21/11. See Plaintiff's Response to SSUMF Nos. 1 and 2. Instead, Plaintiff argues that the timeliness of the 10/6/10

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arbitration claim can somehow be attributed this civil action. Plaintiff also contends that Defendants are equitably stopped from asserting statute of limitations because they led Plaintiff to believe during the prior arbitration that the matter would be mediated. Because of Defendants' conduct, Plaintiff did not pursue the arbitration or a civil action within the limitations period. Plaintiff also contends that even if the action is largely barred, the accounting action survives based on the continuing obligation of Defendant to provide an accounting and Plaintiff last served Defendant with a demand for accounting in March 2012, when it did not receive the February 2012 accounting.

Based on these undisputed facts, the action is time barred. There is no dispute over the validity of the 1-year limitations period and it is clear from the

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10/6/10 arbitration claim that Plaintiff knew of the claims pled in this civil action. As such, Plaintiff had to file this lawsuit within 1-year of that date. Plaintiff waited until 3/22/13, approximately 2 ½ years later.

There is simply no basis in ¶17.3 to find that the filing of the arbitration claim on 10/6/10 somehow renders this action timely. There is nothing in the language of ¶17.3 limiting its application to the “first” action suit or proceeding filed by Plaintiff, or to arbitration claims. ¶17.3 applies to “any action, suit or proceeding of any nature.” Plaintiff fails to provide any logical explanation for his claim that the arbitration claim somehow renders this action timely.

Plaintiff’s equitable estoppel argument also fails. “In order to invoke the doctrine of equitable estoppel, (1) the party to be estopped must be apprised of the facts

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; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) he must rely upon the conduct to his injury." Griffis v. S.S. Kresge Co. (1984) 150 Cal.App.3d 491, 499.

Plaintiff fails to present any evidence that Defendants' acted in a way to mislead Plaintiff into believing that this action would be timely, or would not be barred by the limitations period under ¶17.3 of the Distribution Agreement. Plaintiff testifies that it did not aggressively pursue the 10/6/10 arbitration agreement, because Defendants expressed a willingness to mediate after the arbitration claim was filed. See Decl. of P. Wander, ¶¶13-19. Between January 6 and 10, 2011, Defendants indicated intent

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to proceed with ADR. Id. Thereafter, Defendants failed to cooperate in setting a time for ADR. Plaintiff's last attempt to schedule ADR with Defendants was in April 2011. Id.

None of these facts establish that Defendants misled Plaintiff into believing that a civil action by Plaintiff was not subject to the 1-year limitations period. None of these facts establish that Plaintiff's failure to pursue the arbitration was due to Defendants' conduct, nor would such detrimental reliance have been reasonable. The arbitrator had contacted Plaintiff several times about the failure to pay fees, and Plaintiff was fully aware of Defendants' non-responsiveness to ADR for nearly four months. Despite this knowledge, Plaintiff did not pay the arbitration fees or did not ask for an extension. Plaintiff simply let the file close on the arbitration.

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More importantly, the arbitration was closed on 4/21/11. Plaintiff had nearly six months for Plaintiff to either timely refile a new arbitration claim or the instant civil action. Instead, Plaintiff waited until 3/22/13, almost two years later, to file this civil action. Again, Plaintiff simply fails to provide any logical connection between its decision to wait until 3/22/13 to file this action and Defendants' unresponsiveness to mediation attempts between January and April 2011.

Certainly, there is no inequitable conduct established against Defendants akin to that in Griffis. In Griffis, the court found that defense counsel could not assert statute of limitations he affirmatively stated at one point that opposing counsel's calculation of the limitations period was correct despite constructive knowledge otherwise. "Attorney Slavin replied to the

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lower court's query that he had not made the five-year and tolling calculations, but that he had "no reasons to dispute" Attorney Grasse's calculations. At best, this response negligently withheld from the court the vital information that the matter had been ordered to arbitration on a date substantially later than that relied upon by Attorney Grasse; at worst, the response was an overtly false statement, for Attorney Slavin did have, or should have known he had reason to dispute the basis for the calculations." Griffis, *supra*, 150 Cal.App.3d at 500.

However, Plaintiff raises a triable issues of material fact as to whether ¶17.3 bars the claims based Defendants' failure to provide biannual accountings. Plaintiff contends that because Defendants had periodic obligations to provide accountings, the limitations period began to run on each periodic

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failure to comply with these obligations as the obligations arose. Plaintiff's argument characterizes the contractual obligation to provide accountings to an installment contract.

"Thus, where performance of contractual obligation is severed into intervals, as in installment contracts, the courts have found that an action attacking the performance for any particular interval must be brought within the period of limitations after the particular performance was due." Armstrong Petroleum Corp. v. Tri-Valley Oil & Gas Co. (2004) 116 Cal.App.4th 1375, 1388-1389. "The context of continuing that is, periodic accrual for periodic breach is to be distinguished from that of a single breach or other wrong which has continuing impact. It also is to be distinguished from the breach of an entire contract, though performance of that contract

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may involve the rendering of benefits to the plaintiff before the date for final performance. If the parties to its making intend an entire contract, not a severable one, the courts will not find it divisible despite periodic performance. Generally, the parties' intent is revealed by the nature and character of the agreement. Intent can further be shown by the parties' subsequent acts and conduct." Id. at 1389.

¶12.2 requires Defendants to "provide statements of Gross Proceeds and all deductions therefrom twice a year, no more than 45 business days after the periods ending June 30th and December 31st. In the event there have been no Gross Proceeds since the previous statement, [Defendants] shall remit the next statement no later than on or about the anniversary date of the previous statement. Statements shall be provided to Licensor from the time Delivery is

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complete adnf [sic] or as long as this Agreement is in effect." See Defendants' Exhibit 1, ¶12.2. The term of the agreement is 15 years from the date of execution, which is from 4/20/09 through 4/20/14. Id. at Section C.

Plaintiff presents evidence that Defendants have breached their obligation to provide accountings within a year of filing this action. See Decl. of M. Mahon, ¶¶11, 19-20. In fact, Plaintiff's submits an email wherein Defendants state they are no longer in a business relationship with Plaintiff and apparently asserting they were under no obligation to further perform under the Distribution Agreement. Id. at ¶20 and Plaintiff's Ex. 10. The action was filed on 3/22/13 and any claims based on the failure to provide accounting from 3/22/12 onward are not time barred by the 1-year limitations period under ¶17.3.

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Because each of Plaintiff's claims is based in part on the failure to provide accountings, summary judgment cannot be granted. Summary judgment is only proper where there are no triable issues of material fact remaining as to the entire action.

However, Defendant's motion for summary adjudication is GRANTED. For purposes of summary adjudication, separate and distinct wrongful acts give rise to separate causes of action, regardless of the manner of the pleading. A party may move for summary adjudication challenging a separate and distinct wrongful act, even if that act is combined with other wrongful acts alleged in the same pleaded "cause of action" or count. *Lilienthal & Fowler v. Superior Court* (1993) 12 Cal.App.4th 1848, 1851, 1853. Likewise, affirmative defenses that would negate a plaintiff's claim based on a separate and

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distinct wrongful act are properly adjudicated. See
Edward Fineman Co. v. Supr. Ct. (1998) 66
Cal.App.4th 1110, 1116. Here, the undisputed facts
establish that Plaintiff's claims based on breaches of
¶¶3.1, 5.1, 7.11, 8 and 17.1 are time barred.
Adjudication is granted as to those claims. Thus, the
only remaining claims are based on Defendants'
violation of ¶12.2's accounting obligation.