Tips From The Battlefield: The Zealous Representation of Clients in the Modern World and Avoiding Missteps

October 11, 2019 | 3:15 pm – 4:45 pm

Program Description

From his perspective as a premier trial attorney, Neville Johnson will present an entertaining and informative survey of the hot-button issues facing transactional, litigation and in-house entertainment counsel including potential liability for demand letters, landmines in talking to the press, potential liability when there is dual representation of clients or conflicts, insuring that fee agreements (percentage, oral) are compliant with law, lawyers soliciting employment and negotiating deals under California Talent Agencies Act, failure to advise clients of the risks of litigation, insuring that referral fees are paid, arbitration agreements, profit-participation litigation, copyright registration, bankruptcy, bond requirements for independent producers, and new media issues/distribution methods not anticipated/streaming.

Lead Facilitator

Emily Evitt, Mitchell Silberberg & Knupp, Los Angeles, CA

Speakers

• Neville Johnson, Johnson & Johnson, Beverly Hills, CA

Program Materials

1. Neville ABA Power Point Presentation 2019, By Neville L. Johnson
2. Los Angeles & San Francisco Daily Journal: Trouble in Tinsel Town, By Neville L. Johnson and Douglas L. Johnson
4. Demand Letters: My Big Mouth: When Do Legal Communications Result in Liability, By Neville L. Johnson and Douglas L. Johnson
5. Miner’s Agreement: Entertainment Contracts with Minors in New York and California, By Neville L. Johnson and Douglas L. Johnson
7. NYSBA-Entertainment, Arts and Sports Law Journal, Fall 2016, Vol. 27; N 3: Hollywood Docket-Social Media, the Law and You, By Neville L. Johnson and Donald L. Johnson
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Tips From the Battlefield: The Zealous Representation of Clients in the Modern World and Avoiding Missteps

Neville L. Johnson
See Johnson & Johnson, My Big Mouth: When Do Legal Communications Result In Liability?

CASE OVERVIEW
Flatley v. Mauro (2006)
Malin v. Singer (2013)
Dickinson v. Cosby (2017) and (2019)
Giuffre v. Dershowitz, Case No. 1:19-CV-03377 (S.D.N.Y. Apr. 16, 2019)

KEY TERMS: demand letter, defamation, anti-SLAPP, extortion
California Rules of Professional Conduct

• Rule 3.10(a) (formerly 5-100(A)) specifically prohibits attorneys from “threaten[ing] to present criminal, administrative, or disciplinary charges to obtain an advantage in a civil dispute.”

• Rule 3.6(a) prohibits lawyers from “mak[ing] an extrajudicial statement that the lawyer knows* or reasonably should know* will (i) be disseminated by means of public communication and (ii) have a substantial* likelihood of materially prejudicing an adjudicative proceeding in the matter.”

  *asterisk (*) identifies a word or phrase defined in the terminology rule, rule 1.0.1
California’s SLAPP Suits

• SLAPP = Strategic Lawsuit Against Public Participation

• SLAPP refers to lawsuits filed with the intent to abuse the judicial process in an attempt to chill a defendant’s exercise of their constitutional rights of petition or free speech under the US or California Constitutions in connection to a public issue. California’s Anti-SLAPP law is a one of a defendant’s strongest tools when fighting for the right to exercise constitutionally protected speech.

• Statutes:
  • CCP §425.16 – Anti-SLAPP
  • CCP §425.18 – SLAPPback
CCP §425.16 – Anti-SLAPP

• Under California’s Anti-SLAPP statute, a Defendant can get a suit dismissed at the outset if (1) the Defendant can show alleged unlawful conduct is in fact protected by the US and/or California Constitutions and (2) the Plaintiff cannot show a probability of success on the claim. If a Defendant’s Anti-SLAPP motion is successful, the Defendant is entitled to recover attorneys’ fees and costs.

• Recent Caselaw: After the California Supreme Court case, *FilmOn.com Inc. v. DoubleVerify Inc.*, 7 Cal. 5th 133 (May 2019), the context of the speech at issue (speaker, audience, speech’s purpose, speech’s relationship to public issue and/or issue of public interest) is of utmost importance in determining whether Defendant can strike a Plaintiff’s cause of action. In *Filmon.com*, the court found that the private commercial speech at issue, which was merely circulated to subscribing customers, was not sufficiently connected to a matter of public interest, thus, was not protected by CCP §425.16.

• Defendant’s must be cautious and meticulous when bringing CCP §425.16 Anti-SLAPP motions, lest they be hit with a CCP §425.18 SLAPPback from the Plaintiff.
CCP §425.18 – SLAPPback

• Both California Legislature and courts have found that CCP §425.16 Anti-SLAPP motions have been subject to abuse, thus, under California’s SLAPPback statute, a Plaintiff who was able to overcome a previous Anti-SLAPP motion, by showing their probability of success on the claim, may file a CCP §425.18 SLAPPback motion for malicious prosecution and/or abuse of process.

• However, such Plaintiffs must also be cautious and meticulous when bringing CCP §425.18 SLAPPback motions, lest the court finds their actions to be frivolous and/or solely intended to cause unnecessary delay.

- A defamation suit was filed against Michael Jackson, his companies, his lawyers, and his private investigator over assertions during a press conference that his alleged molestation victims and their counsel had made false accusations in order to extort money from Jackson.
  - The Defendants argued that litigation privilege protected the statements, but the court rejected this, holding that this privilege only applies to statements that have a “functional connection” with potential litigation.
- The court stated:
  “[W]e are frankly astonished by the contention made by [Jackson attorney Bertram] Fields that celebrities and their lawyers must litigate their cases in the press because the public expects it. Fields argues that, because of such public expectations, ‘media attention becomes part of the forum of litigation,’ and to deny celebrity litigants protection for statements made in this ‘forum’ would contravene the policies of the litigation privilege. We expressly reject this argument.”
Flatley v. Mauro (2006)

• An attorney sent a demand letter to a famed dancer, accusing him of rape and demanding money in return for silence.
  • The letter was followed by a period of badgering the dancer’s counsel.
  • The attorney threatened to expose the dancer and “go public” with the story unless the dancer agreed to pay the attorney and his client.

• The dancer responded by filing a civil extortion suit against the attorney.
  • The attorney attempted to counter the suit by using California’s anti-SLAPP statute, but ultimately failed because the attorney’s letter constituted criminal extortion as a matter of law.

• The attorney who wrote the letter subsequently resigned from the Illinois Bar.
Malin v. Singer (2013)

• An attorney sent a demand letter to a restaurant and night club owner, demanding the return of allegedly embezzled funds to the owner’s business partner.
  • The attorney threatened to file a lawsuit that would include allegations that the funds were used to “arrange sexual liaisons with older men”.

• Initially, the case played out much like Flatley. On appeal, however, it was decided that the demand letter in this case “did not expressly threaten to disclose Malin’s wrongdoing to a prosecuting agency or the public” and in anticipation of litigation, the demand letter fell under the litigation privilege.
  • Therefore, the anti-SLAPP motion in this case was successful, and the attorney was awarded $323,689 in attorney’s fees.

• If an attorney is named in a suit over excessive demands, it is likely that a potential or actual conflict of interest between the lawyer and their client may arise, which could require the lawyer to withdraw from representation.
An attorney sent a demand letter to the manager of a print and copy shop, demanding that he pay $75,000 to the shop’s owner.
- The attorney threatened to report the manager for tax fraud.

The court ruled the letter to be civil extortion, as the demand for money was directly coupled with a threat to report a crime.

The court noted the attorney’s conduct was a direct violation of (former) Rule 5-100(A) from the Rules of Professional Conduct, which the State Bar could discipline.
Dickinson v. Cosby (2017) and (2019)

• An attorney sent a demand letter to TV network, demanding that they not broadcast an interview with one of Bill Cosby’s accusers.
  • The attorney claimed that the accuser’s story was “fabricated and is an outrageous defamatory lie.”
  • The attorney threatened litigation if the interview was aired.

• The accuser responded by suing Cosby and his attorney for defamation, arguing that the letter was damaging to her reputation and false in its assertions.
  • The attorney’s anti-SLAPP motion was denied by the trial court, but accepted by the appellate court. They found that the letter was not written in good faith contemplation of a lawsuit, but was merely intended to intimidate media outlets.

• On remand, the trial court determined the attorney could escape liability because there was no showing of constitutional malice for defamation under New York Times v. Sullivan, 376 U.S. 254 (1984), as Dickinson was a limited purpose public figure.
  • It is reasonable that an attorney would believe their client’s statements that allegations were false.
Dickinson v. Cosby (2017) and (2019)

• One day before the appellate court opinion, Dickinson settled the defamation lawsuit with Cosby's insurance company for an “epic amount” against his objection, but this was not revealed until the opinion came down.

• In July 2019, before California's Second Appellate District was notified of the settlement, they released a precedential opinion holding that Cosby can be liable for his lawyer's press statement.
  • Since Cosby never issued a retraction or clarification, the statement can be attributed to him as well. In other words, a client can be sued for what their lawyer has said.

• This opinion holds that post-publication responsibility can be placed on individuals for what their lawyers say publicly.
Giuffre v. Dershowitz

*Giuffre v. Dershowitz*, Case No. 1:19-CV-03377 (S.D.N.Y. Apr. 16, 2019), provides a new test case for the litigation privilege’s expanse and features famed attorney Alan Dershowitz as the defendant. Dershowitz had repeatedly called the plaintiff a liar and extortionist for accusing him of statutory rape in the aftermath of his defense of convicted pedophile Jeffrey Epstein. The complaint discusses a prior settlement with Dershowitz concerning his accusations, made through interviews in national media outlets, that the plaintiff’s attorneys had engaged in unethical behavior with respect to one of Epstein’s victims. Dershowitz’s public statements on the matter included “challenging them to sue me for defamation.” The *Giuffre* complaint accordingly states: “Mr. Dershowitz now has what he claims he has been looking for.” The case is currently in its nascent stage, but should certainly be followed by all attorneys. And see *Unsworth v. Musk*, Case No. 2:18-cv-08048, USDC (CD Cal. Filed Nov. 17, 2019). Musk asked publicly why the plaintiff had not sued for calling him a “pedo.”
Lingering Queries

• Whether a lawyer can be sued by their client for malpractice if the lawyer made a public statement without the client’s permission?

• Whether an attorney need to advise their client of the possibility of a defamation lawsuit if a public statement is made?

• If a lawyer writes a demand letter to a third-party, can the other party then bring a claim of tortious interference with a contract against the lawyer and/or the lawyer’s client?
Here’s What You Should Know…

• Take a **conservative approach** to any **out-of-court** communications regarding litigation matters (i.e., demand letters, cease and desist, comments to press).

• Be sure that any statements you make on behalf of clients are functionally **related to legitimate legal claims** that you **truly intend** to pursue.

• You must be **well-versed** in all relevant authority concerning the **limits of extrajudicial advocacy**, lest your big mouth get you in big trouble.

• Don’t publicly call the other party a **liar** to a third party!

• Don’t invite litigation. “Sue me”
PROFIT PARTICIPATIONS IN FILM

• Twentieth Century Fox Film Corporation v. Wark Entertainment, Inc., JAMS Arbitration Case Reference No. 1220052735 (Arbitrators decision is provided)

• The “Bones Case.” Self dealing claim.

• $179,000,000 damages, of which $128,000,000 punitive. Superior Court threw out punitives as contract did not allow them. Case has settled.

• Century of Progress Productions v. Vivendi S.A., USDC (CD Cal.) 2018 WL 4191340 (fraud claim allowed for false profits statements on “Spinal Tap”) (decision is provided)
Beware Public Relations Dealings May Be Discoverable

• Behunin v. Superior Court (Schwab), 9 CA5th 833 (2017). For attorney work product or privilege to apply, work must be related to the litigation.
Agents and WGA at War

• Antitrust claims made by the “big four” agencies against WGA which told members they could not work for agents who took packaging fees or engaged in production activities. Claims are in USDC. WGA filed in state court, has now dismissed and filed counter-claims in USDC.
• WGA slate of officers and board of directors elected/reelected thus endorsing WGA position.
• Game changing issues
• WGA suggests managers and lawyers can pitch for clients. This would violate Talent Agencies Act.
• Two rulings by Labor Commissioner against attorneys for “negotiating” deals. Would a violation constitute bar discipline? Could client disapprove fees?
• See Johnson and Johnson, “Trouble in Tinsel Town,” Daily Journal, April 23, 2019 (article provided)
Must Have a Registered Copyright to File a Copyright Infringement Claim

Fee Agreements, Conflicts and Informing Clients of Risks

• Fee agreements must be in writing
• If contingency may only get quantum meruit
• Referral fees: client must be advised in writing if referral fee to be paid. But see, Ringler, where attorney referred case stalled on putting it in writing and was required to pay fee. Barnes, Crosby, Fitzgerald & Zeman, LLP, Plaintiff And Appellant, v. Jerome L. Ringler, 212 Cal.App.4th 172 (2012).
• Better advise in writing risk to client, e.g. attorneys fees clause or statute to prevailing party, weaknesses in case
• Make no guarantees
• Waiver of conflicts: representing more than one talent in a production. Need waivers. Wrongful termination claim where major law firm sued by associate who claimed he was ordered to subjugate interests of one client to another.
Agreements with Minors

• Contracts must be approved for those under 18.
• Some contracts require parents to guarantee performance.
• Los Angeles Superior Court (Probate dept.) will not approve management agreements as they are not employment agreements.
• Need to set up “Coogan account.”
• See Johnson & Johnson, “Entertainment Contracts with Minors in New York and California”. Article provided.
Corporate Revival

• Generally, need to pay all back taxes for a suspended corporation. However, may get a waiver and a lien on litigation that goes towards paying such taxes. Bozzio v. EMI Grp. Ltd., No. 13-15685, 2016 U.S. App. LEXIS 1217 (9th Cir.)
Section 230 Communications Decency Act

- Provides immunity to Internet Service Providers
- Huge problem in USA
- Grinder case
- When your or client attacked, try and work it out first with poster. If that doesn’t happen, possibly post a reply. A lawsuit may be necessary against the poster if defamatory or an invasion of privacy. See Johnson & Johnson, “Social Media the Law and You,” NYSBA Entertainment, Arts and Sports Law Journal (Fall 2016), article is provided
Bond Issues for Independent Producers with SAG-AFTRA

• Producers upset at ability to get bonds back they were required to put up for production to guarantee wages to acting talent.
• Rules are unclear as to hope rules are to be enforced.
• SAG-AFTRA sometimes converts bonds into guarantee residuals will be paid.
• Remedy is an arbitration under the collective bargaining agreement.
NEW MEDIA ISSUES; THE END OF BACK END

• Netflix deals do not provide a back-end. Instead a production fee is paid along with a “profit” amount. If show is not a hit, better for talent; if a hit, bad for talent. Netflix will not share statistics on who watches. May negotiate bonuses if awards are garnered.

• Disney doing deals without a traditional back-end. Instead establishing a bonus system and taking total control of all distribution in all media.

• Other channels coming online. Best time ever for producers and talent. May mean better deals for them.
Thank you!

Any questions?

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Trouble in tinsel town

By Neville L. Johnson and Douglas L. Johnson

Hollywood talent agents and writers are at war with each other in what augurs to be the most important litigation in the entertainment industry since this century began. The Writers Guild of America, West, Inc., and Writers Guild of America, East, Inc., are the negotiating bodies for approximately 15,000 screenwriters. There are four “big” talent agencies — Creative Artists Associates, WME Entertainment, United Talent Agents and International Creative Management — that overwhelmingly comprise the representation of actors, directors and producers of film and television, and they have been growing even more powerful over the last two decades as they have merged with or acquired other smaller agencies.

The WGA and the agencies, represented by their interest group, the Association of Talent Agents, have been in collective bargaining negotiations that broke down on April 12. The WGA had two demands: that “packaging fees” be eliminated and that the agencies no longer engage in the production of movies. Shortly thereafter, in what some viewed as a surprise move (given that it was the union, rather than an action exclusively by writers), the WGA filed an action in Los Angeles County Superior Court on behalf of themselves and eight prominent writers, alleging breach of fiduciary duties and unfair competition under Business and Professions Code Section 17200 et. seq.

This is not the first go-round over agency packaging practices. In the 1970s, the William Morris Agency, then the biggest packager of television shows, refused to sign the WGA ban on packaging and unsuccessfully sought to enjoin the ban on the grounds it violated antitrust laws. Adams, Ray & Rosenberg v. William Morris Agency, 411 F. Supp. 403 (C.D. Cal. 1976). The case was thereafter settled and ultimately the William Morris Agency continued to package.

Over the past decade, agencies have engaged in the production of television shows and movies. For many years, agencies entered into “franchise agreements” with the WGA, the Screen Actors Guild (now SAG-AFTRA) and the Directors Guild of America. These agreements regulated what the agents must do to maintain the client, such as securing a certain amount of work or opportunities within a given period, and set a cap on commissions that could be taken. The writers asserted then and now that when their agents produce or take a financial interest in a production, the agents become the writers’ employer, causing an inherent conflict of interest.

In the 1950s and early 1960s, the most powerful talent agency in the world was MCA. In 1958, MCA acquired Universal Pictures and its lot and went into production. Complaints were raised that talent was being forced to work on projects controlled by the agents who were not protecting talent’s interests as fiduciaries. At its height, in 1960, MCA had a major participation in 45 percent of the television shows in primetime, producing many under its production company, Revue Productions. The Department of Justice eventually moved in, led by Robert Kennedy, and gave MCA an ultimatum: divest one of the entities. In 1962, MCA went out of business.

SAG had forbade the agencies from producing (known as “Rule 16(g)”), but in 2002 no renewal of that franchise agreement was reached with that provision intact, and the previous agreement expired. The agencies (but not International Creative Management) thereafter commenced producing. WME in particular has been very actively doing so.

The agents argue that talent is being paid at competitive rates and that increased production is occurring, which benefits all talent and the industry.

The corresponding issue — the ability of the agencies to demand packaging fees in connection with productions — is bitterly contested. Agents traditionally have been paid 10 percent of the gross earnings of talent. However, the William Morris Agency, before it became WME, took a commission on the gross of the entire production under the logic that, when it put two “elements” together, say a writer and actor, they should be paid on the entire budget and earnings, which in many cases are far in excess of the normal 10 percent. The other agencies followed suit, and now over 90 percent of all scripted shows on television are packaged, bringing enormous revenues to the big agencies, who will share commissions with each other when they “co-package,” but won’t do so with smaller agencies. Packaging fees are generally demanded by the agencies, and they will not budge when a client asks that no packaging fee be taken.

Until the recent brouhaha, the WGA franchise agreement with the agencies explicitly permitted packaging fees. Packaging fees are generally based on a “3-3-10” formula, with the upfront fee 3 percent of the “license fee” paid by the studio for the program, the “deferred fee” 3 percent of the license fee paid by the studio (paid when there are profits), and the profit participation 10 percent of the “modified adjusted gross profits.”

The agencies have traditionally argued that talent benefits as the agents don’t commission the individual client, just the package, and in many cases programs do not go into profits, so the fees generated are less than the 10 percent that would otherwise be paid. This true in some circumstances because many productions never go into profits.

The WGA complaint states that packaging fees, depending on the profit definition, often reduces the amount otherwise payable to the writer. There are situations where the agency is paid on “gross” and the talent on “net.” Further, the WGA claims that agencies will often not work with talent at other agencies in order to preserve packaging fees, and will make deals where they get the best packaging arrangements, rather than what is in the best interests of the client.
According to the WGA, the writers are often not informed of the pros and cons of packaging deals. The complaint filed last week cites cases where the agency made more than the client because it had a packaging deal, rather than 10 percent of what the talent made. “Packaging fees have deprived writers of conflict-free and loyal representation in their negotiations with production companies,” asserts the complaint.

Writer David Simon claimed in the complaint that his agency, CAA, never informed him that it got a packaging fee, while “simultaneously representing the purchase of Simon’s IP, thus deliberately suppressing Simon’s compensation and profit participation.”

Because of the foregoing problems, the WGA claims that its members must hire other professionals — lawyers and managers — to protect their interests, which means paying up to an additional 20 percent of earnings.

In addition to the fiduciary duties cause of action, the WGA asserts that these are unfair business practices because they “divert compensation away from the writers and other creative talent that are responsible for creating valuable television and film properties, and undermine the market for writers’ creative endeavors.” Further, the claim is made that the agencies’ conduct violates Section 302 of the Labor-Management Relations Act, 29 U.S.C. Section 186, the so-called “anti-kickback” provision of the Taft-Hartley Act.

After negotiations broke down between the ATA and WGA earlier this month, the writers were instructed by WGA to fire any agents who refused to sign its “code of conduct” prohibiting production and packaging fees. According to the WGA, with few exceptions, its members overwhelmingly have complied. This puts the industry into a no-man’s land. Talent must now find other ways obtain employment. This is a tricky area.

The WGA has suggested that writers use their managers and lawyers to obtain work. However, this likely will violate California’s Talent Agencies Act, Labor Code Section 1700.4 et seq. A remedy under the TAA is “disgorgement” of any fees taken in violation of the act. The WGA informed its members that it will reimburse managers and attorneys for such services if they are unable to be paid because of violation of the TAA. The ATA has stated it is reviewing its options regarding this.

Under the TAA, one cannot offer, promise, procure or attempt to procure employment for talent absent a talent agency license. Personal managers thus are vulnerable absent a license. But it’s generally considered too much trouble to get a license unless one is truly engaged in the business of being an agent — that is, securing work. In reality, many personal managers do “shop” for deals for their clients because in many cases the client cannot get an agent, or the agent, who may have dozens of clients, is not actively seeking employment for the client. Managers are often sued with disgorgement sought for procurement activity absent a license.

Attorneys have a similar problem. In two Labor Commission cases lawyers have been found to have violated the TAA notwithstanding they are members of the California Bar. In Solis v. Blancarte, TAC-27089 (2013), the lawyer didn’t secure the engagement for the client, who had been solicited by a television station. The labor commissioner ruled that an attorney could not negotiate the deal absent a talent agency license. The parties soon settled, but the case remains on the books. The same type of facts and ruling occurred in Doughty v. Hess, TAC-39547 (2017), where a lawyer negotiated various talent deals. Hess’ agreement was declared void and unenforceable. Note that these are cases brought by talent against the lawyer. This is problematic given this is what transactional lawyers in the entertainment business do — draft and negotiate contracts.

There was an attempt after Solis to get a law passed allowing lawyers to negotiate and procure, but not enough of a groundswell was created, with the top firms of the opinion that they clients needed them more than they needed the clients. Moreover, the Legislature eschews the TAA issue given the powerful lobbies involved: labor and talent agencies, neither of which the politicians wished to antagonize. Personal managers are too poorly organized and weak to have much influence. Perhaps now lawyers will care more and attempt to get the law changed to allow them to at least negotiate, if not solicit employment, given the strict licensing and ethical requirements to be a member of the Bar. But are lawyers willing to risk the consequences, and would there be potential bar prosecution if they violate the TAA?

The current dispute concerns hundreds of millions of dollars a year in packaging fees involving writers. Add actors, directors and producers to this mix, and it is billions. Will SAG and/or the Directors Guild of America join the fray? Can producers contest packaging fees, though they do not have a union like the WGA, but rather an association, the Producer’s Guild of America? It is unclear, given the statute of limitations, how far back the WGA can go, but it is seeking “disgorgement” of all fees previously earned.

How will writers secure “pitch meetings” hereafter, particularly for rookie or unknown talent?

Obviously, talent stands to gain from the reduction or elimination of packaging fees, but so do the studios which pay out these fees out. They have been reluctant to challenge the agencies because of the power they wield in keeping talent and projects from them, the lifeblood of the industry. But if studios are not subject to packaging fees anymore, that would free up monies to be paid to talent.

Given the intransigence of the warring factions, these are issues that undoubtedly will require judicial rulings before serious settlement talks resume. In the meantime, it’s a free for all. The war has just begun in the courts: Powerful law firms will be engaged in a massive battle over powerful economic, ethical, and practical issues involving powerful parties with the entire entertainment community in flux as to how to do business in the meantime.

One important takeaway is that talent must hereafter be provided independent legal advice about the propriety of any deal where an agent is a producer, profit participant or seeks a packaging fee. Agents who do not ensure this run a big risk.

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Proceedings: IN CHAMBERS - ORDER RE DEFENDANTS' MOTIONS TO DISMISS [44, 49]

DOLLY M. GEE, UNITED STATES DISTRICT JUDGE

*1 Plaintiffs, Century of Progress Productions (“CPP”), Christopher Guest, Rob Reiner Productions (“RRP”), United Heathen (“UH”), Spinal Tap Productions (“STP”), Harry Shearer, Rob Reiner, and Michael McKeen, filed the operative second amended complaint (“SAC”) on October 19, 2017. [Doc. # 33.] The SAC alleges six causes of action: (1) breach of contract; (2) breach of the implied covenant of good faith and fair dealing; (3) fraud by concealment and misrepresentation; (4) accounting; (5) declaratory relief as to alleged trademark rights, 28 U.S.C. § 2201; and (6) declaratory relief as to alleged copyright reversion, 17 U.S.C § 703. Id. at 1 (caption).

Now before the Court are two motions to dismiss. The first, brought by Defendants Universal Music Group, Inc. and UMG Recordings, Inc. (collectively, “UMG”), seeks to dismiss Plaintiffs’ SAC in its entirety, as alleged against UMG. [Doc. # 44 (“UMG MTD”).] The second, brought by Defendants Vivendi S.A.’s (“Vivendi”), Studio canal S.A.S.’ (“Studiocanal”), and Ron Halpern (collectively, “Studiocanal Defendants”), seeks dismissal of Plaintiffs’ claim for fraud. [Doc. # 49 (“Studiocanal MTD”).] UMG joins in the Studiocanal MTD. See UMG MTD at 17 n.8.

I.

FACTUAL BACKGROUND

A. The Parties and This Is Spinal Tap

This lawsuit concerns the motion picture This Is Spinal Tap (“TIST”) and the rights of its creators and performers. In the late 1970s, Plaintiffs Harry Shearer, Christopher Guest, Rob Reiner, and Michael McKeen (collectively, “Co-creators”) created characters and wrote several songs for a fictional British rock band, Spinal Tap, which first appeared on television in 1979 in a skit series called The T.V. Show. See SAC at ¶¶ 6, 38. Co-creators later decided to make a full-length motion picture about the band, but they first wrote a 20-minute film “complete with fully-realized characters with backstories and musical performances with lyrics, to shop in lieu of a script.” Id. at ¶ 6, 38. TIST, Co-creators’ eventual motion picture, was filmed as a documentary about the fictional British rock band in the middle of an American tour, and it was released in 1984. Id. at ¶ 40.

*2 Co-creators also starred in or directed TIST. Id. at ¶¶ 14–17. Plaintiff CPP is Shearer’s loan-out company, Plaintiff RRP is Reiner’s loan-out company, and Plaintiff UH is McKeen’s loan-out company (collectively, the “Loan-Out Companies”). Id. at ¶ 24, 26–27. Plaintiff STP is a California corporation that, at all relevant times, was entirely owned by CPP, Guest, RRP, and UH. Id. at ¶ 28.

Guest, CCP, RRP, and UH formed and incorporated STP on May 6, 1982 to turn Co-creators’ short film into the feature-length film, TIST. Id. at ¶ 38. Although STP was dissolved in or around June 1986, it brings this suit under California Corporations Code section 2010 to collect and distribute to its owners all royalties and other monies. Id. at ¶ 28. Guest is STP’s president. See id. at ¶ 30.
Defendants Studiocanal and UMG are subsidiaries of Defendant Vivendi, a French corporation. Id. at ¶ 29–30, 32. Defendant Halpern is one of Studiocanal’s executives. Id. at ¶ 31. In or around 1989, predecessors of Vivendi’s subsidiaries acquired pertinent TIST rights. Id. at ¶ 49.

B. The 1982 Agreement
On May 7, 1982, STP and the Loan-Out Companies entered into a multi-part agreement (the “1982 Agreement”) between STP and Embassy Pictures (“Embassy”), an independent studio, for the production, financing, and distribution of TIST. SAC at ¶¶ 7, 38, 43; Ex. A to Studiocanal Defendants’ February 28, 2017 Motion to Dismiss (“MTD FAC”) at 2–12 (“Letter Agreement”) [Doc. # 24-2]. The 1982 Agreement consists of several documents, including, as relevant here, an 11-page letter agreement (“Letter Agreement”) and a single-page Exhibit A to the Letter Agreement, both of which are discussed below. Guest, as STP’s president, signed the Letter Agreement. SAC at ¶ 44; Letter Agreement at 11.

Under the Letter Agreement, Co-creators are pre-approved personnel defined as the “Screenplay Writers” and “Actors,” and the Agreement provides for their fixed, deferred, and contingent compensation and other royalties. SAC at ¶¶ 39, 46–47; Letter Agreement at ¶ 2(a), 4, 6. Additionally, subject to certain terms and conditions, Embassy shall pay to STP 40% of all net receipts related to the film; to Co-creators 50% of all gross receipts (after deduction of administration costs) from TIST music, a performers’ royalty of 6% of retail price of the TIST soundtrack if Co-creators perform on the album, and a producer’s royalty of 3% of the retail price of the TIST soundtrack if they are the album’s sole producers. SAC ¶ 47; Letter Agreement at ¶¶ 4, 6.

*3 Exhibit A to the Letter Agreement, entitled “Instrument of Transfer,” provides that STP, through Co-creators, assigned to Embassy “the following rights ... in the feature motion picture presently entitled ‘Spinal Tap’ “:

- The sole and exclusive right in perpetuity to exhibit, distribute and exploit such motion picture and all elements thereof in all media, whether or not now known, throughout the universe, including, but not limited to, music and soundtrack rights, merchandising rights, video cassette and video disk rights, and theatrical sequel, theatrical remake and standard and non-standard television program rights.

Ex. A to MTD FAC at 20 (“Instrument of Transfer”) [Doc. # 24-2]; SAC at ¶ 8.

The SAC alleges that Embassy’s rights under this Instrument of Transfer changed hands “several times,” most recently to Studiocanal and UMG. SAC at ¶ 9.

C. Accounting Under the 1982 Agreement
In or around 1989, predecessors of Vivendi’s subsidiaries acquired “pertinent TIST rights,” and Vivendi became responsible for accounting under the Letter Agreement as a consequence. Id. at ¶¶ 49–50. Specifically, Plaintiffs allege that Vivendi’s subsidiary, Studiocanal, administers and has a duty to account for revenue streams associated with the film, television, video, and merchandising rights to TIST, while another Vivendi subsidiary, UMG, administers and has a duty to account for revenue streams associated with the sound recording rights. Id. at ¶¶ 53, 72. According to Plaintiffs, UMG has “an obligation to report and pay [Studiocanal, which in turn has an obligation to report and pay Plaintiffs” in connection with the TIST revenue streams, including sound recordings and music publishing. Id. at ¶ 51.

STP allegedly received “[s]ome” profit participation statements. Id. at ¶ 50. Plaintiffs recently discovered errors in the statements, and they allege that the statements reflect the fraudulent practices engaged in by Defendants. See id. at ¶ 51, 52–54. Vivendi, Studiocanal, and UMG allegedly defrauded Plaintiffs by engaging in anti-competitive and unfair self-dealing between Vivendi subsidiaries; cross-collateralizing unsuccessful films bundled with TIST in their accounting; failing to remit accounting statements; failing to respond to inquiries and information requests; failing to keep accurate records; failing to include revenues in accounting statements;
claiming undocumented and false expenses...; and failing to diligently exploit available revenue streams.

*Id. at ¶ 65; see also id. at ¶¶ 54, 86, 88 (providing substantive examples of alleged fraudulent accounting practices and misrepresentations).

In November 2013, a CPP-commissioned study showed that Defendants engaged in “willful misconduct” and intentionally concealed material facts in the accounting statements provided to Plaintiffs in order to deceive and prevent them from discovering such practices. *Id. at ¶ 52.*

D. Plaintiffs Serve Copyright Termination Notices

After initiating suit in October 2016, Plaintiffs exercised their rights under section 203 of the Copyright Act to issue copyright termination notices to recapture all copyrights to the characters, sound recordings, and musical compositions that appeared in TIST. *Id. at ¶¶ 2, 114; Exs. 6–9 to SAC [Doc. # 33-6–33-9].* Plaintiffs served the termination notices on Studiocanal and UMG, and recorded them in the U.S. Copyright Office. SAC at ¶ 114. Those served on Studiocanal concern the TIST motion picture and musical composition copyrights, whereas those served on UMG concern the sound recording copyrights. See Ex. 6 to SAC at 2–7.

*4 After receiving Plaintiffs’ termination notices, Vivendi and Studiocanal threatened to file a counterclaim for declaratory relief to “confirm that Mr. Shearer has no termination rights” because the TIST works are “works for hire.” Defs’ February 28, 2017 Mot. to Dismiss at 9 [Doc. # 24]; SAC at ¶ 3. Plaintiffs dispute the “works for hire” argument, and the SAC alleges a cause of action for declaratory relief in connection with the validity of Plaintiffs’ termination notices. See SAC at ¶¶ 10–13, 109–17.

E. Alleged Damages

CCP and Shearer learned of Defendants’ misconduct in November 2013, and remaining Plaintiffs learned of such conduct only after this suit’s initial filing in October 2016. *Id. at ¶ 57.*

Plaintiffs contend that Defendants’ fraudulent conduct has caused distinct harm, separate and in addition to that which Defendants’ contractual misconduct created, such as “the out-of-pocket expenses incurred to commission the 2013 [CPP] study to discover Defendants’ fraud[ ] [and] the lost time-value of money and interest on the monies wrongfully withheld from Plaintiffs.” *Id. at ¶ 92.* Had Defendants disclosed the aforementioned concealed material facts, Plaintiffs would have shifted, or attempted to shift, control of the exploitation, recovery, and enforcement of TIST assets, including its intellectual property, away from Vivendi many years ago. *Id. at ¶ 91.* Plaintiffs also contend that the alleged fraudulent accounting practices have resulted in a negative balance on the profit participation statements, such that Defendants insist Plaintiffs owe them money in connection with TIST royalties. See *id. at ¶ 22.*

II.

LEGAL STANDARD

The Court set forth the applicable standard for motions to dismiss in its prior order and need not repeat it here. MTD Order at 5 [Doc. # 32].

III.

DISCUSSION

UMG moves to dismiss each of Plaintiffs’ alleged claims except for that seeking declaratory relief in connection with their trademark rights. UMG contends that Plaintiffs fail to state a claim for breach of contract, breach of the implied covenant of good faith and fair dealing, and accounting because there is no contractual relationship between Plaintiffs and UMG. UMG and Studiocanal seek dismissal of the cause of action for fraud based on Plaintiffs’ purported failure to plead sufficient facts. Finally, UMG argues the declaratory relief claim related to copyright reversion is not a ripe controversy. The Court first considers Plaintiffs’ causes of action for breach and accounting.

A. Causes of Action for Breach and Accounting (Against UMG)

UMG argues that Plaintiffs cannot allege any claim for breach or for an accounting in connection with the
1982 Agreement because UMG is not a party to that agreement, nor is it a successor-in-interest to Embassy. Rather, says UMG, Studiocanal is the admitted successor to Embassy’s rights and obligations under the 1982 Agreement and therefore the sole party responsible for the obligations owed under that contract. See Ex. 6 to SAC (“Termination Notices”) at 6 [Doc. # 33-6] (listing Studiocanal “as successor-in-interest to Embassy” and UMG “as successor-in-interest to PolyGram Records,” a party unmentioned anywhere in the operative complaint). Plaintiffs respond that they have sufficiently alleged a contractual relationship.

1. Sufficiency of the Pleadings
The SAC contains the following relevant allegations: (1) Embassy’s rights in Co-creators’ copyrights under the 1982 Agreement “changed hands,” eventually to UMG; (2) UMG is a Vivendi subsidiary, and it accordingly acquired “pertinent” TIST rights; (3) UMG, “through [its] predecessor-in-interest Embassy, entered into” the 1982 Agreement and is obligated to provide accounting services related to UMG soundtrack music rights thereunder; (4) UMG “has an obligation to report and pay [sound recording revenue streams arising from TIST] [to] [Studiocanal, which in turn has an obligation to report and pay Plaintiffs;” and (5) UMG is a “successor[ ]-in-interest to Embassy’s rights” under the 1982 Agreement. SAC ¶¶ 9, 21, 32 49, 51, 53, 72, 113. 6 Although the SAC clearly pleads that UMG is a successor or assignee of Embassy’s rights and obligations, it does not necessarily follow that UMG will be liable under the 1982 Agreement.

*5 In California, the “general rule” of successor liability is that a corporation purchasing the principal assets of another corporation ... does not assume the seller’s liabilities unless (1) there is an express or implied agreement of assumption, (2) the transaction amounts to a consolidation or merger of the two corporations, (3) the purchasing corporation is a mere continuation of the seller, or (4) the transfer of assets to the purchaser is for the fraudulent purpose of escaping liability for the seller’s debts.

Daniels v. Select Portfolio Serv., Inc., 246 Cal. App. 4th 1150, 1170 (2016) (alteration in original) (quoting Ray v. Alad Corp., 19 Cal. 3d 22, 28 (1977) ). Similarly, the “general rule” for assignee liability under California law is that “the mere assignment of rights under an executory contract does not cast upon the assignee the obligations imposed by the contract upon the assignor.” Id. (quoting Enter. Leasing Corp. v. Shugart Corp., 231 Cal. App. 3d 737, 745 (1991) ). “In order for an assignment to oblige the assignee on a contract, there must be either an express assumption of the contract or an acceptance of the benefits of the contract (from which an assumption of the burdens is presumed).” Wilson’s Heating & Air Conditioning v. Wells Fargo Bank, 202 Cal. App. 3d 1326, 1334 (1988); see also Cal. Civ. Code § 1589 (“A voluntary acceptance of the benefit of a transaction is equivalent to a consent to all the obligations arising from it, so far as the facts are known, or ought to be known, to the person accepting.”).

Thus, absent these well-delineated exceptions, UMG, as a successor-in-interest to Embassy or assignee of Embassy’s rights and obligations, is not liable under the 1982 Agreement. As explained below, Plaintiffs have not sufficiently alleged any of these exceptions.

The SAC nowhere alleges the existence of an express or implied agreement involving UMG that gives rise to UMG’s assumption of Embassy’s obligations, under either a successor or an assignee theory. Instead, Plaintiffs allege in a conclusory fashion that UMG has assumed such rights and obligations. See Gerritsen v. Warner Bros Entm’t Inc. (“Gerritsen II”), 116 F. Supp. 3d 1104, 1127 (C.D. Cal. 2015) (plaintiff “must not only plead the existence of an assumption of liability but either the terms of that assumption of liability (if express) or the factual circumstances giving rise to an assumption of liability (if implied)” to establish successor liability under an assumption theory (quoting No Cost Conference, Inc. v. Windstream Commc’ns, Inc., 940 F. Supp. 2d 1285, 1300 (S.D. Cal. 2013) ) ). Nor do Plaintiffs allege any mergers, effective or actual, or any fraudulent asset transfers with respect to UMG and Embassy or any of Embassy’s successors. See SAC at ¶¶ 68, 102 (allegations of merger with respect to StudioCanal); Ex. 2 to SAC (USPTO form and other papers reference merger between “Canal + D.A.” and “Studiocanal Image”).
The SAC also lacks any allegations that UMG, as successor-in-interest, is a “mere continuation” of Embassy. See Gerritsen II, 116 F. Supp. 3d at 1133 (“[T]o prevail on a ‘mere continuation’ theory, plaintiff [must] demonstrate [that] ‘(1) no adequate consideration was given for the predecessor corporation’s assets and made available for meeting the claims of its unsecured creditors; and [that] (2) one or more persons were officers, directors, or stockholders of both corporations.’” (quoting CenterPoint Energy, Inc. v. Superior Court, 157 Cal. App. 4th 1101, 1120 (2007) ) ). Plaintiffs allege that Vivendi and its subsidiaries, including UMG, have the same interests and have abused the corporate form, and that Vivendi “exercises direct control” over its subsidiaries, but these allegations are insufficient to bind UMG to Embassy’s 1982 Agreement obligations under a successor theory, particularly where Studiocanal—not Vivendi—is Embassy’s successor-in-interest. SAC at ¶¶ 64–66. Insofar as Plaintiffs intended to allege liability under an alter ego theory, “[c]onclusory allegations of ‘alter ego’ status are insufficient to state a claim.” Gerritsen II, 116 F. Supp. 3d at 1136. In any event, it is not clear that alter ego is a “viable theory upon which to seek relief from” UMG for the reasons stated in Gerritsen II. See id. at 1135 n.194.

*6 The SAC alleges in one paragraph that UMG “has an obligation to report and pay [Studiocanal], which in turn has an obligation to report and pay Plaintiffs,” which suggests third-party-beneficiary status. SAC at ¶ 51. Yet, “it is not enough that the third party would incidentally have benefited from performance,” and the SAC does not allege even the existence of a third-party-beneficiary contract. Spinks v. Equity Residential Briarwood Apartments, 171 Cal. App. 4th 1004, 1021 (2009); see also Cal. Civ. Code § 1559 (“A contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it.” (emphasis added) ); H.N. & Frances C. Berger Found. V. Perez, 218 Cal. App. 4th 37, 43 (2013) (“Because third party beneficiary status is a matter of contract interpretation, a person seeking to enforce a contract as a third party beneficiary ‘must plead a contract which was made expressly for his [or her] benefit and one in which it clearly appears that he [or she] was a beneficiary.’” (quoting Schauer v. Mandarin Gems of Cal, Inc., 125 Cal. App. 4th 949, 957 (2005) ) ). Although the Opposition introduces new facts in support of Plaintiffs’ claims for breach and accounting, the SAC is the operative pleading, and the allegations therein fail to give rise to either claim. See Gerritsen v. Warner Bros. Entm’t Inc. (“Gerritsen I”), 112 F. Supp. 3d 1011, 1033 n.93 (C.D. Cal. 2015) (“In deciding a motion to dismiss, courts may not ‘take into account additional facts asserted in a memorandum opposing the motion to dismiss, because such memoranda do not constitute pleadings under [Federal] Rule [of Civil Procedure] 7(a).’” (quoting In re Turbodyne Techs., Inc. Sec. Litig., No. CV 99-00697 MMM (BQRx), 2000 WL 33961193, at *10 (C.D. Cal. Mar. 15, 2000) ) ); see also Guz v. Bechtel Nat’l Inc., 24 Cal. 4th 317, 349 (2000) (“The covenant of good faith and fair dealing, implied by law in every contract, exists merely to prevent one contracting party from unfairly frustrating the other party’s right to receive the benefits of the agreement actually made. The covenant thus cannot ‘be endowed with an existence independent of its contractual underpinnings.’” (quoting Waller v. Truck Ins. Exchange, Inc., 11 Cal. 4th 1, 36 (1995) ) ); Jolley v. Chase Home Fin., LLC, 213 Cal. App. 4th 872, 910 (2013) (“A cause of action for an accounting requires a showing that a relationship exists between the plaintiff and defendant that requires an accounting ....” (quoting Teselle v. McLoughlin, 173 Cal. App. 4th 156, 179 (2009) ) ).

The Court therefore GRANTS the UMG MTD with respect to the causes of action for breach of contract, breach of the implied covenant of good faith and fair dealing, and accounting.

2. Leave to Amend
To determine whether leave to amend should be granted, the Court next considers, to the extent possible, the Opposition’s three theories of UMG’s liability under the 1982 Agreement, which are completely absent from the SAC. First, the Court addresses Plaintiffs’ argument about a merger between UMG and non-party MCA Records, Inc. (“MCA”).

a. UMG–MCA Merger
Plaintiffs point to the 1999 merger of UMG and MCA, which purportedly gave rise to UMG’s obligations under an agreement between MCA and Pairapance
Communications, Inc. (which also binds McKean, Guest, and Shearer). Opp’n at 23–24 & n.4 [Doc. # 51]; see Ex. B to Humphreys Decl. (“MCA Agreement”) [Doc. # 51-3]; Ex. C to Humphreys Decl. [Doc. # 51-4] (UMG–MCA merger documents). The MCA Agreement and subsequent UMG–MCA merger may impose upon UMG certain obligations under that contract, but such obligations (and any potential liability for breach thereof) appear independent of those resulting from the 1982 Agreement, even though the MCA Agreement concerns the Spinal Tap band. See MCA Agreement.

Despite this, the Court cannot say conclusively that leave to amend would be futile because all of the relevant facts are unknown to the Court at this time. Accordingly, the Court will grant Plaintiffs leave to file an amended pleading that alleges UMG’s obligations under the MCA Agreement insofar as those obligations are relevant to the 1982 Agreement. 7

b. UMG–Polygram Agreement

Plaintiffs next contend that an agreement between Embassy and Polygram Records (“Polygram”), UMG’s predecessor-in-interest, 8 imposes upon UMG the contractual obligation to collect and report to Embassy (now Studiocanal) the sound recording revenues associated with TIST (the “Polygram Agreement”), so that Studiocanal can comply with its accounting obligations under the 1982 Agreement. Thus, say Plaintiffs, UMG accepted benefits of the 1982 Agreement, including ownership of the TIST sound recording copyrights, and therefore is required by law to accept the obligations thereunder. Opp’n at 24; see Cal. Civ. Code § 1589.

Plaintiffs do not allege this theory anywhere in the SAC, and neither side has presented the Polygram Agreement to the Court in support of their Opposition or Reply despite their briefs’ argument over the agreement’s relevance. Thus, the Court cannot determine, for the purpose of deciding whether to grant leave to amend, whether UMG assumed any obligations under the 1982 Agreement by virtue of the Polygram Agreement. See Recorded Picture Co. v. Nelson Entm’t, Inc., 53 Cal. App. 4th 350, 362 (1997) (“[W]hether there has been an assumption of the obligations is to be determined by the intent of the parties as indicated by their acts, the subject matter of the contract or their words.” (alteration in original) (quoting Shugart, 231 Cal. App. 3d at 745)).

Additionally, it is not clear that the Polygram Agreement can support Plaintiffs’ breach claims in connection with the 1982 Agreement under an assignment theory. For section 1589 to apply and burden the assignee with the contract’s obligations, the assignee must have accepted “all the benefits of a full performance.” Id. (quoting Fruitvale Canning Co. v. Cotton, 115 Cal. App. 2d 622, 626 (1953) ). According to the Opposition, UMG (through Polygram) received ownership of only the sound recording copyrights, while, according to the SAC, Studiocanal (through Embassy) has retained ownership of the remaining copyrights associated with the film. If this is the case, UMG is not an assignee of the 1982 Agreement, and it did not accept or receive all of the 1982 Agreement’s benefits. See id. at 362–63 (where sub-distributor, under a separate contract with distributor, received only partial benefits of producer–distributor contract, sub-distributor was a licensee and not an assignee and section 1589 did not apply to burden sub-distributor with distributor’s contractual obligations); see also id. at 363 (“We decline to adopt the rule proposed by the [plaintiff] producers—that a company must comply with a contract to which it is not a party if it has accepted even a portion of the benefits of that contract through a subsequent, separate agreement with one of the original contracting parties. Such a rule would lead to absurd consequences.”).

The Court recognizes nonetheless that because the SAC does not allege the circumstances of the Polygram Agreement, such as Polygram’s knowledge of the 1982 Agreement or that agreement’s terms, amendment to pursue an assignee theory of liability may not be futile. See In re Pajaro Dunes Rental Agency, Inc., No. 97CV2516, 2001 WL 1743285, at *8 (N.D. Cal. Nov. 1, 2001), aff’d sub nom. Pajaro Dunes Rental Agency, Inc. v. Pajaro Dunes Ass’n, 73 F. App’x 953 (9th Cir. 2003) (section 1589 ‘s rule applied even though the alleged assignee, Pajaro Dunes Rental Agency, did not obtain all benefits under the original contract).

c. Third-Party Beneficiary

Finally, Plaintiffs argue in opposition that UMG is liable to Plaintiffs as third-party beneficiaries of the Polygram Agreement. As explained above, however,
Plaintiffs do not allege the existence of a third-party agreement, between UMG and Polygram or otherwise. Absent allegations about the Polygram Agreement or other facts surrounding that agreement, the Court cannot determine UMG’s potential liability under such a theory.

In light of Plaintiffs’ argument that the Polygram Agreement requires UMG to collect and report to StudioCanal the TIST sound recording revenues so that StudioCanal may provide the required accounting to Plaintiffs, amending the complaint does not appear futile. The Court therefore **GRANTS** Plaintiffs leave to amend to cure the deficiencies identified in this Order with respect to Plaintiffs’ breach and accounting claims against UMG, if possible.

**B. Cause of Action for Fraud (Against UMG and StudioCanal Defendants)**

StudioCanal and UMG seek dismissal of the cause of action for fraud in its entirety based on the economic loss rule. UMG also moves to dismiss the cause of action for fraud on two additional grounds: (1) the SAC contains no allegations that UMG made knowingly false representations or concealed material fact by UMG; and (2) there are insufficient facts for the Court to reasonably infer that StudioCanal employees acted as agents of UMG.

Because both sets of moving defendants argue that the economic loss rule applies to bar Plaintiffs’ alleged fraud claim, the Court considers this ground for dismissal first. Then, if necessary, the Court considers the sufficiency of Plaintiffs’ allegations of fraud.

**1. Economic Loss Rule**

Defendants assert that the economic loss rule bars Plaintiffs’ cause of action for fraud because the alleged claim “arises from defendants’ performance (or lack thereof) under the [1982] Agreement and nothing more,” and because “[P]laintiffs have not alleged exposure to personal injuries” or “the breach of a duty distinct from the [1982 Agreement] or a harm distinct from the damages that flow from a breach” thereof. StudioCanal MTD at 3; StudioCanal Reply at 1. Plaintiffs counter that the intentional tort and special relationship exceptions to the economic loss rule apply and that policy concerns weigh in favor of permitting the breach and tort claims to proceed simultaneously. First, the Court provides background on the economic loss rule. Then it considers the proper application of the exceptions raised by Plaintiffs. Ultimately, the Court concludes that the economic loss rule does not apply to bar, as a matter of law, Plaintiff’s cause of action for fraud.

**a. Economic Loss Rule and Its Exceptions**

“[T]he economic loss doctrine is designed to maintain a distinction between damage remedies for breach of contract and for tort.” **Giles v. Gen. Motors Acceptance Corp.,** 494 F.3d 865, 873 (9th Cir. 2007); see also **Robinson Helicopter Co. v. Dana Corp.,** 34 Cal. 4th 979, 988 (2004) (economic loss rule “prevents the law of contract and the law of tort from dissolving one into the other”). Under the rule, “[a] person may not ordinarily recover in tort for the breach of duties that merely restate contractual obligations. Instead, ‘[c]ourts will generally enforce the breach of a contractual promise through contract law, except when the actions that constitute the breach violate a social policy that merits the imposition of tort remedies.’” **Aas v. Superior Court, 24 Cal. 4th 627, 643 (2000)** (second alteration in original) (quoting **Erlich v. Menezes, 21 Cal. 4th 543, 552 (1999)** ), superseded by statute on other grounds as stated in **McMillin Albany LLC v. Superior Court, 4 Cal. 5th 241 (2018).**

*9 As many courts have observed, “the economic loss rule is easy to state, [but] the rule’s application and exceptions are more conceptually difficult,” particularly “[w]hen applied in cases outside the product liability context.” **Giles, 494 F.3d at 874,** **United Guar. Mortg. Indem. Co. v. Countrywide Fin. Corp.,** 660 F. Supp. 2d 1163, 1180 (C.D. Cal. 2009). Outside of the product liability context, “California’s economic loss rule has a ... category of exceptions for breach of a noncontractual duty” that “require the breach of a tort duty apart from the duty not to act negligently.” **United Guaranty, 660 F. Supp. 2d at 1181; see also Applied Equipment Corp. v. Litton Saudi Arabai Ltd., 7 Cal. 4th 503, 515 (1994)** (“The law imposes the obligation that ‘every person is bound without contract to abstain from injuring the person or property of another, or infringing upon any of his rights.’ This duty is independent of the contract.” (quoting **Cal. Civ. Code § 1708; Jones v. Kelly, 208 Cal. 21, 255 (1929)**) ). The economic loss rule exceptions arise, as relevant here, where the alleged misconduct “breaches a duty imposed by some types of ‘special’ or ‘confidential’ relationships”
or “breaches a ‘duty’ not to commit certain intentional torts.” United Guaranty, 660 F. Supp. 2d at 1181.

In addition to the independent duty requirement, the economic loss rule “requires a purchaser to recover in contract for purely economic loss due to disappointed expectations, unless he can demonstrate harm above and beyond a broken contractual promise.” Robinson Helicopter, 34 Cal. 4th at 988; see also Giles, 494 F.3d at 876–77 (“Where [tort claims beyond negligence and strict liability] have been barred, they have usually amounted to nothing more than a failure to perform a promise contained in a contract. In such cases, the plaintiff has been held to be entitled only to ordinary contract damages. For example, if the tort alleged is intentional or fraudulent misrepresentation by a seller to a buyer, but the misrepresentation only goes to the quality or quantity of the goods promised in the contract, some courts limit the buyer to contract remedies[.]” (collecting cases)).

The foreseeability of the alleged harm and the parties’ reasonable contractual expectations are essential to that inquiry. See Erlich, 21 Cal. 4th at 550 (“Contract damages are generally limited to those within the contemplation of the parties when the contract was entered into or at least reasonably foreseeable by them at that time. . . . In contrast, tort damages are awarded to [fully] compensate the victim for [all] injury suffered.”) (emphasis added) (second and third alterations in original) (quoting Applied Equipment, 7 Cal. 4th at 515, 516). As the California Supreme Court explained most recently in Robinson Helicopter,

A breach of contract remedy assumes that the parties to a contract can negotiate the risk of loss occasioned by a breach. “ [W]hen two parties make a contract, they agree upon the rules and regulations which will govern their relationship; the risks inherent in the agreement and the likelihood of its breach. The parties to the contract in essence create a mini-universe for themselves, in which each voluntarily chooses his contracting partner, each trusts the other’s willingness to keep his word and honor his commitments, and in which they define their respective obligations, rewards and risks. Under such a scenario, it is appropriate to enforce only such obligations as each party voluntarily assumed, and to give him only such benefits as he expected to receive; this is the function of contract law.’ ” However, “[a] party to a contract cannot rationally calculate the possibility that the other party will deliberately misrepresent terms critical to that contract.” No rational party would enter into a contract anticipating that they are or will be lied to.

34 Cal. 4th at 992–93 (quoting Applied Equipment, 7 Cal.4th at 517; Tourek et al., Bucking the “Trend”: The Uniform Commercial Code, the Economic Loss Doctrine, and Common Law Causes of Action for Fraud and Misrepresentation, 84 Iowa L.Rev. 875, 894 (1999)).

*10 Accordingly, while the Court must take care not to “open the door to tort claims in virtually every case in which a party promised to make payments under a contract but failed to do so,” the Court also must consider whether the “damages the plaintiff seeks are” in fact “the same economic losses arising from the alleged breach of contract.” Foster Poulty Farms v. Alkar-Rapidpakk-MP Equipment, Inc., 868 F. Supp. 2d 983, 991–92 (E.D. Cal. 2012) (quoting Multifamily Captive Grp., LLC v. Assurance Risk Managers, Inc., 629 F. Supp. 2d 1135, 1146 (E.D. Cal. 2009)); see also Robinson Helicopter, 34 Cal. 4th at 993 (noting that the higher pleading standard for fraud helps guard against “open[ing] the floodgates” to tort litigation based on contractual breach).

The Court turns next to the exceptions advanced by Plaintiffs to determine whether the economic loss rule should apply to bar the cause of action for fraud.

b. Application of the Intentional Tort Exception

First, the Court considers the intentional tort exception. In Erlich v. Menezes, the California Supreme Court explained as follows:

[O]utside the insurance context, “a tortious breach of contract . . . may be found when (1) the breach is accompanied by a traditional common law tort, such as fraud or conversion; (2) the means used to breach the contract are tortious, involving deceit or undue coercion; or (3) one party intentionally breaches the contract intending or knowing that such a breach will cause severe, unmitigable harm in the form of mental anguish, personal hardship, or substantial consequential damages.”

21 Cal. 4th at 553–54 (second alteration in original) (quoting Freeman & Mills, Inc. v. Belcher Oil Co., 11 Cal. 4th 85, 105 (1995)); see also Robinson Helicopter, 34 Cal. 4th at 991 n.7 (“The economic loss rule is designed
to limit liability in commercial activities that *negligently or inadvertently* go awry, not to reward malefactors who affirmatively misrepresent ....” (emphasis added); *Harris v. Atlantic Richfield Co.*, 14 Cal. App. 4th 70, 78 (1993) (“When one party commits a fraud during the contract formation or performance, the injured party may recover in contract and tort.”).

In *Erlich*, the Court disallowed the recovery of tort damages for defendant’s negligent breach of contract—the contractor defendant’s “ineptitude” resulted in substantial water damage to the “dreamhouse” he built for plaintiffs—because a “negligent breach of a contract ... is not sufficient to support tortious damages for violation of an independent tort duty.” *Erlich*, 21 Cal. 4th at 548, 553, 554. In reaching that conclusion, the Court made clear, however, that a tort claim may proceed alongside a breach claim. See id. at 551 (“[T]he same wrongful act may constitute both a breach of contract and an invasion of an interest protected by the law of torts.” (quoting *N. Am. Chem. Co.*, 59 Cal. App. 4th at 774)); 553 (“Focusing on intentional conduct gives substance to the proposition that a breach of contract is tortious only when some independent duty arising from tort law is violated.”).

Following *Erlich*, the California Supreme Court in *Robinson Helicopter* declined to apply the economic loss rule where the defendant’s alleged fraud was separate from its breach, even though both arose in the context of a contractual arrangement. Although the *Robinson Helicopter* holding was narrow and limited, in part, to circumstances not at issue in this case, the decision provides a helpful articulation of the distinction between breach of contract and breach of an independent, noncontractual duty. Its explanation of the contours of the economic loss rule and its exceptions, like *Erlich*’s before it, therefore offers guidance for the doctrine’s application in this case.

*11* Here, Plaintiffs base many of the fraud allegations on conduct that goes above and beyond the 1982 Agreement’s obligations even though the events giving rise to the cause of action occurred in the context of the alleged contractual relationship between the parties. See id. at 989 (“[A] party’s contractual obligation may create a legal duty and ... a breach of that duty may support a tort action.” (citing *Erlich*, 21 Cal. 4th at 551)). For example, Defendants allegedly breached the 1982 Agreement by failing to provide the required accounting statements and to remit all royalties owed, but they also allegedly engaged in separate nefarious accounting practices to conceal and underreport (and therefore underpay) TIST profits, such as bundling unsuccessful films and music rights with TIST in the Embassy catalogue, misrepresenting and manufacturing false expense deductions, self-dealing between subsidiaries, and lying about the recovery of a $1.6 million settlement. SAC at ¶ 86; see also id. at ¶¶ 49–54 (describing improper bundling and accounting practices with examples).

This alleged misconduct amounts to more than mere false assurances that Defendants were complying with the 1982 Agreement. See, e.g., *Antonick v. Elec. Arts Inc.*, No. C 11-1543 CRB, 2014 WL 245018, at *14 (N.D. Cal. Jan. 22, 2014) (breach of agreement accompanied by representations that defendant is not in breach does not amount to actionable tort under economic loss rule); *Multifamily*, 629 F. Supp. 2d at 1146 (same). Rather, Defendants allegedly “sought to frustrate [Plaintiffs’] enjoyment of contracted-for benefits” and then made additional misrepresentations about those efforts. *Erlich*, 21 Cal. 4th at 553. Such conduct is distinct from the efficient breach that the economic loss rule seeks to protect. See *Freeman & Mills*, 11 Cal. 4th at 106, 109 (“The efficient breach of contract occurs when the gain to the breaching party exceeds the loss to the party suffering the breach, allowing the movement of resources to their more optimal use. ... Breaches accompanied by deception or infliction of intentional harm may be so disruptive of commerce and so reprehensible in themselves that the value of deterring such actions through the tort system outweighs the marginal loss in the predictability of damages that may result.”).

Moreover, the alleged extra-contractual conduct imposed additional costs on Plaintiffs not reasonably within the parties’ contemplation during contract formation, such as out-of-pocket expenses to discover Defendants’ wrongful conduct and an over-$14,000 outstanding balance allegedly owed to Defendants due to the manufactured expense deductions. SAC at ¶¶ 22, 50, 52, 92; See *Robinson Helicopter*, 34 Cal. 4th at 992–93 (fraud lies outside contracting parties’ reasonably anticipated losses from breach); *Erlich*, 21 Cal. 4th at 550 (limitations of contract damages). Accordingly, Plaintiffs have stated a claim “by which [they] suffered damage independent from the nonpayment of royalties” under the 1982 Agreement.
Defendants contend that *Alexsam Inc. v. Green Dot Corp.* urges the economic loss rule’s application in this case. The Court disagrees. In *Alexsam*, the plaintiff brought suit against defendants in connection with their alleged breach of a settlement agreement involving a patent dispute. No. 2:15-cv-5742-CAS (PLAx), 2017 WL 2468769, at *2 (C.D. Cal. June 5, 2017). Plaintiff argued that defendants failed to pay royalties under the settlement agreement and falsely represented their belief that they did not owe such royalties. *Id.* at *2–3. The *Alexsam* plaintiff raised causes of action for breach of contract, accounting, and intentional misrepresentation. *Id.* at *1.

Defendants’ reliance on *Alexsam* is misplaced. Notably, the District Court asserted that, according to *Robinson Helicopter*, the economic loss rule “applies ‘even when the breach is accomplished in a fraudulent manner.’” *Alexsam*, 2017 WL 2468769, at *4 (quoting *Robinson Helicopter*, 34 Cal. 4th at 995). Yet, that language appears in the *Robinson Helicopter* decision’s dissent, where Justice Werdegar stated,

>*12 Until today, we have rejected the notion that [a bad faith breach of contract, a breach of contract by fraudulent means, or a bad faith denial of breach] could give rise to punitive damages.... The law eschews inquiry into a breaching party’s motives; whether acting in good faith or bad faith, a party that breaches a commercial contract must pay only contract damages.... even when the breach is accomplished in a fraudulent manner.

34 Cal. 4th at 995 (Werdegar, J., dissenting) (emphasis added) (citations omitted).

More importantly, the *Alexsam* complaint suffered additional deficiencies not present here. For example, the plaintiff failed to allege how defendants’ supposed fraudulent conduct caused the purported injuries. *Alexsam*, 2017 WL 2468769, at *5. Additionally, the operative pleading and exhibits contained readily distinguishable allegations. In *Alexsam*, defendants represented that it “did not believe it owed any royalties because its products were not covered by the [relevant] patents,” requested that plaintiff provide a “more specific” explanation of why defendants’ use of the product was “relevant to the question of royalties,” and offered to consider plaintiff’s position “in good faith” but otherwise did not “see a basis to believe that royalties are owed.” *Id.* at *2–3 (quoting the record). From these statements, the District Court concluded that “[defendants’] contention that it owed no royalties under the [settlement agreement] was always implicit in its decision not to pay royalties,” and “[t]hat [plaintiff] elicited affirmative representations about royalties did not convert [its] breach of contract claim into a claim for fraud.” *Id.* at *6.

The SAC paints a very different story in this case, as explained above. Taking those allegations as true, as this Court must at the motion-to-dismiss stage, Plaintiffs have alleged Defendants’ breach of a duty not arising from contract, and resulting harm distinct from breach. Thus, the economic loss rule does not apply to bar, wholesale, Plaintiffs’ cause of action for fraud because of the intentional tort exception. *See, e.g., Herring Networks, Inc. v. AT&T Servs., Inc.*, No. 2:16-cv-01636-CAS-AGR, 2016 WL 4055636, at *14 (C.D. Cal. July 25 2016) (declining to apply economic loss rule where defendants allegedly took affirmative steps to reduce benefits owed to plaintiff under the agreement); *Bentham v. Bingham Law Group*, No. 13cv1424-MMA (WVGx), 2013 WL 12186171, at *11–12 (S.D. Cal. Nov. 15, 2013) (declining to apply economic loss rule where defendant allegedly breached agreement by tortious means, including the use of deceit, fraud, and conversion).

*13 The Court therefore DENIES the Studiocanal MTD under the economic loss rule.

2. Sufficiency of the SAC’s Allegations (as Against UMG)

UMG argues independently that the SAC fails to allege it made fraudulent statements directly to Plaintiffs, and that the pleading lacks the requisite particularity with respect to the fraud claim.

The elements for a fraud claim are (1) false representation, (2) knowledge of its falsity, (3) intent to defraud, (4) justifiable reliance, and (5) damages. *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1105 (9th Cir. 2003). To satisfy...
Rule 9(b)’s particularity standard, a plaintiff must allege particular facts explaining the circumstances of the fraud, such as “the who, what, when, where, and how” of the alleged misconduct. Id. at 1106.

Although Rule 9(b) carries a heightened pleading standard, such standard “is not an invitation to disregard[] Rule 8’s requirement of simplicity, directness, and clarity,” and among the Rule’s purposes [is] the avoidance of unnecessary discovery.” McHenry v. Remne, 84 F.3d 1172, 1178 (9th Cir. 1996). Moreover, the particularity requirement is meant to “ensure[ ] that allegations of fraud are specific enough to give defendants notice of the particular misconduct which is alleged to constitute the fraud charged so that they can defend against the charge and not just deny that they have done anything wrong” and to “prevent[] the filing of a complaint as a pretext for the discovery of unknown wrongs.” Semegen v. Wediner, 780 F.2d 727, 731 (9th Cir. 1985).

The SAC pleads sufficient facts about the alleged fraud to put UMG on notice of its alleged misconduct. Plaintiffs contend that UMG, in performing its alleged reporting obligations in connection with the TIST sound recording rights from 1989 to 2016, engaged in anti-competitive and deceptive behavior by “willfully conceal[ing]” revenues and “manipulate[ing] years of accountings to retain monies due and owing to Plaintiffs.” SAC at ¶¶ 51, 53, 54. Examples of the alleged fraudulent accounting practices include the improper “bundling” and “cross-collateralization” of TIST with unsuccessful films to hide profits stemming from pertinent TIST rights. See id. at ¶¶ 49–54. According to Plaintiffs, such practices resulted in UMG reporting and paying to Studiocanal “a mere $98 ... in gross receipts from music sales” over the 27-year period, despite TIST’s widespread acclaim and cultural significance that has extended past the early 2000s. Id. at ¶ 54; see id. at ¶¶ 40–41, 51. These allegations provide a factual basis for the plausibility of Plaintiffs’ cause of action for fraud.

In turn, Studiocanal allegedly provided to Plaintiffs profit participation statements that reflected the fabricated reduced earnings conveyed by UMG, and paid them less in royalties than actually owed. See id. at ¶¶ 50–51, 87–91. Defendants’ possessed exclusive knowledge of the revenues collected—UMG with respect to the TIST soundtrack rights—so Plaintiffs relied on the statements and Defendants’ representations regarding their accuracy, and refrained from investigating the accounting until 2013 and from shifting control over the assets away from Defendants. Id. at ¶¶ 51–53, 87, 91; see also, e.g., OCM Principal Opportunities Fund v. CIBC World Markets Corp., 157 Cal. App. 4th 3d 835, 864 (2007) (reliance is justifiable when “circumstances were such to make it reasonable for [the] plaintiff to accept [the] defendant’s statements without an independent inquiry or investigation,” and such reasonableness “is judged by reference to the plaintiff’s knowledge and experience” (alterations in original) (quoting Wilhelm v. Pray, Price, Williams & Russell, 186 Cal. App. 3d 1324, 1332 (1986) )). As a result, Plaintiffs have received less in royalties than they deserve, and Plaintiffs have incurred additional out of pocket costs as discussed above. See SAC at ¶¶ 91–92.

*14 Because UMG allegedly underreported and underpaid music-related earnings to Studiocanal, and Studiocanal allegedly underreported and underpaid all TIST earnings to Plaintiffs, it is not clear whether the allegations of improper expense deductions and undocumented charges are aimed at the Studiocanal Defendants (and their agents or representatives) as well as, or instead of, UMG. See, e.g., id. at ¶ 51, 54; see also id. at ¶ 21 (using “Vivendi” to refer to Vivendi, Studiocanal, and UMG collectively). Given Plaintiffs’ allegations that Vivendi’s subsidiaries, including UMG, worked together to hide profits and manipulate revenue, and that Defendants have exclusive knowledge over the accounting process, it is plausible that Plaintiffs would not know all minute details of the alleged fraud. E.g., id. at ¶ 51, 87; see also United States v. United Healthcare Ins. Co., 848 F.3d 1161, 1184 (9th Cir. 2016) (“There is no flaw in a pleading ... where collective allegations are used to describe the actions of multiple defendants who are alleged to have engaged in precisely the same conduct.”). The Court therefore will not dismiss the fraud allegations for lack of specificity due to minor ambiguities in the pleading. Plaintiffs have sufficiently alleged a fraudulent scheme that involves UMG, and which sufficiently puts Defendants on notice of the import of the allegations against them.

Additionally, it is of no moment that Plaintiffs do not allege direct misrepresentations between UMG and Plaintiffs. California law recognizes as actionable “indirect misrepresentation,” by which an alleged tortfeasor makes a misrepresentation to an intermediary
who, in turn, conveys the information to the injured party. E.g., Mirkin v. Wasserman, 5 Cal. 4th 1082, 1095–96 (1993) (discussing the principle and collecting cases); Lovejoy v. AT&T Corp., 92 Cal. App. 4th 85, 94 (2001) (same). The plaintiff must, in turn, “act[ ] in justifiable reliance upon” the misrepresentation. Mirkin, 5 Cal. 4th at 1096 (quoting Restatement (Second) of Torts § 533). Here, Plaintiffs have alleged both UMG’s misrepresentation conveyed to them through an intermediary and their justifiable reliance on the communication. See SAC at ¶¶ 51, 91.

Yet, to maintain a fraud claim under an indirect misrepresentation theory, the plaintiff must also allege that the defendant “intend[ed] or [had] reason to expect that [the misrepresentation] w[ould] be ‘repeated and acted upon by the plaintiff.’ ” Lovejoy, 92 Cal. App. 4th at 94 (quoting Geernaert v. Mitchell, 31 Cal. App. 4th 601, 605 (1995) ). The SAC states that UMG has an obligation to report to and pay Studiocanal, which in turn reports to and pays Plaintiffs. SAC at ¶ 51. The pleading does not allege, however, UMG’s knowledge—actual or implied—or reasonable expectation that Studiocanal would convey UMG’s report to Plaintiffs, as discussed in Section III.A, supra, in the breach and accounting discussion.

The Court therefore GRANTS the UMG MTD in connection with the fraud claim. Because the UMG MTD moving papers discuss at length UMG’s potential knowledge of Studiocanal’s reporting obligations to Plaintiffs, the Court also GRANTS Plaintiffs leave to amend this deficiency, if possible.

C. Ripeness of Copyright Reversion Claim
Under section 203 of the Copyright Act, an author of any work, other than a work for hire, may terminate the exclusive or nonexclusive grant of a transfer or license of copyright or any right thereunder. See 17 U.S.C. § 203(a).

Under the facts presented in this case, the termination notices, if valid, will be effective beginning March 2, 2019. SAC at ¶ 114; see 17 U.S.C. § 203(a)(3), (a)(4)(A). Upon the effective date, all rights revert to the authors, but future rights vest as of the date that the termination notices were served. See 17 U.S.C. § 203(b)(2).

UMG argues that Plaintiffs’ claim for declaratory relief concerning copyright reversion is not ripe for adjudication. UMG advances two reasons: first, UMG “has not taken a position in this litigation or elsewhere concerning its sound recording copyrights,” whereas Studiocanal has threatened challenges to Plaintiffs’ termination rights in connection with the TIST movie and music composition rights; and second, the effective date of the termination notices is no earlier than March 2019. UMG MTD at 22–24.

*15 To determine whether there is a ripe controversy within this Court’s jurisdiction, the Court must decide “whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.” Mintz v. Mark Bartelstein & Assocs. Inc., 906 F. Supp. 2d 1017, 1027–28 (C.D. Cal. 2012). Plaintiffs carry the burden of establishing the existence of an actual controversy. Id. at 1028. They contend “[t]he notion that UMG will take a position different from its corporate parent [with respect to the termination notices’ validity] defies credulity,” and they urge the Court to decide the validity of the notices for judicial economy reasons due to Studiocanal’s open challenge to Plaintiffs’ termination rights. Opp’n at 28–29 (citing Ray Charles Found. v. Robinson, 795 F.3d 1109, 1117 (9th Cir. 2015) ). The Court concludes that the controversy is ripe.

UMG relies on Mintz v. Mark Bartelstein & Associates, but that case does not support UMG’s position that there is no actual controversy to adjudicate. Notably, Mintz did not involve a ripeness question with respect to copyright termination notices. Moreover, the facts are otherwise distinguishable. There, the plaintiff sought a declaratory judgment invalidating two provisions in his employment contract with Defendant: (1) a two-year non-compete clause; and (2) a requirement of 14 days’ written notice of termination. Mintz, 906 F. Supp. 2d at 1027.

The District Court found that plaintiff lacked standing to seek declaratory relief in connection with both provisions. Id. at 1027–28. With respect to the non-compete clause, the defendant’s unequivocal concession that it did not want, and would not attempt, to enforce the provision at any point “now or in the future” precluded plaintiff from demonstrating the existence of a controversy with “sufficient immediacy and reality” to warrant a declaratory judgment. Id. at 1028. As for the notice provision, the Court found that the plaintiff “misconstrued” defendant’s position in its motion papers.
to “conjure an actual controversy,” and that the parties’
positions “[were] not in fact opposed.” Id. Such a
manufactured controversy did not satisfy the plaintiff’s
burden to show an actual controversy.

In this case, UMG has not taken a stance similar to
that of the defendant in Mintz. UMG has not conceded
that Plaintiffs’ termination notices are valid, nor has it
made clear to either Plaintiffs or this Court that it has
“no intention now or in the future” of challenging the
termination notices. Rather, UMG asserts that it has
yet to take a position on the validity of the termination
notices. Such an evasive stance is insufficient for the
Court to find a lack of actual controversy with sufficient
immediacy and reality to warrant the issuance of a
declaratory judgment.

Moreover, the actual controversy between Plaintiffs
and Studiocanal supports the request for declaratory
judgment as to the termination notices served on UMG.
Plaintiffs rely on royalties from the TIST copyright grants,
which Defendants have failed to exploit in Plaintiffs’
best interests. As a result, Plaintiffs suffer from reduced
royalties. Plaintiffs seek to terminate the grants, and
the terminations, if valid, would allow Plaintiffs to
shift control of the copyrights away from Defendants,
redressing that injury. According to the SAC, Studiocanal
challenges the termination notices on the ground that
the TIST related works are works for hire not subject
to termination, which Plaintiffs heavily dispute, and
Studiocanal contends that the termination notices have
placed a cloud over Studiocanal’s interests in the works.
SAC at ¶¶ 3–4, 115–16. A determination of the nature
of Plaintiffs’ authorship does not require this Court “to
engage in abstract inquiries about speculative injuries.”
See, e.g., Ray Charles Found. v. Robinson, 795 F.3d 1109,
1117 (9th Cir. 2015).

Here, there is a ripe controversy over the validity of
Plaintiffs’ termination notices. See Wolfson v. Bramer,
616 F.3d 1045, 1057 (9th Cir.2010) (“The ripeness doctrine
is peculiarly a question of timing, designed to separate
matters that are premature for review because the injury
is speculative and may never occur from those cases that
are appropriate for federal court action.”). The Court thus
DENIES the UMG MTD’s ripeness challenge.

IV.

CONCLUSION

In light of the foregoing, Defendants’ MTD is GRANTED
in part with leave to amend and DENIED in part consistent
with this Order. Plaintiffs shall file an amended complaint
that cures the specific deficiencies as to Defendant
UMG discussed in this Order, or inform the Court and
Defendants that they do not intend to amend, within 21
days from the date of this Order. Defendants shall file
their response within 21 days after the filing and service of
the amended complaint or notification that no amended
complaint will be filed.

IT IS SO ORDERED.

All Citations

Slip Copy, 2018 WL 4191340

Footnotes

1. The UMG parties are newly joined defendants who were not parties to the action until the SAC’s filing. Although, like
Plaintiffs, they are alleged California citizens and would therefore defeat diversity jurisdiction, this Court has subject


The Court’s citations to the parties’ moving papers refers to the page numbers assigned by the CM/ECF docketing system, not those assigned by the parties.

The Court accepts all factual allegations in the FAC as true solely to decide the motions to dismiss, except where they contradict documents properly subject to the Court’s consideration. For example, the Court also considers, under the incorporation by reference doctrine, the agreement underlying this action, which the SAC expressly references and upon which it relies. See Knievel v. ESPN, 393 F.3d 1068, 1076 (9th Cir. 2005).

As explained in the September 28, 2017 Order granting in part and denying in part Vivendi’s, Studio canal’s, and Halpem’s motion to dismiss Plaintiffs’ first amended complaint (“MTD Order”), loan-out companies are legally fictitious entities “employed for the financial benefit of successful artists and entertainers ... [that are] typically wholly owned by an artist.” MTD Order at 1 n.2 [Doc. # 32] (quoting Bozzio v. EMI Grp., Ltd., 811 F.3d 1144, 1147 (9th Cir. 2016) ). Their “sole function” is “to ‘loan out’ the services of the artist-owner to producers and other potential employers” while offering “limited personal liability and beneficial tax treatment.” Id. (quoting Bozzio, 811 F.3d at 1147).

Because Exhibit A spans four docket entries [Doc. ## 24-2–24-5], the Court’s citations to this exhibit reference the pagination assigned by Studio canal Defendants, rather than the PDF pagination assigned by CM/ECF.

UMG also argues that the SAC’s allegations directly contradict Plaintiffs’ contention that UMG is bound by the Letter Agreement because the complaint alleges that “Vivendi,” not UMG, “is Embassy’s successor-in-interest.” UMG MTD at 14 (quoting SAC at ¶ 48). Plaintiffs define the term “Vivendi,” however, to include “Vivendi and its subsidiaries, including ... [UMG].” SAC at ¶ 21.

Although the Court will grant leave to amend in connection with this theory, the Court cautions Plaintiffs to exercise care. It is not clear that any cause of action for breach brought by Plaintiffs against UMG in connection with the MCA Agreement should be heard in this Court given Plaintiffs’ and UMG’s California citizenship, the state law nature of the claim, and the apparently distinct facts that give rise to the copyright reversion claim versus breach of the MCA Agreement. See 28 U.S.C. § 1367(a) (supplemental jurisdiction appropriate where the state and federal claims “form part of the same case or controversy”); United Mine Workers of Am. V. Gibbs, 383 U.S. 715, 725 (1966) (“The state and federal claims must derive from a common nucleus of operative fact.”); Brady v. Brown, 51 F.3d 810, 816 (9th Cir. 1995) (same).

Neither side explains how UMG is the successor-in-interest to Polygram, but both sides seem to agree on this fact. See, e.g., UMG MTD at 10; Opp’n at 23–24; UMG Reply at 5.

First, after explaining the economic loss rule and its application to the facts at bar, the Court announced its holding. See Robinson Helicopter, 34 Cal. 4th at 991 (“We hold the economic loss rule does not bar [plaintiff’s] fraud and intentional misrepresentation claims because they were independent of [defendant’s] breach of contract.”) (citing Erlich, 21 Cal. 4th at 552–54 ). Then, after discussing the policy implications of the decision, the Court qualified its holding. Id. at 993 (“Our holding today is narrow in scope and limited to a defendant’s affirmative misrepresentations on which a plaintiff relies and which expose a plaintiff to liability for personal damages independent of the plaintiff’s economic loss.”). Several courts have opined that the decision may not be applicable outside of the products liability or contracts-for-goods context. See, e.g., JMP Sec. LLP v. Altair NAnotechs. Inc., 880 F. Supp. 2d 1029, 1043 (N.D. Cal. 2012); United Guaranty, 660 F. Supp. 2d at 1183. As made clear in this Order, the Court does not premise the instant decision not to apply the economic loss rule on Robinson Helicopter alone.

UMG joins in Studio canal’s motion, and thus urges dismissal based on the economic loss rule, despite UMG’s contention that it is neither a party to nor bound by the 1982 Agreement. Plaintiffs oppose application of the economic loss doctrine in part based on the special relationship exception, which is not the case. See, e.g., Body Jewelz, Inc. v. Valley Forge Ins. Co., 241 F. Supp. 3d 1084, 1092–93 (C.D. Cal. 2017) (exception applies when parties are not in contractual privity). Studio canal’s arguments against the special relationship exception’s operation here mostly advance this proposition. Moreover, the Studio canal MTD papers do not argue the exception’s operation as to UMG, and absent briefing on the subject from UMG, the Court will not address the exception. Notably, because of the intentional tort exception, the Court need not consider the alternative exception Plaintiffs advance to avoid application of the economic loss rule at this time.
My Big Mouth: When Do Legal Communications Result in Liability?

By Neville L. Johnson and Douglas L. Johnson

Introduction

Much of an attorney’s job is communication. Attorneys may talk to the press about a case they are working on, write letters to other parties, or draft memoranda for the courts. If a lawyer is not careful, these statements could subject him or her to civil liability or judicial sanctions, “litigation privilege” notwithstanding. This article explores potential liability for attorney communications under both California and New York law.

I. California Law

Flatley v. Mauro

In Flatley v. Mauro, 39 Cal. 4th 299 (2006) (“Flatley”), an attorney sent a demand letter on behalf of a client to a famed dancer, accusing him of rape. Flatley, 39 Cal. 4th at 308. The letter warned that if a monetary settlement was not urged, the rape allegations would be revealed in court (and therefore to the media), and various other matters would thereby be “exposed.” Id. at 309. The letter threatened outsized punitive damages, made abundant use of bold and capitalized fonts, and imposed a non-negotiable timeline of 28 days to reach a settlement. Id. at 308-09. The attorney thereafter badgered the dancer’s counsel with numerous phone calls, threatening to “go public” with the story and “ruin” the dancer unless he agreed to pay the client and his attorney “seven figures.” Id. at 311.

Instead, the dancer, represented by attorney Bertram Fields, filed a civil extortion suit against the attorney, who responded by bringing a motion to strike the complaint under California’s anti-SLAPP statute (Code Civ. Proc. Section 425.16), arguing that the dancer was attempting to hold him liable for constitutionally protected speech (i.e., settlement negotiations made in contemplation of litigation). The California Supreme Court denied the anti-SLAPP motion on the basis that the attorney’s letter constituted criminal extortion as a matter of law. Id. at 311. The threats to “go public” with the accusations were coupled with an immediate demand for a seven-figure sum, and were further compounded by the insinuation that the dancer could be reported to tax and immigration authorities for conduct entirely unrelated to the client’s claims. Id. at 330.

Before the case was completed, the attorney resigned as a member of the Illinois Bar.

Malin v. Singer

In Malin v. Singer, 217 Cal. App. 4th 1283 (2013) (“Malin”), attorney Martin Singer sent a letter to a restaurant and nightclub owner demanding the return of allegedly embezzled funds to the owner’s business partner. The attorney threatened to file a lawsuit alleging not just embezzlement, but use of the funds to “arrange sexual liaisons with older men such as ‘Uncle Jerry’, Judge ----, a/ka ‘Dad’…, and many others.” Malin, 217 Cal. App. 4th at 1289. The case initially played out much like Flatley – the owner sued for civil extortion, the attorney filed an anti-SLAPP motion in response, and the trial court found the letter to be criminal extortion as a matter of law. Id. at 1291. On appeal, however, the court distinguished the two cases on the grounds that "Singer’s demand letter did not expressly threaten to disclose Malin’s alleged wrongdoings to a prosecuting agency or the public at large." Id. at 1298. The salacious details about the arranged sexual liaisons was held not to be extortionate because the activity was “inextricably tied” to the embezzlement complained of by the business partner. Id. at 1299.
Though the attorney in *Malin* evaded liability and was awarded $323,689 in attorney’s fees following his successful anti-SLAPP motion, the distinctions drawn by the Court of Appeal demonstrate that demand letters require a careful threading of the needle in order to remain on the right side of zealous advocacy. Not only can excessive demands expose the drafting party to liability, being named in a suit over such demands likely creates a potential or actual conflict of interest between the lawyer and their client, which could require the lawyer to withdraw from representation.

**Mendoza v. Hamzeh**

In *Mendoza v. Hamzeh*, 215 Cal. App. 4th 799 (2013) (“*Mendoza*”), an attorney demanded that the manager of a print and copy shop repay $75,000 to the shop’s owner lest he be reported to the California Attorney General, the Los Angeles District Attorney, and the Internal Revenue Service regarding tax fraud. The court ruled the attorney’s letter to be civil extortion, as the demand of $75,000 was directly coupled with a threat to report a crime, and demanding money in exchange for silence with respect to a reportable crime cannot be transmuted to something other than extortion merely because it is accompanied by a threat of garden-variety civil litigation (here, for fraud and breach of contract). *Id.* at 805-06.

The *Mendoza* court further noted that such conduct will subject an attorney to State Bar discipline, as the Rules of Professional Conduct “specifically prohibit attorneys from ‘threaten[ing] to present criminal, administrative, or disciplinary charges to obtain an advantage in a civil dispute.’” *Mendoza*, 215 Cal. App. 4th at 805 (quoting former Rules of Prof. Conduct, rule 5-100(A)). New York similarly forbids lawyers from threatening criminal prosecution “solely to obtain an advantage in a civil matter.” New York Disciplinary Rule 7-105(a). Notably, Rule 7-105(a) has been interpreted in New York to prohibit lawyers from even mentioning an adversary’s potential criminal liability to obtain a litigation advantage. See *Heng Chan v. Sung Yue Tung Corp.*, 2007 U.S. Dist. LEXIS 33883, at *22 (S.D.N.Y. May 4, 2007) (noting that “the mere mention of potential criminal liability can constitute a threat under this provision”).

**Dickinson v. Cosby**

*Dickinson v. Cosby*, 17 Cal. App. 5th 655 (2017) (“*Dickinson*”) involved Martin Singer – the same attorney from *Malin* – sending a demand letter to a television network that planned to broadcast an interview with one of Bill Cosby’s accusers, claiming that the accuser’s story was "fabricated and is an outrageous defamatory lie," and explicitly threatening litigation if the broadcast occurred. *Dickinson*, 17 Cal. App. 5th at 662. Similar letters were sent to several other media outlets contemplating similar coverage of the matter. *Id.* The accuser responded by suing Cosby and his attorney for defamation, arguing that the letters’ assertion that the accuser made up her allegations was false and damaging to her reputation. *Id.* at 655.

Once again, the attorney brought an anti-SLAPP motion to strike the complaint as futile in the face of litigation privilege, the trial court denied the motion, and the appellate court reversed. Originally, the court held that litigation privilege did not apply to the letters because they were not written in good faith contemplation of a lawsuit, but were merely intended to intimidate media outlets that had yet to run relevant segments, and no litigation was filed when the letters’ demands were not met. *Id.* at 684. Back at the trial court, the tribunal found an independent reason for why the lawsuit could not succeed against the attorney; the plaintiff was a public figure and could not satisfy the constitutional malice standard for defamation under *New York Times v. Sullivan*, 376 U.S. 254 (1984). A near-identical result was reached in *McKee v Cosby*, 874 F.3d 54 (1st Cir. 2017), cert denied, 139 S. Ct. 675 (2019), prompting Justice

As for *Dickinson*, the parties ultimately settled with a “walkaway”: the accuser did not appeal, and the attorney waived his right to collect fees under California’s anti-SLAPP statute. Notably, Cosby did not enjoy the same level of success in escaping the lawsuit, and his appellate challenges continue. His attorney was also forced to withdraw from the action in recognition of the ethical issues raised in the discussion of *Malin, supra*.

**Rothman v. Jackson**

*Rothman v. Jackson*, 49 Cal. App 4th 1134 (1996) (“*Rothman*”) serves as a forerunner to the previously-discussed cases. A defamation suit was filed against Michael Jackson, his companies, his lawyers (Bertram Fields, Howard Weitzman, Johnny Cochran) and his notorious private investigator, Anthony Pellicano, over assertions during a press conference that his alleged molestation victims and their counsel had made false accusations in order to extort money from Jackson. The defendants argued that litigation privilege protected the statements as made in anticipation of a possible criminal prosecution against Jackson. *Rothman*, 49 Cal. App 4th at 1145. The court rejected this argument, holding that litigation privilege applies to statements that have a “functional connection” with potential litigation, not merely a connection to the subject matter of litigation. *Id.* at 1146. Here, the statements were made to members of the press, who had “no legitimate connection with any litigation that could be anticipated between” the accusers’ counsel and the defendants. *Id.* at 1156.

The court also dispensed with the notion that litigation privilege should be extended based on societal expectations of celebrity litigants’ typical public relations strategies. The court pointedly observed:

> [W]e are frankly astonished by the contention made by [Jackson attorney Bertram] Fields that celebrities and their lawyers must litigate their cases in the press because the public expects it. Fields argues that, because of such public expectations, ‘media attention becomes part of the forum of litigation . . .’ and to deny celebrity litigants protection for statements made in this ‘forum’ would contravene the policies of the litigation privilege. We expressly reject this argument.

*Id.* at 1149. Thus, *Rothman* made clear that litigation privilege has no sliding scale between public and private figures. The court’s most salient guidance came in the form of a simple, pithy maxim: “attorneys who wish to litigate their cases in the press do so at their own risk.” *Id.* at 1148.

**II. New York Law**

**Aguirre v. Best Card Agency, Inc.**

In *Aguirre v. Best Card Agency, Inc.*, 961 F. Supp. 2d 427 (E.D.N.Y. 2013) Aguirre, a Filipino immigrant, accused her H1-B visa sponsors, Best Care, of exploiting her for cheap labor under threat of withdrawing their sponsorship. *Aguirre*, 961 F. Supp. 2d at 432-44. Afraid of losing her visa, Aguirre “felt compelled to agree to [Best Care’s] proposals” regarding her assigned duties and pay, “and continued to work for them at a much lesser compensation rate than required by law.” *Id.* After years of exploitation, it was revealed that Aguirre’s sponsors were not even capable of paying her the amount stated in her work petition, leading the United States Citizenship and Immigration Services to reject her
green card application. *Id.* at 437. At this point, the Department of Homeland Security served Aguirre a Notice to Appear in Immigration Court, which signified the beginning of removal proceedings against her. *Id.* at 437-38.

At this point, Aguirre began to tell her story to the public. In an article published by the Filipino Times, Aguirre blamed Best Care for her predicament. She then sued Best Care and its proprietors, claiming in her complaint that Best Care “promised but failed to sponsor her green card application, effectively enslaving her, paying her far less than promised for long hours of work, and keeping her in ‘silence, fear and obedience through the defendants’ constant veiled threats and intimidation that she might be deported.’” *Id.* at 440-41. Another article quoted Aguirre’s attorney as saying the defendants “knew they did not have the financial capacity to sponsor Plaintiff but misrepresented their financial capacity to Plaintiff, who became a ‘one woman office staffing agency for them.’” *Id.* at 441.

The defendants countersued, alleging that quotations accusing them of “human trafficking” and fraudulent inducement were inaccurate and defamatory. *Id.* at 459. The court rejected the defendants’ claim on the grounds of litigation privilege, which “offers a shield to one who publishes libelous statements in a pleading or in open court for the purpose of protecting litigants’ zeal in furthering their causes.” *Id.* at 456. This privilege extends to out of court statements that “constitute substantially accurate descriptions and characterizations of the Complaint.” *Id.* at 459. Here, the statements the defendants cited as defamatory were either directly quoted from the complaint or made by Aguirre and her attorney that did “not suggest misconduct more serious than that alleged in the Complaint.” *Id.* at 460. Specifically, because Aguirre had sued for violation of The Victims of Trafficking and Violence Protection Act (TVPRA), statements accusing the defendants of human trafficking were privileged. *Id.* at 459.

**Officemax Inc. v. Cinotti**

In *Officemax Inc. v. Cinotti*, 966 F. Supp. 2d 74 (E.D.N.Y. 2013), an employee of Officemax, Cinotti, left for a competitor and solicited his former Officemax customers for their business in violation of a settlement agreement between Officemax and the competitor. Officemax sent both Cinotti and his new employer a letter notifying them of this breach, then sued them for breach of the duty of loyalty and violation of the Computer Fraud and Abuse Act. *Id.* at 76-77. Cinotti filed a counterclaim for defamation concerning the letter from Officemax, arguing that because it didn’t relate to the then-still-forthcoming lawsuit between Officemax and Cinotti, it was not protected by litigation privilege. *Id.* at 77. The court rejected Cinotti’s argument, holding that litigation privilege extends to communications pertinent to any litigation, no matter whether the parties have actually commenced litigation or not. *Id.* at 80. Here, the letter was pertinent to previous litigation between Officemax and Cinotti’s new employer, because it alleged a violation of the terms of the settlement agreement that resulted from that litigation. *Id.* at 81. Furthermore, the letter was pertinent to possible litigation between the parties, because Cinotti’s violation of the terms of the settlement agreement gave rise to Officemax’s lawsuit.

**Polin v. Kellwood Co.**

*Polin v. Kellwood Co.*, 103 F. Supp. 2d 238 (S.D.N.Y. 2000) (“Polin”) serves as an example of the unique perils of arbitration when it comes to sanctionable attorney communications. The underlying matter concerned a corporate president suing his ex-employer for wrongful termination. *Polin*, 103 F. Supp. 2d at 241. After his suit ended up in arbitration, his attorney complained in a letter to the American Arbitration Association that the neutrality of their assigned arbitrator had been compromised by the defendants making payments directly to said arbitrator (rather than through the Association), and that “defendants would withhold any further payments to the neutral arbitrator as a means of coercing him into desisting from granting such additional time necessary to complete the arbitration.” *Id.* at 246
(emphasis in original). When the arbitration panel convened a special hearing to explore the factual basis for this letter, the plaintiff’s attorney refused to answer the panel’s questions “[o]n constitutional grounds as well as jurisdictional grounds,” leading the arbitration panel to sanction him personally for one-half of the arbitration costs. *Id.* at 247.

The attorney attempted to have these sanctions reversed in federal court as violative of New York’s public policy against punitive damages in arbitration. However, the court found that the parties had contracted around this prohibition by permitting the arbitrators to award “any remedy or relief that the arbitrator deems just and equitable, including any remedy or relief that would have been available to the parties had the matter been heard in court.” *Id.* at 267-68 (quoting National Rules for the Resolution of Employment Disputes Rule 32(c) (American Arbitration Association 1997)). Thus, because courts have the power to sanction attorneys appearing before them for improper conduct, so too did the arbitrator. *Id.* at 248.

**Lipin v. Nat’l Union Fire Ins. Co. of Pittsburgh, Pa.**

*Lipin v. Nat’l Union Fire Ins. Co. of Pittsburgh, Pa.*, 202 F. Supp. 2d 126, 130 (S.D.N.Y. 2002) ("Lipin") is a sequel to *Polin*, featuring the same plaintiff’s attorney suing the defense attorneys for defamation and injurious falsehood arising out of a memo they filed in the *Polin* proceedings to confirm the arbitration sanctions. *Lipin*, 202 F. Supp. 2d. at 137. The memo highlighted a continuous pattern of deception by the plaintiff’s attorney, including stealing and copying documents from the other side’s file. *Id.* at 138. The court held that this memo was protected by the litigation privilege, because conduct in the earlier proceedings was “pertinent” to the defense attorneys’ request to uphold the *Polin* arbitration sanctions. *Id.* The court emphasized that “the concept of pertinent material is ‘extremely broad’ and ‘embraces anything that may possibly or plausibly be relevant or pertinent, with the barest rationality, divorced from any palpable or pragmatic degree of probability.’ *Id.* at 137. Here, demonstrating that a party had a propensity to engage in unethical conduct if left undeterred was reasonably related to the propriety of arbitration sanctions over precisely such conduct.

**Giuffre v. Dershowitz**

*Giuffre v. Dershowitz*, Case No. 1:19-CV-03377 (S.D.N.Y. Apr. 16, 2019), provides a new test case for the litigation privilege’s expance and features famed attorney Alan Dershowitz as the defendant. Dershowitz had repeatedly called the plaintiff a liar and extortionist for accusing him of statutory rape in the aftermath of his defense of convicted pedophile Jeffrey Epstein. The complaint discusses a prior settlement with Dershowitz concerning his accusations, made through interviews in national media outlets, that the plaintiff’s attorneys had engaged in unethical behavior with respect to one of Epstein’s victims. Dershowitz’s public statements on the matter included “challenging them to sue me for defamation.” The *Giuffre* complaint accordingly states: “Mr. Dershowitz now has what he claims he has been looking for.” The case is currently in its nascent stage, but should certainly be followed by all attorneys. And see Unsworth v. Musk, Case No. 2:18-cv-08048, USDC (CD Cal. Filed Nov. 17, 2019). Musk asked publicly why the plaintiff had not sued for calling him a “pedo.”

**III. Rules of Professional Conduct**

Recognizing that trial publicity remains invariable in a hyperconnected age, various state bars have implemented ethical rules – typically tracking the model rules promulgated by the American Bar Association – regarding how such publicity may be conducted. Rules 3.6 of both the New York and California Rules of Professional Conduct, for example, prohibits lawyers from making extrajudicial statements that they know (or reasonably should know) will (i) be disseminated by means of public
communication and (ii) have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter. Both rules provide representative lists of permissible statements under this standard, while New York additionally provides a representative list of impermissible statements. These lists and governing standards should be carefully studied by any attorney considering turning to the press for assistance in their matters.

**Conclusion**

The foregoing cases and professional rules counsel a conservative approach to any out-of-court communications regarding litigation matters, whether currently pending or not. Attorneys must take care to ensure their statements on behalf of clients are functionally related to legitimate legal claims that they truly intend to pursue. They must also carefully weigh the possibility of their clients being sued even if they personally are immune, which raises the specter of malpractice claims. While provocative gestures and strong-arm tactics may momentarily impress clients, they can quickly become significant liabilities that subsume even meritorious cases. Attorneys must be well-versed in all relevant authority concerning the limits of extrajudicial advocacy, lest their big mouths get them in big trouble.

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1 Law clerk Andrew Keyes, a student at Loyola Law School, Los Angeles, assisted in writing this article.
Entertainment Contracts with Minors in New York and California

By Neville L. Johnson and Douglas L. Johnson

The entertainment industry faces considerable issues in deals made with minor employees. A production entity puts time and effort into a piece of work, only to often later have the minor disaffirm the contract, leaving the entity high and dry. This makes knowledge and mastery of handling entertainment contracts in New York and California involving minors crucial.

Christina Aguilera sued her ex-manager Steve Kurtz for allegedly taking more than 20 percent of her profits, stemming from an agreement she made when she was 17 that made Kurtz her personal manager. As a minor, LeAnn Rimes sued her father and also her co-manager for allegedly swindling at least $7 million of her earnings over a five-year period. Additionally, she later sued her record label to have her recording contract nullified as it was signed by her father and her mother while she was a minor.

Minors — those under 18 in New York and California — do not have the capacity to enter into valid contracts, meaning they are voidable unless approved in court. N.Y. Gen. Oblig. Sections 3-101, et seq.; Cal. Fam. Code Section 6501. Exceptions apply regarding contracts made for necessities and other statutory exceptions. However, contracts related to a minor’s business dealings (including involvement in entertainment productions and personal management contracts) do not generally constitute necessities. Berg v. Taylor, 148 Cal. App. 4th 809, 820 (2007) (“we cannot conclude that a contract to secure personal management services for the purpose of advancing [a minor’s] acting career constitutes payment for the type of necessity contemplated by Family Code section 6712”). However, transfers of copyright are valid, NY Consolidated Laws, Estates, Powers and Trusts Law (“EPTL”) Section 7-71(b); Cal. Fam. Code Section 6750(a);

California and New York laws protects both entertainment entities and minors. In New York, the contract can be approved in the supreme or surrogate court in the county where the minor resides of where the employer has office or is conduct business. Arts &
Cul. Aff. Law Section 35.03. The minor and his or her parents appear before a judge (one judge is assigned to hear these in Manhattan) and testify about the contract and their understanding of it. Approvals are commonly done without counsel being present. Also, the record can be sealed to protect confidential information and protect privacy.

California has streamlined the procedure of obtaining judicial approval of a minor’s contract in the entertainment industry more than other jurisdictions, mainly due to the high volume of petitions the courts see. To begin the process in Los Angeles Superior Court, one files a petition for the confirmation of the minor’s contract in Department 2. The contract at issue must be attached as an exhibit to the petition, and the petition must come with a separately filed proposed order. L.A. Super. Ct. R. 5.22. Once a contract is approved, the minor does not have the same ability to disaffirm the contract as they otherwise would — within a reasonable time after reaching the age of majority — and said approval extends to all terms and conditions of the contract. What constitutes a “reasonable time” depends on the circumstances of each case. Hurley v. S. Cal. Edison Co., 183 F. 2d 125, 132 (9th Cir. 1950). More than six months after majority occurs is probably pushing it.

California does not limit the term of a minor’s employment contract, but no personal service contract can exceed seven years. Cal. Lab. Code Section 2855. In New York, a contract may not exceed three years unless the minor was represented by experienced and competent counsel in the entertainment field when the contract was negotiated, in which case it may be extended to seven years. Arts & Cult. Aff. Law Section 35.02(2)(d).

One key provision of California and New York laws established to protect minors in the entertainment industry is the mandating of so-called “Coogan Accounts,” which owe their existence to the case of Jackie Coogan, a child actor whose parents squandered the majority of his multimillion-dollar earnings. To prevent such inequity, once a contract has been judicially approved, a Coogan Account is set up where a percentage of a minor’s net earnings must be deposited to be held in trust for them until they reach the age of majority. This account must be set up by the parent or guardian, and withdrawals from the trust are not allowed unless authorized by court order. EPTL 7-7.1, 2; Cal.
Fam. Code Section 6753(b). For minors, once judicial approval is obtained, a trust account must be set up by their parent or legal guardian where at least 15 percent of their net earnings will be kept in trust for them until they reach the age of majority. EPTL 7-7.1 (c); Cal. Fam. Code Section 6752(b)(1). (These are minimums, a court can order a higher amount.) In New York, the child performers parent or legal guardian may serve as custodian until the amount in trust reaches $250,000, at which point a trust company must be appointed as custodian of the account. EPTL 7-7.1 (c).

There are two thorny issues regarding minors’ agreements. First, in California, personal managers of minors run into trouble because courts will not approve those contracts as they are not considered employment contracts and, therefore, are not covered by California Family Code Section 6750. One possible solution that has been suggested is for personal managers to take their contracts to Probate Court for approval. If someone can be appointed to supervise the minor’s activities (a parent or guardian ad litem), then the personal manager can also request that the guardian ad litem be allowed to reaffirm the management agreement between the personal manager and the minor. Whether this will work in practice is an open question. This issue regarding personal management agreements does not appear to be an issue in New York.

In practice, entertainment companies commonly require the precautionary step that the parent or guardian of the minor sign a separate personal guarantee of the minor’s contract (for employment, personal management or transfer of intellectual property), whereby the parent approves the same and accepts liability if the minor disaffirms the agreement. In this manner, the entertainment company hopes the parent will encourage the minor not to disaffirm the agreement, because the parent has independent liability for the minor’s breach or disaffirmation of the entertainment contract. *Raden v. Laurie*, 120 Cal. App. 2d 778, 783 (1953) (“We find no merit in the claim that the disaffirmance of the agreement by the minor operated to terminate the obligation of [the parent who was also a signator to the agreement]”). This is a strong deterrent for minors to disaffirm, assuming they care about the financial well-being of their family. However, it is uncertain whether such a guarantee will be valid in New York in that doing so arguably would subvert the purpose of the laws relating to judicial approval of contracts with
minors. Of note, Cal. Civ. Code Section 3344(a) permits a parent or guardian to grant consent for use of a minor’s statutory right of publicity without court approval.

Second, the guidelines as to how a court determines whether or not to approve a contract are murky. In New York, the court is mandated to inquire whether the contract is in the best interests of the minor. Art & Cult. Aff. Law Section 3503(5)(k). In some cases, a New York court will require the contract be reviewed for fairness and appropriateness by an independent third party. In California, “The court may consider whether the terms of the contract are reasonable in the light of the then financial and educational interests of the minor as well as the proper development of his talents and his chances for success in the profession.” *Warner Bros. Pictures v. Brodel*, 31 Cal. 2d 766, 775 (1948). Deals that meet traditional models do not present impediments to approval and but for emerging areas, such as influencers and the internet, this could be problematic. The content of one’s contract may also be a determining factor in deciding whether to approve a contract. For example, assume a minor is in a film that is X-rated and/or might contain nudity or content that is arguably pornographic. Would a court approve such a contract? And would a court allow it to be enforced?

While significant steps have been taken to protect both the interests of the entertainment industry and of the minors employed by the industry, clarification is needed on the judicial standards for approving these employment contracts, and legislation needs to be pursued or an appellate decision needs to be handed down in California to protect personal managers who are unfairly terminated because of their inability to get their contracts judicially approved.

Once approval is granted (a topic outside the scope of this article), be mindful there are many regulations, laws and union rules to comply with regarding hours of work, education, and other aspects of production, and obtaining an Entertainment Work Permit, which is required in California. See, e.g. Cal. Admin. Code, Title 8, Sections 11750-11765.

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Public relations and attorney-client privilege

PR firms are frequently used in entertainment litigation for many reasons, including to develop a litigation strategy or plan for maneuvering a lawsuit into an optimal position for settlement, or to win in the court of public opinion. However, certain communications with PR representatives may not be privileged.

The 2nd District Court of Appeal recently held that communications between a PR firm hired by a lawyer for a client to create a website were not protected by the attorney-client privilege, if the PR firm’s role was not essential to the lawyer’s representation of the client. Behunin v. Superior Court (Schwab), 9 Cal. App. 5th 833 (Ct. App. 2017) review denied (June 14, 2017).

Nicholas Behunin filed suit against Charles Schwab and his son Michael Schwab over an unsuccessful real estate investment deal. Behunin’s attorney, Leonard Steiner, hired a public relations consultant, Levick Strategic Communications, to create a website (www.chuck-you.com) containing information linking the Schwabs and their real estate investments in Indonesia to the family of former Indonesian dictator Suharto. The Schwabs sued Behunin for libel, slander, and invasion of privacy. Behunin responded by filing an anti-SLAPP Motion (Cal. Civ. Proc. Code Section 425.16).

In response to the anti-SLAPP Motion, the Schwabs filed motions for limited discovery, seeking to take discovery on the malice element of their defamation causes of action in connection with the statements on the website. The Schwabs sought to depose and obtain documents from Steiner, Behunin, and Levick regarding communications among the three of them relating to the website. Behunin and Steiner objected to the discovery on the grounds that the requests exceeded the scope of the order authorizing discovery, and sought documents protected from disclosure by the attorney-client privilege and work-product doctrine. A referee and the trial court both denied these objections, prompting Behunin’s attempt for a writ of mandate.
On appeal, the issue was whether the communications among Behunin, Steiner and Levick were confidential, attorney-client privileged communications and whether disclosure to Levick, the PR company, waived the privilege. The Court of Appeal concluded that although in some circumstances the attorney-client privilege may extend to communications with a public relations consultant, Behunin failed to prove that the communications to Levick were reasonably necessary for Steiner’s representation of Behunin in his lawsuit against the Schwabs. Accordingly, the court denied Behunin’s petition for a writ of mandate.

Thus, any written or oral communications with a public relations professional should be considered at least potentially discoverable and be worded with discretion. Counsel must always consider how a jury would react if they were to see communications with a third-party PR consultant.

In situations involving PR media campaigns, the burden will be on the retaining attorney to demonstrate a connection between the PR consultant’s active role in implementing the PR campaign and the nature and purpose of the attorney’s retention. The engagement agreement with a PR consultant should make this very clear, as should all subsequent communications between the consultant and the attorney. The key is to make clear that all communications between the attorney and PR consultant are “reasonably necessary” to the attorney’s representation of the client.

The Behunin court was careful to say that it was not finding a blanket prohibition against the attorney-client privilege with a PR consultant, and discussed exceptions to the general rule. But the court emphasized that as the holders of the privilege, the attorney and client are going to have to do more than just say PR consultants were hired and therefore the communications with them are privileged.

“There may be situations in which an attorney’s use of a public relations consultant to develop a litigation strategy or a plan for maneuvering a lawsuit into an optimal position for settlement would make communications between the attorney, the client and the consultant reasonably necessary for the accomplishment of the purpose for which the attorney was consulted,” the opinion said. “But this is not that case.”

“A certain kind of case may actually involve litigation over something a PR firm would be an expert on, and a lawyer could hire them for advice to help his client” and potentially be privileged, the court said, “[b]ut when they go out and talk about PR strategy generally, well, it’s hard to imagine many circumstances in which a PR firm is going to get really close to helping translate a legal issue.”

The court reviewed a line of cases regarding the role of public relations firms that are retained to advise on how to best protect a clients’ interests in light of the fact that the client’s legal problem has been widely publicized and criticized. (In re Grand Jury Subpoenas, 265 F.Supp.2d 321 (S.D.N.Y. 2003); Bloomingburg Jewish Education Center v. Village of Bloomingburg, New York, 171 F.Supp.3d 136, 146 (S.D.N.Y. 2016); In re Chevron Corp., 749 F.Supp.2d 170 (S.D.N.Y. 2010)). The court then held that the privilege may be extended in those situations because the engagement with the public relations firm may form an integral role in assisting counsel in best representing the client and protecting its interests. This included services rendered by PR consultants after participating in confidential communications with counsel with the object of restoring balance and creating a level playing field for the client after the client had been prejudiced by damaging press. The court also noted that the privilege may remain in situations where a PR consultant is retained to
lawyer could hire them for advice to help his client” and potentially be privileged, the court said, “[b]ut when they go out and talk about PR strategy generally, well, it’s hard to imagine many circumstances in which a PR firm is going to get really close to helping translate a legal issue.”

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When hiring a public relations firm to assist in a case, attorneys should make sure that such engagement is essential to the attorney’s representation of the client. Beware of disclosing case strategy and important case information while communicating with a PR person as it may be discoverable. Attorneys should assume the communications with a hired PR consultant may be discoverable and take extra caution with respect to statements made in such communications. As a practice note, attorneys should refrain from written communications with PR persons, and that goes for the client as well. The attorneys should hire the PR firm, otherwise an argument could be made that no privilege would apply as there is not an agreement that would involve privileged communications because it is between non-attorneys. Finally, the client should be wary of communications with the PR firm without the presence of the attorney, as those communications may also be discoverable.
HOLLYWOOD DOCKET
Social Media, the Law, and You
By Neville L. Johnson and Douglas L. Johnson

Here in the digital age, the cyber-social scene is ripe with legal issues that have important implications for the unwary online traveler. Those of us who mingle in the digital scene are in extraordinarily vast company. Facebook boasts over 1.7 billion monthly users; Twitter, 313 million; LinkedIn, 100 million. Over 100 million use Snapchat on a daily basis, consisting of 30% of U.S. "millenials," sharing 9,000 snaps per second. Yet we do more than just socialize in the digital world: 81% of consumers search for online reviews before making a purchase, and 88% of consumers find online reviews to be helpful. What's more, over 80% of millennials are more inclined to hire lawyers who have online reviews, and more broadly, 59% of millennials use online reviews before hiring any professional. On top of this, our communications and "posts" on the Internet are unregulated and largely permanent. The result is a barrage of legal issues that practicing lawyers must be aware of before taking aspects of their practice into cyber-reality.

"The takeaway: though social media posting is easy and seems insignificant, rules of professional conduct with respect to solicitation apply just as forcefully."

Juror "Stalking"

Social media is an effective way to learn detailed personal information about total strangers. It is clear that "friend requesting" judges and represented parties during litigation is improper. As for jurors, however, many courts are not only aware of social media as a potential juror-research tool, but some have gone so far as to condone Internet investigations of jurors. Yet it is certainly not a free-for-all, as New York and California alike restrict attorney research of jurors and potential jurors. A 2012 New York City Bar Association opinion differentiated between passive and active review of jurors' social media posts, finding that certain methods of obtaining information, such as sending a direct "friend" or "follow" request, could be impermissible communications with jurors as prohibited by Rule 3.5 (prohibiting communications between attorneys and potential jurors during trial). Even viewing a juror's "profile" page where the social media site informs the profile owner of the viewing could amount to a prohibited communication. It is the attorney's responsibility, the opinion warned, to be up to date on the various and often complicated privacy settings of the social media research tools he or she is using to gain information about jurors.

Similarly, California Rule 5-320(E) restricts attorneys' juror investigations to methods that will not influence the juror's service, indicating that the California Bar may also restrict research which reveals to the juror that he or she is being investigated. Yet one California court went even further, requiring that the jurors be instructed on the extent of investigations that the parties and attorneys would conduct on them throughout trial. (Ultimately, the parties took the court's suggestion that they agree to a complete ban on juror investigation.)

That being said, we recommend investigation of potential jurors prior to their selection and submit that it is the norm.

Social Media Solicitation

What else is social media for but to share our accomplishments, travels, meals, and career achievements with our virtual social circles? As satisfying as it may be to inform our social media "friends" about our latest favorable verdicts, settlement agreements, or scintillating academic pieces, attorneys need to be wary that their cyber self-promotion may constitute unlawful solicitation, prohibited under California and New York professional conduct rules. New York Rule of Professional conduct § 7.3 prohibits solicitation initiated by a lawyer that is directed at "a specific recipient or group of recipients," and California Rule of Professional Conduct § 1-400 similarly prohibits communications advertising the lawyer's availability for employment "regardless of medium" and "directed to the general public or any substantial portion thereof." Thus, an attorney's Facebook post announcing: "Won a million dollar verdict—Tell your friends and check out my website", could arguably be deemed an unlawful solicitation under either rule, while one simply stating "Case finally over—Unanimous verdict! Celebrating tonight!" will most likely be permissible.

The takeaway: though social media posting is easy and seems insignificant, rules of professional conduct with respect to solicitation apply just as forcefully.
Client Social Media Clean-Up

Social media accounts are a significant source of evidence at trial due to the magnitude of interactions that occur in the cyber-social scene on a daily basis. Indeed, one's Twitter posting history may provide circumstantial evidence of a crime, constitute an admission or a strong indication of liability, and provide detailed information as to a person's character, hobbies, and everyday whereabouts. Multiple jurisdictions have recognized the party should switch to a "private" setting, which hides all personal information, photos, posts, and tags from any non-"friend" of the user.

A Virginia State Bar decision is illustrative. In 2013, the Virginia State Bar issued a five-year suspension to Matthew Murray, a lawyer who instructed his client to delete certain photos from his Facebook account, and later, his entire Facebook account, after receiving a Request for Documents from opposing counsel that asked for screenshots of the client's profile page, photos, and his message board.5

On a related matter, although some courts have begun to take judicial notice of the information on private websites, many remain reluctant to do so for screenshots of private websites that have changed since the screenshot was taken.6

Addressing "Unfair" Online Reviews

Not everyone likes his or her lawyer. Disgruntled clients unhappy with the results obtained by their lawyers despite hefty legal bills now have somewhere to turn to express their resentment of their attorneys, the legal system, and society in general. This presents a tricky situation for lawyers who wish to respond to their former clients' criticism, since we are bound by the rules of professional conduct preventing us from revealing any confidential information. The Los Angeles County Bar Association, applying a straightforward analysis of the rules of professional conduct, has stated that an attorney may respond to a former client's Internet posting if the attorney adheres to each of the following: (1) the response does not disclose confidential information; (2) the response does not injure the former client in a manner involving the former representation; and (3) the attorney's response is proportionate and restrained. Similarly, a 2014 New York State Bar Association Ethics Opinion held that the "self-defense" exception to the attorney duty of confidentiality only applies to official accusations of wrongful conduct where an attorney may reasonably be subject to punishment by the State Bar. Where an "accusation" of incompetence is purely informal, posted on an Internet review site, the attorney must adhere to the traditional duty of confidentiality and all other professional rules of conduct.

Nonetheless, it may be necessary to respond to a negative post, on Yelp, for example. If so, it is important to be aware of and not cross the ethical boundaries.

"The provision passed into law without opposition in 1996 under the guise presented by powerful lobbyists that it would encourage self-regulation by these sites."

Internet Defamation and S 230 of the Communications Decency Act

Section 230 of the Communications Decency Act forecloses liability for "providers or users of an interactive computer service," such as review sites, for any defaming speech posted on their websites by third parties. The provision passed into law without opposition in 1996 under the guise presented by powerful lobbyists that it would encourage self-regulation by these sites. Of course, self-regulation never occurred. Courts have used S 230 to essentially erect an impenetrable shield around sites where users post reviews and defaming comments. A few examples are illustrative:

- Reit v. Yelp (2010): a New York court allowed Yelp! to selectively remove positive reviews about the plaintiff's dental practice, holding that S 230 protected Yelp's editorial powers;8

- Asia Economic Institute v. Xcenttic Ventures (2011): a California court held that a website could not be held responsible for third-party consumer reports, even where the website mechanically altered them so that they would be more visible to Internet traffic;9 and,

- Jones v. Dirty World Entertainment Recordings (2014): a 6th Circuit court refused to hold a website liable whose owners had contributed their own defaming comments directed at the plaintiff, on the grounds that the website had been exercising its "editorial powers" permitted under S 230.10
Moreover, even as plaintiffs attempt to pursue alternative remedies, such as injunctions and alternative torts, perhaps the New York Committee on Professional Ethics put it best:

Unflattering but less formal comments on the skills of lawyers, whether in hallway chatter, a newspaper account, or a website, are an inevitable incident of the practice of a public profession, and may

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requests to subpoena an anonymous poster's identity from a host site. Some courts have required that the plaintiff proves the cause of action before the host site would be required to turn over evidence pointing to the poster's identity.15

In our dealings with Google, Twitter and Facebook, they have been willing to communicate only by email, and we have been able to get them to take down defamatory posts when there is a judgment finding defamation. However, this is not part of their public policy. Thus, the best remedy for a defamation often is to sue the poster of the defamation, obtain a judgment, and then try and convince the Internet Service Provider to take it down.16

A Solution Found in Copyright Law

One potential solution to the lopsided aftermath of S 230 is to conform it to the structure of the Digital Millennium Copyright Act (DMCA), which dealt with the issue of widespread copyright infringement across the web. The DMCA developed a system of notice and takedown procedures to help minimize pervasive infringement, requiring host sites to respond to takedown notices and actually enforce them under the right circumstances. Since Internet defamation is similarly widespread and arguably more harmful to its victims, there is a strong case for updating S 230 to reflect the DMCA structure. At least victims could avoid some of the crippling harms stemming from unchecked defaming Internet posts that are otherwise mostly permanent.

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Endnotes


5. In the Matter of Matthew B. Murray (July 9, 2013) VSB Nos. 11-070088405, 11-070-088422, Disciplinary Board of the Virginia State Bar.


7. New York State Bar Association Committee on Professional Ethics Opinion 1032 (October 30, 2014).


11. See, e.g., Fair Housing Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157 (9th Cir. 2008) (finding the host site, Roommates.com, liable for facilitating unlawful user content where the site solicited its users preferences on gender, race, and sexual orientation, and then provided options based on such choices and concealed listings that did not conform); Doe v. Internet Brands, Inc., 824 F.3d 846 (9th Cir. 2016) (holding that S 230 did not bar the plaintiff's claim that the host site (Model Mayhem) was liable for failure to warn where two purported "employers" used the site to lure unsuspecting models to their homes and drug and rape them).

12. Blockowicz v. Williams, 630 F.3d 563 (7th Cir. 2010).


15. Dendrite International, Inc. v. Doe No. 3 (2001) 342 N.J.Super. 134 (requiring, among four other elements, that the plaintiff provide "sufficient evidence for each element of its claim" before granting the plaintiff's motion to compel); Doe v. Cahill (2005) 884 A.2d 451 (denying the plaintiff's request that the host site comply with a subpoena requesting information about the poster's identity, because the plaintiff had not shown that the defamatory comments were capable of a defamatory meaning).

16. Consider also making a demand in countries outside the United States, as S 230 has no extrajudicial effect.

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