Before the
COPYRIGHT ROYALTY JUDGES
Washington, D.C.

In the Matter of	)	
	)	
Distribution of the 2000-2003	)	**Docket No. 2008-2**
Cable Royalty Funds	)	**CRB CD 2000-2003 (Phase II)**
	)	

SETTLING DEVOTIONAL CLAIMANTS' COMMENTS TO INDEPENDENT PRODUCERS GROUP'S MOTION FOR PARTIAL DISTRIBUTION

The Settling Devotional Claimants ("SDC") submit these comments pursuant to the Copyright Royalty Judges' Notice Requesting Comments on Independent Producers Group's ("IPG") motion of April 27, 2017, for partial distribution of 2000-2003 cable royalties in the Devotional Category ("*IPG Motion*").

I. Preliminary Statement

IPG seeks a distribution of 21.52% of the cable royalty funds allocated to the Devotional Category for cable royalty years 2000-2003 based on its argument that the amount is 75% of the 1999 final award to IPG. The SDC submitted an opposition to IPG's motion. *See Opposition of SDC to IPG Motion for Partial Distribution*, filed April 26, 2017 ("*SDC Opposition*"). The objections raised in the *SDC Opposition* remain pertinent now. As the Judges have held, "the requirement of a recipient being an 'established claimant' is in service to and not in derogation of the statutory requirement that the Judges determine whether the disbursement is reasonable or, as the statute puts it, whether any claimant has made a reasonable objection to the disbursement." *Order Granting Allocation Phase Parties' Motion for Partial Distribution of 2015 Satellite Royalties*, No. 17-CRB-0011-SD (2015) at 6. IPG is not an "established claimant," nor is the requested partial distribution justified by IPG's inconsistent history of awards. Moreover, the

SDC have a reasonable concern, based on IPG's prior conduct, that IPG lacks the willingness or the ability to disgorge any funds that it wrongly receives. The SDC's reasonable concern based on substantial evidence constitutes a reasonable objection to a partial distribution. IPG's motion should be denied.

II. The SDC Have a Reasonable Objection to the Partial Distribution Sought.

A. IPG is not an "established claimant" and, at any rate, has not established a basis for the partial distribution it seeks.

As noted in the SDC opposition, IPG itself cannot be an "established claimant," because it is not a claimant at all. IPG is a commercial entity that exists for the sole purpose of representing claimants to royalties. *See SDC Opposition* at 2 (citing *Memorandum Opinion and Ruling on Validity and Categorization of Claims*, No. 2012-6 CRB CD 2004-09 (Phase II), No 2012-7 CRB SD 1999-2009 (Phase II) (Mar. 13, 2015) at 6-7). Of course, the SDC do not contend that a representative of claimants can never qualify to receive a partial distribution. It is true that other organizations have received partial distributions in their capacity as representatives of claimants or claimant groups. Indeed, the Allocation Phase participants in copyright royalty cases, including the SDC, regularly seek partial distributions to the Office of the Commissioner of Baseball as common agent for distribution. *See, e.g., Motion of the Allocation Phase Parties for Partial Distribution of 2017 Cable Royalty Funds*, No. 18-CRB-0009-CD (2017) (Mar. 15, 2019).

But at the risk of stating the obvious, IPG is not the Office of the Commissioner of Baseball. Other than in the single example of a partial distribution to IPG in the Program Suppliers category, the SDC are unaware of any instance in which the Judges or their predecessors have authorized a partial distribution to any entity with no business or significant assets of its own apart from its participation on behalf of claimants in copyright royalty

proceedings. As is further discussed below, IPG's inconsistent performance in copyright royalty proceedings, its history of fraud, and its suspicious and still unexplained assignment of all rights to collect royalties for royalty years 2010 and later all cast doubt on its future as a going concern. IPG is not an "established claimant" of the same kind that the Judges and their predecessors previously entrusted with partial distributions.

B. The partial distribution that IPG seeks is not justified by its inconsistent history of final awards.

Even if IPG were an "established claimant," its "established" history of awards would not justify a partial distribution of 21.52% of the Devotional component of the cable royalty funds for the years in question. Although IPG received a final award of 28.7% in the Devotional category of cable royalty year 1999, IPG has failed to achieve an equivalent Devotional award in any fund for any other year:

Cable Royalty Year	IPG Devotional Award
1999	28.7%
2000	Pending
2001	Pending
2002	Pending
2003	Pending
2004	10.9%
2005	10.8%
2006	12.5%
2007	7.6%
2008	9.8%
2009	10.0%

Satellite Royalty Year	IPG Devotional Award
1999	0.0%
2000	0.0%
2001	1.2%
2002	1.5%
2003	2.8%
2004	1.2%
2005	1.6%
2006	8.8%
2007	2.9%
2008	0%
2009	2.1%

Final Distribution Determination, No. 2008-1 CRB CD 98-99 (Phase II), 80 Fed. Reg. 13,423, 13,444 (Mar. 13, 2015), *aff'd in Settling Devotional Claimants v. Copyright Royalty Bd.*, No. 15-1084, 2017 WL 1483329 (D.C. Cir. Feb. 10, 2017); *Final Distribution Determination*, Nos. 2012-6 CRB CD 2004-09 (Phase II), 2012-7 CRB SD 1999-2009 (Phase II), 84 Fed. Reg. 16,038, 16.039 (Apr. 17, 2019). (IPG has appealed the award for satellite royalty year 2000, and

has expressed its intention to appeal the awards for the remaining years decided in Nos. 2012-6 CRB CD 2004-09 (Phase II) and 2012-7 CRB SD 1999-2009 (Phase II). These awards are therefore not final.)

Similarly, if the Judges were inclined to consider the history of awards to IPG's successor-in interest, Multigroup Claimants ("MGC") (an assumed name of Alfred Galaz, the father of IPG's founder, Raul Galaz), these awards likewise would not support a partial distribution to IPG of 21.52%, with only a single year in which MGC's award in the Devotional category slightly exceeded the amount of the partial distribution that IPG now seeks.

Cable Royalty Year	MGC Devotional Award
2010	22.9%
2011	17.4%
2012	15.2%
2013	10.9%

Satellite Royalty Year	MGC Devotional Award
2010	24.7%
2011	11.7%
2012	9.3%
2013	2.3%

Final Distribution Determination, No. 14-CRB-0010-CD/SD (2010-13), 83 Fed. Reg. 38,326 (Aug. 6, 2018) (Neither the SDC nor MGC appealed the awards in the Devotional category for 2010-13, and their time to do so has expired. These awards are therefore final.) Neither IPG nor MGC filed any claim for 2014, and neither will be entitled to any award for that year.

IPG also claims that the partial distribution sought is "well within the parameters of the minimum award advocated by the SDC …." *IPG Motion* at 5. But the Judges have recently reopened this proceeding (*Order Reopening Record*, No. 2008-02 CRB CD 2000-03 (Phase II) (Remand) (Mar. 4, 2019)), and IPG is currently opposing the SDC's motion to be allowed to use the data that may be deemed necessary to authenticate a portion of the evidence necessary to support the award that the SDC previously proposed. *See IPG's Opposition to Motion of SDC for Relief From Protective Order*, No. 2008-02 CRB CD 2000-03 (Phase II) (Remand) (Apr. 25,

2019). If IPG is successful in its opposition, and if the SDC's evidence is otherwise deemed to be unauthenticated, then the SDC may be required to rely upon an alternative methodology – for example, by benchmarking against the 2000-03 satellite awards or the 2004 cable award, an approach that would be consistent with prior determinations of the Judges and their predecessors, but would be far worse for IPG. IPG's share implied by the SDC's methodology may very well go down substantially in such circumstances.[1]

Even the SDC, long-time established participants in the Devotional category since the category's inception, have received partial distributions of only 50% for the years in question. There is no basis for IPG, with its inconsistent history of awards and with no right to collect royalties for any year after 2009, to receive a distribution of 75% of the highest award that either it or its successor in interest has ever achieved in the Devotional category.

C. The SDC have a reasonable objection to a partial distribution based on IPG's demonstrated unwillingness or inability to disgorge funds, and based on concerns about IPG's continued solvency.

As was pointed out in the SDC's Opposition, being an "established claimant" is not the legal standard for a partial distribution. Pursuant to 17 U.S.C. § 801(b)(3)(C), the Judges may only make a partial distribution of fees if they conclude that no claimant has stated a "reasonable objection" to the partial distribution. *See also Order Granting Allocation Phase Parties' Motion for Partial Distribution of 2015 Satellite Royalties*, No. 17-CRB-0011-SD (2015) (Nov. 7, 2018) at 6 ("[T]he requirement of a recipient being an 'established claimant' is in service to and not in derogation of the statutory requirement that the Judges determine whether the disbursement is

[1] Admittedly, certain IPG claimants who were disqualified in the 2004-09 cable royalty years and the 1999-2009 satellite royalty years were not disqualified in the 2000-03 cable royalty years. (The reverse is also true, as two of IPG's claimants in the Devotional category were disqualified in the 2000-03 proceeding, but were allowed in the 2004-09 cable and 1999-2009 satellite proceeding.) Nevertheless, if the sufficiency and authenticity of the SDC's viewership evidence is ultimately rejected, the parties will face a very real possibility that there simply will be no evidence of the value of those IPG claimants that were not part of IPG's award in the benchmark years.

reasonable or, as the statute puts it, whether any claimant has made a reasonable objection to the disbursement."). The Judges have recognized that "the inability or unwillingness of a party to disgorge an overpayment is a reasonable concern," and could therefore constitute a reasonable objection. *Order Granting in Part and Denying in Part IPG's Motion for Partial Distribution of Program Suppliers' Royalties*, Nos. 2012-6 CRB CD 2004-09 (Phase II), 2012-7 CRB SD 1999-2009 (Phase II) (Sep. 29, 2016) at 9.

A partial distribution is the economic equivalent of a no-interest loan, secured on an uncertain future final distribution award. A reasonable lender would consider the financial staying power of borrower's business before extending such a loan, especially on security of uncertain value. The Judges likewise should exercise diligence and prudence. *See, e.g., Order Granting Allocation Phase Parties' Motion for Partial Distribution of 2015 Satellite Royalties*, No. 17-CRB-0011-SD (2015) (Nov. 7, 2018) at 7 ("The Judges are mindful that the best way to ensure such a situation [*i.e.*, failure to repay an over-allocated royalty payment] does not arise in the first instance is to maintain adequate safeguards with respect to partial distributions.").

There is substantial reason to suspect that IPG is insolvent. It engaged in a large conveyance of assets without consideration to Alfred Galaz, Raul Galaz's father, under two different fictitious names, Multigroup Claimants and Spanish Language Producers, by transferring its rights to collect on behalf of cable and satellite copyright claimants for the years 2010 and later. *See SDC Opposition* at Ex. 1, Authorization and Transfer to Multigroup Claimants; Ex. 2, Authorization and Transfer to Spanish Language Producers; Ex. 3, Assumed Name Records for Multigroup Claimants; Ex. 4, Assumed Name Records for Spanish Language Producers.[2] In another case, Alfred Galaz was found to be a "mere straw man" for Raul Galaz in

[2] IPG claims in its reply to the SDC Opposition that the SDC are "without a shred of familiarity with the intra-family transfer amongst the principals of IPG, Multgroup Claimants, and Spanish Language Producers," and

a fraudulent conveyance of copyright royalty rights. *See id.* at Ex. 5, *Galaz v. Galaz*, 2015 Bankr. LEXIS 229, at *13 (Bankr. W.D. Tex. Jan. 23, 2015), *affirmed in Galaz v. Galaz*, 850 F.3d 800 (5th Cir. 2017) ("Alfredo [Galaz] was a mere straw man, while Raul [Galaz] had full knowledge of the fraudulent nature of his actions. The Court finds that Raul intended to defraud debtor by transferring the royalty rights to . . . an LLC purportedly owned by Alfredo, an insider – for no consideration"). The fact that Raul Galaz and Alfred Galaz previously engaged in a fraudulent conveyance of similar assets under similar circumstances demonstrates motive, opportunity, and intent to engage in fraudulent conveyances to protect Raul Galaz's potential sources of assets and income, like IPG.

In affirming the finding that Raul Galaz and Alfred Galaz engaged in a fraudulent conveyance, the U.S. Court of Appeals for the Fifth Circuit relied on six "badges of fraud." *Galaz v. Galaz*, 850 F.3d at 805. All six "badges of fraud" are also present in IPG's transfer of assets to MGC: (1) The transfer was to Raul Galaz's father, an insider; (2) Raul Galaz retains substantial control over the royalty rights exercised in the name of MGC; (3) there is no evidence that IPG or MGC's represented claimants (their creditors) have been informed of the transfer or surrounding circumstances, and Alfred Galaz (or Raul Galaz) actively attempted to deceive the Judges and other participants as to the identity of MGC and Spanish Language Producers, by falsely stating in pleadings that MGC and Spanish Language Producers settled "controversies" between them, and had reached a "confidential agreement," (*SDC Motion* at Ex. 8) when in fact

goes on to imply, without expressly stating, that there may have been consideration for the transfer. IPG Reply at 9. The SDC's familiarity with the transaction is based entirely on MGC's document production, which shows the transfer but shows no consideration paid. On the assumption that MGC made a complete production as required by the SDC's document requests and the Judges' order compelling production of documents relating to the formation and structure of MGC (*see Order Granting in Part SDC's Motion to Compel Production by MGC*, No. 14-CRB-0010-CD (2010-13) (Sep. 14, 2016)), the SDC infer that there was no consideration for the transfer. Neither IPG nor MGC has ever claimed otherwise.

MGC and Spanish Language Producers were one and the same person, Alfred Galaz;[3] (4) the transfer was of substantially all of IPG's assets, at least from 2010 and later; (5) no "reasonably equivalent" consideration was paid; (6) there are at least some indications that IPG is insolvent, including its engagement in an evidently fraudulent transfer and its refusal to disgorge funds that it has no right to retain (further discussed below).

If IPG is insolvent or is engaged in fraudulent conveyances, then it likely lacks an ability or willingness to disgorge funds. No reasonable creditor would extend a no-interest loan under these circumstances, and the Judges should not do so either.

IPG's inability or unwillingness to disgorge funds is further demonstrated by IPG's actual refusal to disgorge funds wrongly paid to it in the Public Television category by PBS for programming claimed by former IPG claimant Bob Ross, Inc. Although the Judges have previously concluded that concluded that the allegations related to a contract dispute, and not to fraud (*Order Granting in Part and Denying in Part IPG's Motion for Partial Distribution of Program Suppliers' Royalties*, Docket Nos 2012-6 CRB CD 2004-09 (Phase II) and 2012-7 CRB SD 1999-2009 (Phase II)), IPG has now also refused a demand from PBS to disgorge the funds back to PBS.

---

[3] In the context of a motion to disqualify MGC as an agent, the Judges did not find that the SDC met their burden to show that MGC's statement regarding "settlement" was deceptive, because "Alfred Galaz treated SLP and MGC as though they were separate entities. The record does not reveal why." *Ruling and Order Regarding Objections to Cable and Satellite Claims*, Nos. 14-CRB-0010-CD (2010-13), 14-CRB-0011-SD (2010-13) (Oct. 23, 2017), at 4. The SDC agree that the record does not reveal why Alfred Galaz submitted a pleading suggesting that SLP and MGC were separate entities, but the SDC submit that the statement was nevertheless deceptive, regardless of his motive for making it. Alfred Galaz led the Judges and other parties to believe that SLP and MGC were separate entities, and he did so by making a demonstrably false statement – that there were "disputes" between them that were settled by a "confidential agreement." That statement was not and could not be true. Although we may not know precisely the reason for the deception, it was a deception.

At any rate, even if the SDC fell short of their burden to prove a deception in the context of a claims challenge, their burden is lower in the context of an opposition to a partial distribution, where the SDC need only state a "reasonable objection." Even if the Judges are not personally persuaded that Alfred Galaz's conduct was intended to deceive, they may nevertheless deny the motion for partial distribution if they are persuaded merely that the SDC's objection on this basis is "reasonable."

In the 2004-2009 cable and 1999-2009 satellite royalty case, the Judges expressly "disallowed" IPG's claims for Bob Ross, Inc. *Memorandum Opinion and Ruling on Validity and Categorization of Claims*, No. 2012-6 CRB CD 2004-09 (Phase II), Mar. 13, 2015, at Ex. A-2 at 2. IPG's successor-in-interest, MGC, conceded to the Judges that IPG's claims for Bob Ross, Inc. "had been made in error." *MGC's Opposition to Program Suppliers Motion for Disallowance of Claims Made by Multigroup Claimants*, No. 14-CRB-0010-CD 2010-13, Oct. 28, 2016, at 30-31. MGC further expressed to the Judges that IPG was willing "for the entire amount to be returned to PBS." *MGC's Opposition to SDC Motion for Disallowance of Claims Made by Multigroup Claimants*, No. 14-CRB-0010-CD 2010-13, Oct. 28, 2016, at 33.

On the basis of these concessions, PBS demanded IPG to return the entire amount to PBS. *See SDC Opposition* at Ex. 11, Letter from R. Dove to B. Boydston, Feb. 7, 2017. At the end of a long and contentious exchange of letters between IPG, PBS, and counsel for Bob Ross, Inc., IPG refused to disgorge the funds to PBS. *See id.*, Letter from B. Boydston to R. Dove and E. Hammerman, Apr. 12, 2017 (the entire exchange of correspondence is attached to the *SDC Opposition* as Exhibit 11, minus lengthy attachments to the correspondence). The Judges have found that "for years IPG filed claims on Bob Ross, Inc.'s behalf without authorization and never took steps to correct the public record." In their *Ruling and Order Regarding Objections to Cable and Satellite Claims*, Nos. 14-CRB-0010-CD (2010-13) and 14-CRB-0011-SD (2010-13) (Oct. 23, 2017) at 11, n. 24. In addition to having failed to correct the record, IPG also has failed or refused to disgorge funds that it admits it received in error.

IPG's obstinate refusal without any plausible basis to disgorge funds that IPG should not have received in the first place should cast serious doubt on the prudence of extending to IPG the

credit of a partial distribution that it may very well refuse to disgorge if necessary. This reasonable concern constitutes a reasonable objection to a partial distribution to IPG.

Additional developments since the filing of the SDC's Opposition raise further concerns about IPG's financial stability and future:

1. *Worldwide Subsidy Group v. Worldwide Pants, Inc.* The Ninth Circuit affirmed summary judgment in favor of Worldwide Pants, Inc., denying all rights that Worldwide Subsidy Group (IPG's legal name) claimed to royalties for the David Letterman Show and other programs owned by Worldwide Pants. Exhibit A, Memorandum Opinion, *Worldwide Subsidy Group v. Worldwide Pants, Inc.*, No. 17-55353 (July 9, 2018). In this case, Worldwide Pants accuses IPG of stealing royalties that IPG collected on behalf of Worldwide Pants – similar to IPG's conduct toward Bob Ross, Inc. Exhibit B, Defendant-Appellee's Answering Brief, No. 17-55353 (9th Cir. Nov. 22, 2017), at 16-17.
2. *Worldwide Subside Group v. Federation Int'l de Football Ass'n*. On April 26, 2018, after trial, a jury found that IPG did not have a contract with FIFA, and the court entered judgment denying IPG's breach of contract claim against FIFA. Exhibit C, Order Denying Plaintiff's Motion for Judgment as a Matter of Law, or, in the Alternative, New Trial, *Worldwide Subsidy Group v. FIFA*, No. CV 14-00013-AB (C.D.Ca. July 24, 2018). The case is on appeal to the Ninth Circuit. This case shows yet another example where IPG sought to claim royalties on behalf of a claimant that had not authorized it to act on its behalf.

If the Judges nevertheless determine that the claimants represented by IPG in this proceeding are entitled to a preliminary distribution (which the SDC continue to oppose for the

reasons set forth above), then the SDC, as the parties with the most direct interest in the Devotional funds, ask that the individual ministries that have been determined to be proper claimants in this case receive the funds directly, and that those ministries – not IPG – should execute the agreement with the Copyright Office.[4]

D. The amount available for distribution in the Devotional category for the years 2000-03 remains unresolved, further increasing the possibility that disgorgement from any partial distribution will be required.

In the SDC's Opposition, the SDC made the Judges aware of an unresolved question as to precisely how much money is available to be distributed to the Devotional category claimants for the years 2000-2003. This question is relevant to IPG's motion for partial distribution, because uncertainty in the amount of funds available for distribution makes it more likely that a need for some disgorgement will later arise.

As the SDC explained in their Opposition, because all the other category claims had been resolved and payments made, 100% of the amounts remaining in the 2000-2003 funds should belong to the Devotional category. However, based on a review of records commencing with the inception of each fund year, the SDC determined that the balance amount for 2000 was approximately $1.1 million more than it should have been, and the balance for 2003 was approximately $200,000 less than it should have been. Further, the SDC determined amounts for 2001 and 2002 also appeared to be in error, although by lesser amounts. *See SDC Opposition* at 13-14 and Exhibit 12 thereto.

---

[4] IPG has previously suggested that if a partial distribution of royalty funds constitutes an overpayment in one year, then the overpayment could be recovered from funds in a later year. *See IPG's Reply in Support of Motion for Partial Distribution of 2004-2009 Cable Royalties and 2000-2009 Satellite Royalties*, Nos. 2012-6 CRB CD 2004-2009 (Phase II), 2012-7 CRB SD 1999-2009 (Phase II) at 7-8 (Oct. 1, 2015). IPG's suggestion may allow the inference that one of its purposes in assigning its rights to MGC was to avoid a potential avenue for recoupment of any funds overpaid in a partial distribution or otherwise.

Following publication of the *CRB Notice*, the SDC again contacted the Licensing Division and was advised that the most recent *Growth of Funds Reports* cannot be relied upon to determine the balances in the accounts. *See* Exhibit D, Email from V. Murzinski to A. Lutzker (redacted to remove potentially confidential information). Therefore, the correct balances should be resolved before any partial or final distributions are made.

III. Conclusion

For the reasons set forth herein, the SDC request the Judges to deny the motion for partial distribution.

Respectfully submitted,

/s/ Matthew J. MacLean

Matthew J. MacLean (D.C. Bar No. 479257)
matthew.maclean@pillsburylaw.com
Michael A. Warley (D.C. Bar No. 1028686)
michael.warley@pillsburylaw.com
Jessica T. Nyman (D.C. Bar No. 1030613)
jessica.nyman@pillsburylaw.com
PILLSBURY WINTHROP SHAW PITTMAN LLP
1200 17th Street NW
Washington, D.C. 20036
Tel: (202) 663-8000
Fax: (202) 663-8007
Counsel for Settling Devotional Claimants

May 1, 2019

CERTIFICATE OF SERVICE

I hereby certify that on May 1, 2019, a copy of the foregoing was electronically filed in eCRB and served on the following participants:

INDEPENDENT PRODUCERS GROUP
Brian D. Boydston
PICK & BOYDSTON LLP
10786 Le Conte Avenue
Los Angeles, CA 90024

PROGRAM SUPPLIERS
Gregory O. Olaniran
Lucy Holmes Plovnick
Alesha M. Dominique
MITCHELL SILBERBERG & KNUPP LLP
1818 N Street N.W.
8th Floor
Washington, D.C. 20036

/s/ Matthew J. MacLean
Matthew J. MacLean

EXHIBIT A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

JUL 09 2018

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

WORLDWIDE SUBSIDY GROUP, LLC, a Texas Limited Liability Company, Plaintiff-Appellant, v. WORLDWIDE PANTS INCORPORATED, a California corporation and DOES, 1-10, inclusive, Defendants-Appellees.	No. 17-55353 D.C. No. 2:14-cv-03682-AB-AS MEMORANDUM[*]

Appeal from the United States District Court
for the Central District of California
Andre Birotte, Jr., District Judge, Presiding

Submitted June 7, 2018[**]
Pasadena, California

[*] This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

[**] The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Before: D.W. NELSON and CHRISTEN, Circuit Judges, and SHEA,*** District Judge.

Worldwide Subsidy Group (WSG) appeals the district court's order granting summary judgment in favor of Worldwide Pants Inc. (WPI) and denying its motion to strike. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

1. The district court did not err by ruling WSG's breach of contract claims arising from the 2002 written agreement were time-barred. California's four-year statute of limitations for written agreements "accrues at the time of the breach." *Reichert v. Gen. Ins. Co. of Am.*, 442 P.2d 377 (Cal. 1968). Assuming WSG maintained post-term collection rights under the 2002 written agreement, WPI put WSG on notice in December 2003 that it had no intention to honor said rights when WPI and WSG mutually agreed to terminate the 2002 agreement. Accordingly, the statute of limitations ran on WSG's claims in December 2007, making its 2014 complaint untimely.

2. The district court did not err by ruling WSG's claims arising from the alleged 2007 oral contract were time-barred. In California, the statute of limitations for oral contracts is two years, and is triggered on the date of the alleged breach. Cal. Civ. Proc. Code § 339. If an oral contract existed, WPI breached it in

*** The Honorable Edward F. Shea, United States District Judge for the Eastern District of Washington, sitting by designation.

March 2007 when WPI issued a declaration expressly revoking WSG's authorization to collect royalties on its behalf. WSG received notice of this revocation by at least May of that year.

3. The district court did not err by denying WSG's motion to strike. WSG filed a Rule 12(f) motion to strike which is inapplicable to a motion for summary judgment.

AFFIRMED.

EXHIBIT B

No. 17-55353

In the United States Court of Appeals for the Ninth Circuit

WORLDWIDE SUBSIDY GROUP, A TEXAS LIMITED LIABILITY COMPANY,

Plaintiff–Appellant,

v.

WORLDWIDE PANTS INCORPORATED, A NEW YORK CORPORATION,

Defendant–Appellee.

On Appeal from the United States District Court for the Central District of California, Los Angeles, Case No. 2:14-cv-03682-AB-AS

DEFENDANT-APPELLEE'S ANSWERING BRIEF

Orin Snyder
GIBSON, DUNN & CRUTCHER LLP
200 Park Avenue
New York, NY 10166-0193
Telephone: (212) 351-4000
Facsimile: (212) 351-4035
osnyder@gibsondunn.com

Theane Evangelis
Michael H. Dore
Abbey Hudson
Theodore M. Kider
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, California 90071-3197
Telephone: (213) 229-7000
Facsimile: (213) 229-7520
tevangelis@gibsondunn.com
mdore@gibsondunn.com
ahudson@gibsondunn.com
tkider@gibsondunn.com

Attorneys for Defendant-Appellee

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the undersigned counsel for Defendant-Appellee Worldwide Pants Incorporated states that no publicly held company owns 10% or more of the stock of Worldwide Pants Incorporated.

/s/ *Theane Evangelis*
Theane Evangelis
Counsel of Record

TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

Statutes

TABLE OF AUTHORITIES
(continued)

Page(s)

Regulations

INTRODUCTION

This case is about a company directed by a convicted felon who stole from David Letterman's production company, Worldwide Pants Inc. ("Worldwide Pants"), and then had the temerity to sue his victim. In rejecting the baseless lawsuit filed by Worldwide Subsidy Group, LLC ("WSG"), the District Court correctly granted Worldwide Pants' motion for summary judgment for three reasons. It held that (1) the statute of limitations barred WSG's claims related to a 2002 written agreement between the parties, (2) the statute of frauds barred a purported oral "re-engagement" under that agreement in 2007, and (3) the statute of limitations also barred WSG's claims under the purported oral 2007 agreement. The Court should affirm the District Court's ruling on these grounds and for additional reasons the District Court did not reach.

The Statute of Limitations Bars WSG's Claims Under the 2002 Written Agreement. The evidence in support of the District Court's ruling is undisputed and straightforward. In December 2003—almost eleven years before WSG filed suit—Worldwide Pants' counsel faxed a letter to WSG asserting that WSG was no longer authorized to represent Worldwide Pants under the 2002 written agreement. This disavowal of WSG's right to continue to represent Worldwide Pants in royalty proceedings was clear and triggered the statute of limitations. But WSG did not decide to sue Worldwide Pants until Worldwide Pants reiterated its disavowal years

later. The District Court thus correctly concluded that the four-year statute of limitations had long passed by the time WSG filed suit.

The Statute of Frauds Bars WSG's Claims Under a Purported 2007 Oral Agreement. WSG itself alleges that the purported oral agreement it invokes incorporated the terms of the 2002 written agreement, which could not be terminated before four years passed. WSG's binding admissions thus place the oral agreement squarely within the statute of frauds. The lack of any writing stating the essential elements of this purported oral agreement is the final nail in the coffin for WSG's claim.

The Statute of Limitations Bars WSG's Claims Under The Purported 2007 Oral Agreement. To the extent there was any 2007 oral agreement at all, WSG again was on clear notice that Worldwide Pants disavowed WSG's purported rights many years before WSG finally sued. It is undisputed that WSG received a Worldwide Pants declaration in 2007 terminating the Canadian royalty collection rights that Worldwide Pants had given it a month earlier. In fact, WSG admits that in October 2010 it kept royalties belonging to Worldwide Pants as a remedy for what it believed to be Worldwide Pants' breach. But WSG did not sue until almost four years later. The District Court thus correctly held that the two-year statute of limitations for claims based on oral contracts bars WSG's claims.

The Record Supports Summary Judgment On Grounds The District Court Did Not Reach. The District Court did not even reach another clear alternative basis for granting Worldwide Pants' motion: WSG's own breach of the parties' alleged agreement by stealing from Worldwide Pants. WSG has admitted that it took more than $60,000 belonging to Worldwide Pants to which WSG had no right even under the broadest interpretation of the parties' alleged agreement. This undisputed theft in violation of the same contract that WSG now seeks to enforce precludes WSG's recovery as a matter of law.

***

Against this backdrop of straightforward legal barriers to its claims and undisputed facts, WSG relies on baseless and conclusory arguments. The principal source of WSG's self-serving claims is its co-founder (and convicted criminal) Raul Galaz. He testified on the company's behalf in this case and repeatedly has testified for WSG in royalty proceedings. A former lawyer, Galaz pleaded guilty in 2002 to federal mail fraud and was sentenced to 18 months' imprisonment in connection with a scheme to steal the same kind of television royalties that WSG seeks here.

The U.S. Copyright Royalty Board concluded in 2013 that Galaz is, "to say the least," an "imperfect messenger for WSG," noting that Galaz "admittedly lied in a cable distribution proceeding much like the instant proceeding." 78 Fed. Reg. 64984, 65000 (Oct. 30, 2013). It ruled in 2015 that Galaz again gave

"false testimony," holding that he "did not testify truthfully" regarding whether WSG filed royalty claims. ER 1022-23. According to the U.S. Copyright Royalty Board, Galaz committed a "flagrant affront to the truth-seeking function of adversary proceedings" involving WSG. *Id.* (quotations omitted).

This case thus is a stark example of why statutes of limitations and statutes of frauds are needed to protect against sham litigation. "Statutes of limitations are intended to provide notice to defendants of a claim before the underlying evidence becomes stale." *In re Hanford Nuclear Reservation Litig.*, 534 F.3d 986, 1009 (9th Cir. 2008). Likewise, the "primary purpose" of the statute of frauds is to prevent enforcement "through fraud or perjury of contracts never in fact made." *Sterling v. Taylor*, 40 Cal. 4th 757, 766 (2007) (quotations omitted). WSG's claims implicate both issues.

WSG purports to rely on documents it now says it cannot find, and its chief architect and main witness (*i.e.*, Galaz) either says he does not recall certain key facts dating back more than a decade or has no personal knowledge about them because he was in prison at the time. WSG did not take a single deposition in this case, and it points to nothing in the record to show the terms of the purported 2007 oral agreement. By contrast, one straightforward writing in December 2003 and the absence of any relevant writing in early 2007 make clear that the District Court

correctly relied on the statute of limitations and the statute of frauds to dismiss WSG's claims.

True to form, WSG and Galaz try to counter the overwhelming evidence against them with unsubstantiated and self-serving accusations against others. Testifying in a deposition on behalf of WSG, Galaz claimed here that the facts he admitted under oath at his change of plea hearing were "not fully" true because the U.S. Attorney's Office wanted him to lie. ER 181-82. He even sued his mail fraud co-conspirator in what the California Court of Appeal described as an action "to restore stolen property to the thief because he was double-crossed by the person who agreed to fence the goods." *Galaz v. Jackson*, 2006 WL 648852, at *5 (Cal. Ct. App. Mar 16, 2006).

Now, WSG questions the integrity of the District Court, claiming that it was "evasive," showed "zeal" in ruling for Worldwide Pants, and "ignored" evidence and facts. AOB 24, 29, 41. But it is WSG that has "mischaracterized" (AOB 34) clear and undisputed facts to try to escape the consequences of its delay and theft. The District Court's order granting Worldwide Pants' motion for summary judgment, and denying WSG's motion to strike, should be affirmed.

JURISDICTIONAL STATEMENT

WSG sued Worldwide Pants in California Superior Court for the County of Los Angeles on April 7, 2014. Worldwide Pants then removed the action to the

United States District Court for the Central District of California (the "District Court") pursuant to 28 U.S.C. § 1441(b) on May 13, 2014 (C.D. Cal. Docket No. 1).

On February 15, 2017, the District Court entered its order granting Worldwide Pants' motion for summary judgment and denying WSG's motion to strike portions of Worldwide Pants' summary judgment motion. (C.D. Cal. Docket No. 84.) The District Court entered judgment in Worldwide Pants' favor on March 16, 2017, and WSG filed its notice of appeal to this Court on March 17, 2017. (C.D. Cal. Docket Nos. 86, 87.)

ISSUES PRESENTED

1. Whether the District Court properly held that the applicable four-year statute of limitations barred WSG's 2014 claims for breach of an alleged written 2002 agreement, where Worldwide Pants notified WSG almost eleven years earlier (in December 2003) that WSG was "no longer . . . acting on behalf of WPI," WSG acknowledged in its deposition that Worldwide Pants' counsel sent that letter to WSG's fax number, and WSG offered no evidence to rebut the presumption that it received the 2003 letter.

2. Whether the District Court properly held that the statute of frauds—which bars oral contracts that cannot be performed within one year—precluded WSG's claims for breach of an alleged 2007 oral agreement, where WSG alleged in

its complaint and represented in its deposition that the purported oral 2007 agreement was a renewal of the parties' relationship "under the [2002] agreement," acknowledged that the 2002 agreement could not be terminated before four years passed, and cited only a document specifically limited to the Canada territory as a writing memorializing the purportedly worldwide and perpetual right to collect royalties for Worldwide Pants.

3. Whether the District Court properly held that the applicable two-year statute of limitations barred WSG's 2014 claims for breach of an alleged oral 2007 agreement, where the 2002 agreement barred any oral modification thereof, any collection right that Worldwide Pants gave was expressly limited to Canadian royalties, and in March 2007 WSG received a notarized Worldwide Pants declaration that revoked any right WSG had to file new royalty claims.

4. Alternatively, whether the Court should affirm the District Court's order granting Worldwide Pants' motion for summary judgment based on grounds not ruled upon by the District Court, where WSG never disputed that "WSG cannot breach the 2002 Agreement by withholding funds it owes Worldwide Pants and at the same time recover from Worldwide Pants under a breach of contract theory," and WSG likewise did not dispute that it pocketed tens of thousands of dollars of royalties attributable to Worldwide Pants' programs.

5. Whether the District Court properly denied WSG's Motion to Strike, where WSG sought to strike a non-pleading pursuant to Federal Rule of Civil Procedure 12(f) and has publicly filed multiple documents containing the same claims it sought to strike.

STATEMENT OF THE CASE

As WSG states, "the material facts upon which the District Court relied for its ruling are largely undisputed." (AOB 10.) But throughout its opening brief, WSG repeatedly tries to add facts without citing any supporting evidence in the record. (*E.g.*, AOB 18.) In some instances, WSG purports to rely on facts that the record expressly contradicts. The facts and admissions that WSG disregards or mischaracterizes clearly show that the District Court correctly dismissed WSG's claims.

I. WSG and Worldwide Pants Enter Into a Written Agreement in 2002

In 1999, before David Letterman's production company Worldwide Pants gave WSG any written authorization to do so, WSG claimed approximately $407,000 worth of retransmission royalties attributable to the broadcast of Worldwide Pants' programs in Latin America. (ER 0545, ER 0575.) Although WSG principal Raul Galaz explicitly stated that he did not "want a perception that [Worldwide Pants'] funds are held 'hostage,'" he was clear that after forwarding the

royalties to Worldwide Pants he wanted to discuss "appropriate compensation to Worldwide Subsidy Group." (ER 0575.)

The parties later entered into a written agreement negotiated in early 2002 (the "2002 Agreement"). (ER 0576.) The executed 2002 Agreement assigned WSG the right to collect certain secondary royalties—which are paid in the form of "Distribution Proceeds"—in connection with three of Worldwide Pants' programs. The term of the contract was set for "no less than four (4) years." (ER 13.)

A. Raul Galaz's Fraud Conviction and False Testimony

Fewer than two months after the parties executed the 2002 Agreement, on June 20, 2002, WSG Principal Raul Galaz was convicted of mail fraud in the U.S. District Court for the District of Columbia in connection with the collection of cable and satellite retransmission royalties. (ER 0577.) As part of the fraud, Galaz created a fictitious company to assert royalty claims under pseudonyms. (*Id.*)

The facts establishing Galaz's fraudulent acts are beyond dispute. As part of the plea agreement in his criminal case, Raul Galaz agreed that he "knowingly, voluntarily, and truthfully admit[ted] the facts contained in the attached Information as the factual basis for Plea." (ER 0203.) According to that Information, the scheme generally involved Galaz "falsely representing that fictitious business entities were owners, or agents of owners, of copyrighted programs and were entitled to receive royalty fees, which fees defendant Raul C. GALAZ converted to his own personal

use." (ER 0214.) Contrary to WSG's claims (AOB 13), the facts underlying that scheme relate directly to WSG and this lawsuit.

WSG has used various names throughout its existence, but Galaz's misconduct has touched all of them. For example, WSG, which also does business as Independent Producers Group, was once named "Artist Collections Group, LLC." ER 0138. In Raul Galaz's criminal case, he admitted that his fraudulent scheme included "the opening of an offshore bank account in Antigua in the name of Artist Collections Group, a Bahamas corporation" and "the transferring of $129,000.00 of stolen proceeds to the Artist Collections Group offshore bank account." (ER 0216.) Galaz also admitted that his scheme to defraud continued "through in or about March 2001," which post-dated the formation of Worldwide Subsidy Group, LLC and the beginning of WSG's business dealings with Worldwide Pants. ER 0213. For good measure, Galaz admitted that:

> It was further a part of the scheme and artifice that defendant Raul C. GALAZ concealed and perpetuated his scheme by testifying falsely under oath at a statutorily convened Copyright Arbitration Royalty Panel administrative proceeding that: (1) he was not Bill Taylor; (2) he did not have any involvement or interest in companies he represented in particular, Tracee Productions . . .; and (3) he never filed a claim without authorization.

(ER 0216.)[1] It is no wonder that the Copyright Royalty Board later ruled that Galaz was "an imperfect messenger" for WSG, noting his "fraud conviction and prior false testimony" 78 Fed. Reg. 64984, 65000 (Oct. 30, 2013).

Moreover, in March 2015 the CRB noted that in June 2014 it had denied WSG a presumption that its claims were valid because WSG's 1999 joint cable claim included a claim on behalf of Tracee Productions, the "fictitious entity . . . used by Mr. Galaz as part of the fraudulent scheme for which he was convicted and incarcerated." (ER 0399.) It added in its order that "[b]ecause Mr. Galaz and [WSG] likewise have failed to remove the fraudulent Tracee Productions claim from IPG's 1999 satellite filing in the present proceeding, the Judges reach the same conclusion now." (ER 0400 (emphasis in original).)

Thus, the Copyright Royalty Board has concluded that Galaz's criminal scheme involved an entity using WSG's old name and a fictitious claimant for which WSG continued to claim royalties all the way through at least 2015.

Galaz was incarcerated for his crimes from February 2003 to May 2004. (ER 0578.) After Galaz's guilty plea, and because of it, on January 28, 2003, Worldwide Pants and WSG amended the 2002 Agreement to mutually terminate it, effective December 31, 2002. (ER 0573, 0578.)

[1] The Copyright Arbitration Royalty Panel was the predecessor to the Copyright Royalty Board. *See* ER 1203.

B. Worldwide Pants Sends WSG a December 18, 2003 Letter Telling WSG That Their Agreement is Already Terminated and WSG May Not Represent WSG In Royalty Proceedings

On December 18, 2003, upon learning that WSG had submitted a filing to the Copyright Office claiming to act on Worldwide Pants' behalf, Worldwide Pants sent a letter to WSG noting that the Agreement had been terminated as of December 31, 2002. ER 0221. The letter attached the WSG filing with the U.S. Copyright Office, which was entitled "Comments on the Existence of Controversies and Notice of Intention to Participate in Phase I and Phase II Hearings." ER 0222. In the filing, WSG had notified the Copyright Office that "WSG maintains claims on behalf of the producers and distributors of syndicated programming (aka 'Program Suppliers')," and "[i]n connection therewith, WSG asserts that a controversy exists as to Phase I and Phase II with respect to the 2001 cable royalty fund." *Id.* WSG's filing was signed by Marian Oshita, who was holding herself out to be WSG's president while Galaz was incarcerated. ER 0224. It further stated that it was filed "on behalf of all the parties listed in the attachment hereto," which was entitled "Independent Producers Group Notice of Intent 2001 Cable" and included "Worldwide Pants, Inc." as one the parties that WSG represented. (ER 0223, 0229.)

The December 18, 2003 letter from Worldwide Pants' counsel to WSG stated that it enclosed a copy of the filing "made by WSG with the U.S. Copyright Office on September 12, 2003 in which WSG ***purports to*** act on behalf of WPI." (ER 0221

(emphasis added.) After noting that the 2002 Agreement had been terminated, the letter continued, "Although I have been unable to reach you by phone to confirm that the reference to WPI in the Filing was an inadvertent error, I trust that this error was in fact inadvertent." (*Id.*) The December 18, 2003 letter to Oshita added, "Accordingly, please promptly forward me evidence that you have amended the Filing to indicate that ***you no longer are acting on behalf of WPI*** and ***deleting*** WPI from the list of entities set forth in Exhibit 'A' of the Filing." (*Id.* (emphasis added).)

A "Transmission Verification Report" showed the result of the fax as "ok" (ER 0230), and Raul Galaz confirmed during his deposition that the fax number that Worldwide Pants' counsel used to send its December 2013 letter in fact was WSG's fax number. (ER 0162, ER 0237).

C. WSG Tells Worldwide Pants That "Millions of Dollars" Are Available And Worldwide Pants Authorizes WSG To Collect Those Canadian Royalties

On January 19, 2007, Lisa Katona Galaz, acting on WSG's behalf, sent a letter to Worldwide Pants noting that "[i]t has been several years since we have spoken, and I am contacting you at this time in order to notify Worldwide Pants, Inc. of a pending deadline for the distribution of significant retransmission royalties." (ER 0246.) The letter informed Worldwide Pants that the Canadian agency had "millions of dollars [to] be distributed to Worldwide Pants," but it required a declaration to show Worldwide Pants was a legitimate enterprise rather than another

sham company created by Raul Galaz. (ER 0247, 252.) Worldwide Pants in turn submitted the required declaration, which was dated February 1, 2007, referenced only "matters pertaining to Canadian re-transmission copyright royalties," and made clear that it was giving a new authorization for WSG to collect royalties rather than validating an existing one. (ER 747 ("I hereby confirm that Worldwide Pants Incorporated ***hereby authorizes*** Worldwide Subsidy Group LLC to register claims . . . .") (emphasis added).)

The February 1, 2007 declaration did not limit the time period of WSG's right to collect Canadian royalties on Worldwide Pants' behalf from the CCC. (ER 747.) It did state, however, that "[t]he aforesaid authorization may be revoked by Worldwide Pants Incorporated at any time by written notice. (ER 0747 (emphasis omitted).) On March 1, 2007, Worldwide Pants executed another declaration that terminated WSG's right to collect Canadian retransmission royalties for any period after December 31, 2004. (ER 254-257.) The CCC sent that terminating March 1, 2007 declaration to WSG on March 14, 2007, and again on May 15, 2007. (ER 254-257.) WSG produced the March 2007 declaration and the CCC's emails transmitting it to WSG in discovery in this case. (ER 254-257.)

WSG was aware of the existence of the March 2007 declaration as of January 2010. (ER 302.) Then, on or about October 29, 2010, Worldwide Pants kept $60,215 in royalties that it received from the CCC without authorization, and

without forwarding any portion to Worldwide Pants. (ER 160:11-161:10.) It did so as a purported "offset" for monies that it believed "may have been inappropriately collected by WPI." (ER 1191; *see also* ER 302-03; ER 0160.)

II. Procedural History

On April 7, 2014, WSG filed this action in Los Angeles Superior Court, alleging causes of action for (1) Breach of Contract, (2) Breach of the Covenant of Good Faith and Fair Dealing, (3) Quantum Meruit, (4) Declaratory Relief, and (5) Accounting. (ER 0001-0036.) Worldwide Pants removed this case on May 13, 2014, and answered WSG's complaint on May 20, 2014. (*See* ER 0037.)

WPI filed its Motion for Summary Judgment on May 23, 2016. The District Court granted that motion on February 15, 2017, and at the same time denied WSG's Motion to Strike portions of Worldwide Pants' motion for summary judgment. The District Court entered judgment on March 16, 2017. (*See* ER 1255-60.)

SUMMARY OF THE ARGUMENT

This Court should affirm the District Court's grant of Worldwide Pants' Motion for Summary Judgment and its denial of WSG's meritless Motion to Strike for at least the following five independent reasons:

First, the District Court correctly held that the statute of limitations bars WSG's claims regarding a breach of the 2002 Agreement. As the District Court ruled, the December 2003 letter from Worldwide Pants to WSG "clearly informs

WSG that it no longer has the authority to collect copyright royalties on WPI's behalf and is therefore a breach of any rights that WSG still had under the 2002 Agreement as amended." (ER 1248.) Worldwide Pants' December 2003 letter triggered the limitations period more than a decade before WSG filed its belated lawsuit.

Second, the District Court correctly held that the statute of frauds bars an alleged 2007 oral contract pursuant to which WSG alleges that Worldwide Pants "re-engaged" WSG "under the [2002] Agreement." ER 0006. California's statute of frauds bars oral contracts which cannot be completed within one year. The 2002 Agreement indisputably could not be terminated in less than four years. According to WSG, the purported oral agreement adopted the same terms as the 2002 Agreement. The District Court thus correctly found that the purported oral agreement was barred by the statute of frauds. In fact, the parties themselves barred an oral re-engagement under the 2002 Agreement because that agreement required any modification to be made in writing.

Third, even if the statute of frauds did not apply, the two-year statute of limitations would bar WSG's claim under the purported 2007 oral agreement. WSG has alleged that Worldwide Pants' direct collection of royalties from any agency in the world is a breach of the parties' agreement. When Worldwide Pants submitted its March 2007 declaration (a declaration that WSG received twice in 2007 and produced from its files in this case), that cut off WSG's right to collect Canadian

royalties. At that time, or at least no later than January 2010, WSG believed that Worldwide Pants breached the purported contract between the parties. Indeed, WSG stole tens of thousands of dollars from Worldwide Pants in October 2010 because it contended that Worldwide Pants acted improperly. WSG then acknowledged that theft in 2011. All of this transpired more than two years before WSG filed suit in April 2014. Thus, once again, the District Court correctly held that WSG's claims were time-barred.

Fourth, summary judgment in Worldwide Pants' favor was warranted for myriad reasons the District Court did not have occasion to address. Chief among them, WSG acknowledged both that it violated the purported "Agreement" under which it sued Worldwide Pants and that such a violation precludes its contract claim. Worldwide Pants' arguments for dismissing WSG's other claims are equally straightforward and meritorious, and warrant affirming the District Court.

Fifth, the District Court properly denied WSG's Motion to Strike as untimely. The District Court correctly noted this Court's holding that "only pleadings are subject to motions to strike." *Sidney-Vinstein v. A.H. Robins Co.*, 697 F.2d 880, 885 (9th Cir. 1983). Many other courts also have rejected Rule 12(f) motions to strike non-pleadings. In any event, because WSG has repeated in multiple public filings the same valid arguments and accurately recited facts that it sought to strike, any error in this ruling was thus harmless. Fed. R. Civ. Proc. 61.

STANDARD OF REVIEW

"A district court's grant of summary judgment is reviewed de novo." *Curley v. City of N. Las Vegas*, 772 F.3d 629, 631 (9th Cir. 2014). Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 629-30 (9th Cir. 1987). The non-movant may not rely on mere conclusions, speculation, and unsupported factual allegations in opposing summary judgment. *U.S. ex rel. Cafasso v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1061 (9th Cir. 2011).

This Court "may affirm a grant of summary judgment on any ground supported by the record, even one not relied upon by the district court." *Curley*, 772 F.3d at 631 (citation omitted); *see also Summers v. Teichert & Son Inc.*, 127 F.3d 1150, 1152 (9th Cir. 1997) (same).

The District Court's denial of WSG's Motion to Strike is reviewed for abuse of discretion. *El Pollo Loco, Inc. v. Hashim*, 316 F.3d 1032, 1038 (9th Cir. 2003).

ARGUMENT

I. The Statute of Limitations Bars WSG's Claims Under the 2002 Agreement

The statute of limitations bars WSG's claims under the 2002 Agreement because WSG was on notice of that purported breach in 2003, more than ten years before it sued Worldwide Pants. *See Love v. Fire Ins. Exch.*, 221 Cal. App. 3d 1136,

1143 (1990) ("[T]he statute of limitations commences when a party knows or should know the facts essential to his claim.") (emphasis omitted); *Fed. Deposit Ins. Corp. v. Dintino*, 167 Cal. App. 4th 333, 350 (2008) ("'[T]he plaintiff discovers the cause of action when he at least suspects a factual basis, as opposed to a legal theory, for its elements, even if he lacks knowledge thereof . . . .").

A. The December 2003 Letter Represented the Same "Disavowal" of WSG's Purported Rights As The Later Communications On Which WSG Bases Its Lawsuit.

The December 18, 2003 letter from Worldwide Pants' counsel to WSG's president Marian Oshita made clear Worldwide Pants' position that the 2002 Agreement had "terminated." (ER 0221.) The letter likewise informed WSG that WSG was not authorized to act on Worldwide Pants' behalf in royalty proceedings, telling WSG, "you are no longer acting on behalf of WPI." (ER 0221.). It even demanded that WSG remove Worldwide Pants' name from a list of WSG clients that WSG filed with the U.S. Library of Congress in royalty proceedings related to 2001 programming. (*Id.*) The District Court thus properly concluded that the December 2003 letter breached any rights WSG had under the 2002 Agreement, triggering the four-year statute of limitations more than ten years before WSG filed suit.

Nonetheless, WSG argues that communications in the 2011 to 2014 time frame (and not the December 2003 letter) first put WSG on notice of its breach-of-

contract claim. According to WSG, the December 2003 letter "did not state that WPI disavowed WSG's post-Term collection right." AOB 28 (emphasis omitted). But that is exactly what the letter did. It attached a filing with the U.S. Copyright Office in which WSG tried to exercise its purported post-Term collection right, and told WSG that its claim to represent Worldwide Pants was unauthorized and should be withdrawn. (ER 0221.) Worldwide Pants could not have been clearer.

In fact, the position taken by Worldwide Pants in its December 2003 letter is exactly *what WSG alleges* to be a breach in this case. WSG's complaint broadly alleged that Worldwide Pants' "refus[al] to cooperate with WSG in the collection of Distribution Proceeds" was an actionable breach of the contract. (ER 0008). Likewise, WSG argues here that a claim accrued where Worldwide Pants "effectively disavowed the post termination collection obligations and rights of WSG," and where Worldwide Pants allegedly refused to "acknowledge WSG's contractual rights." AOB 21. The December 2003 letter does all of those things and was therefore indisputably sufficient by WSG's own logic.

Indeed, it is substantively identical to the later communications that WSG says gave rise to its claims. For example, WSG cites Worldwide Pants' lack of a "substantive response" to WSG's requests for information after the Copyright Royalty Board issued a September 22, 2011 order announcing the "Negotiation Period" for royalty distribution. AOB 20, ER 0006. It likewise quotes a March 2014

email from Worldwide Pants' counsel to WSG that states in part, "To the extent that third parties have reason to believe that our client has authorized your company to represent it in connection with such collections, please advise them to the contrary." AOB 21.

Worldwide Pants' December 2003 notice to WSG is just the sort of "disavowal" and refusal to "cooperate" and "acknowledge WSG's contractual rights" that WSG cites from 2011/2012 and 2014 as a basis for its claims. *See Reichert v. Gen. Ins. Co. of Am.*, 68 Cal. 2d 822, 831 (1968) ("[A] cause of action for breach of contract accrues at the time of the breach."). The only difference is that Worldwide Pants' 2003 refusal to cooperate in WSG's "post-Term collection right" took place more than a decade before WSG finally filed suit.

The simple fact is that someone reading the December 18, 2003 letter, which took the position that the 2002 Agreement was already "terminated," made clear that WSG purported to (but did not) represent Worldwide Pants, and stated to WSG's president that "you are no longer acting on behalf of WPI" (ER 0221), could not be surprised when Worldwide Pants later "refus[ed] to acknowledge WSG's contractual rights or cooperate with WSG in collecting WPI's royalties" (AOB 21). All the communications are of the same character.

Indeed, WSG sees the December 2003 letter as enough of a "disavowal" of its purportedly "perpetual" post-Term collection right that it argues here that the letter

is a "misunderstanding" and "misstating" of WSG's rights under the 2002 Agreement. AOB 28, 29 n.27. In doing so, WSG acknowledges that WPI and WSG had vastly different interpretations of the 2002 Agreement and WSG's right to litigate copyright royalty proceedings in WSG's name.[2]

Thus, Worldwide Pants gave WSG clear notice all the way back in 2003 that Worldwide Pants "disavowed" and would not "cooperate" with WSG's claimed right to collect royalties for Worldwide Pants after December 31, 2002. Galaz may not have seen the December 2003 letter because he was in prison at the time. But that does not excuse *WSG*'s more than ten-year delay in suing Worldwide Pants. The statute of limitations thus bars any contract claim based on the 2002 Agreement.

B. WSG Admitted That Worldwide Pants Sent Its December 18, 2003 Letter to WSG's Fax Number.

Aside from its meritless challenge regarding the contents of the December 2003 letter, WSG also claims that it never received the letter in the first place. Of course, WSG already has conceded that a fax confirmation page creates a rebuttable presumption that a fax was received. ER 0589; *see Stevens Shipping & Terminal Co. v. Japan Rainbow II MV*, 334 F.3d 439, 444 (5th Cir. 2003) (finding

[2] To be clear, the scope of WSG's collection right was not a material issue for purposes of Worldwide Pants' motion for summary judgment and it is not relevant to this appeal. But it *was* a material issue in December 2003, when Worldwide Pants clearly informed WSG that Worldwide Pants believed WSG had no post-Term collection right. *See* AOB 23.

that fax confirmation sheet created rebuttable presumption that fax was received); *Morgan Tire of Sacramento, Inc. v. Goodyear Tire & Rubber Co.*, 60 F. Supp. 3d 1109, 1117 (E.D. Cal. 2014) ("A confirmation that a fax reached its destination, such as a confirmation page or destination phone number on a copy of the document, creates a rebuttable presumption that the fax was received.").

WSG's challenge here instead turns on whether the confirmation page at issue shows that a faxed version of the December 18, 2003 letter was sent to WSG. Specifically, WSG contends that "all fax attempts to WSG's fax number failed," that the fax confirmation sheet listed "an unknown fax number," that "no representation exists that such was a WSG fax number," and that "such was not a WSG fax number." AOB 17 n.17. But each of these claims is demonstrably false.

At the deposition of WSG taken pursuant to Federal Rule of Civil Procedure 30(b)(6), Raul Galaz admitted that the fax number on the "Transmission Verification Report" attached to the December 18, 2003 letter—that is, 310-372-1969—accurately reflected WSG's fax number. ER 0162, 0237.[3] WSG did nothing to rebut

---

[3] Q. Looking at the third claim form, Exhibit 20, which is the satellite claims for 2002 --

A. Okay.

Q. -- it identifies contact information for Worldwide Subsidy Group. Do you see that?

A. Correct.

Q. Is that contact information accurate? [continued on next page]

the presumption that WSG's "long-departed" (AOB 17 n.17) president received the December 18, 2003 letter, and cannot disavow WSG's receipt of it here with conclusory, self-serving, and false claims. *See FTC v. Publ'g Clearing House, Inc.*, 104 F.3d 1168, 1171 (9th Cir. 1997) ("A conclusory, self-serving affidavit, lacking detailed facts and any supporting evidence, is insufficient to create a genuine issue of material fact.").

Thus, whether or not Raul Galaz was aware of the December 2003 letter, WSG knew at that time that Worldwide Pants did not permit, and thus would not cooperate with, WSG's representation of Worldwide Pants in royalty proceedings. Because WSG waited more than 10 years to bring suit on these same grounds, California's four-year statute of limitations bars its claim arising from the written 2002 Agreement. *See* Cal. Code Civ. Proc. § 337(1); *see also E-Fab, Inc. v. Accountants, Inc. Servs.*, 153 Cal. App. 4th 1308, 1319 (2007) ("For purposes of accrual of the limitations period, inquiry notice is triggered by suspicion. . . . Once the plaintiff has a suspicion of wrongdoing, and therefore an incentive to sue, she must decide whether to file suit or sit on her rights.") (internal quotations omitted).

A. Yes.

Q. That includes the address, phone number and fax number?

A. I believe so.

ER 162:12-23.

II. The Statute of Frauds Bars WSG's Claim Arising From a Purported 2007 Agreement

The District Court noted that "WSG has alleged that in 2007 it was orally reengaged by WPI to begin collecting royalties as it had under the 2002 Agreement." (ER 1250.) Quoting portions of WSG's deposition testimony by Raul Galaz the District Court recognized that WSG claimed the oral agreement adopted the terms of the 2002 Agreement. *Id.* It further noted that the 2002 Agreement "could in no situation be terminated in less than four years." *Id.* This meant that the 2002 Agreement "could not be performed within one year" and was subject to the statute of frauds. ER 1251.

Because Worldwide Pants' 2007 declarations regarding Canadian royalties did not specify the "essential terms" of the purported oral agreement (*see Sterling*, 40 Cal. 4th at 766), the District Court held that they did not satisfy the statute of frauds' writing requirement. *Id.* The court thus correctly held that "WSG's attempt to enforce the terms of this oral contract . . . is barred by . . . the statute of frauds." ER 1250.

A. The Statute of Frauds Applies Because WSG Alleges An Oral Agreement That Could Not Be Performed Within One Year

California Civil Code section 1624 provides that, "[t]he following contracts are invalid, unless they, or some note or memorandum thereof, are in writing and subscribed by the party to be charged or by the party's agent: (1) An agreement that

by its terms is not to be performed within a year from the making thereof . . . ." *See also Rossberg v. Bank of Am., N.A.*, 219 Cal. App. 4th 1481, 1503 (2013) ("An agreement to modify a contract that is subject to the statute of frauds is also subject to the statute of frauds.").

As WSG alleged in its complaint, the 2002 Agreement had "a minimum term of four (4) years." ER 0005. WSG's own deposition testimony shows that the purported 2007 oral agreement was no different. Among other things, WSG testified that the oral agreement was "basically adopting the exact same terms that had already been negotiated before." ER 0159:11-20. According to Galaz, "WSG would "pick up exactly where it had picked up before, doing the exact same thing." ER 0156:13-15; *see also* 158:19-22 (Q. "And you believed [the purported 2007 oral agreement] related to every single royalty collection agency, this new agreement?" Galaz: "I know it did because the original agreement did."). WSG cites no evidence that creates any dispute as to this issue. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (Rule 56 requires the non-moving party to offer evidence of "***specific facts*** showing that there is a genuine issue for trial") (quotations omitted, emphasis added); *see also Kennedy v. Allied Mut. Ins. Co.*, 952 F.2d 262, 266 (9th Cir. 1991)

("The general rule in the Ninth Circuit is that a party cannot create an issue of fact by an affidavit contradicting his prior deposition testimony."). [4]

In fact, WSG is precluded as a matter of law from contesting that the purported 2007 oral agreement deviates from the 2002 Agreement. WSG's complaint alleged that "[i]n or around January 31, 2007, WSG was re-engaged by WPI ***under the Agreement***," with "Agreement" defined as the 2002 Agreement attached to WSG's complaint. ER 0006 (emphasis added), ER 0004; *accord* ER 1250 (D. Ct. Order: "Plaintiff's position in the complaint and this motion is that the oral contract adopted the terms of the 2002 Agreement but not the 2003 Amendment."). And WSG brought only one breach of contract claim, alleging that "WSG and WPI entered into ***the Agreement***" and that Worldwide Pants "breached ***the Agreement***." ER 0008 (emphasis added). WSG is bound by its allegations that define the 2002 Agreement and the 2007 oral agreement synonymously. *Am. Title Ins. Co. v. Lacelaw Corp.*,

[4] WSG contends that the District Court "*sua sponte* located and recited deposition testimony of Raul Galaz not previously cited by WPI, and broadly mischaracterized it" to conclude that the purported 2007 oral agreement violates the statute of frauds. AOB 34. In fact, Worldwide Pants *did* cite to the portion of WSG's deposition transcript that the District Court cited, and the court was permitted to consider uncited record evidence in any event. ER 0081; *see* Fed. R. Civ. Proc. 56(c)(3) ("The court need consider only the cited materials, but it may consider other materials in the record."). WSG's complaint (which attached the 2002 Agreement) and several related portions of its deposition make clear that the District Court correctly stated WSG's position that the purported 2007 oral agreement adopted the terms of the 2002 Agreement.

861 F.2d 224, 226 (9th Cir. 1988) ("Factual assertions in pleadings" are "considered judicial admissions conclusively binding on the party who made them."). The statute of frauds thus indisputably applies to the alleged oral agreement here.[5]

In any event, the original written contract between WSG and Worldwide Pants clearly stated that it "may not be modified except by a ***written instrument*** signed by the parties hereto." (ER 0015 (emphasis added)). Thus, the purported 2007 oral agreement was foreclosed by the parties' 2002 Agreement as well.

B. WSG Failed To Satisfy the Statute of Frauds' Writing Requirement

Because the statute of frauds applies, WSG was required to show the existence of a writing setting forth the "essential terms" of the alleged oral agreement.

[5] In fact, at the time of the purported January 2007 oral agreement between WSG and Worldwide Pants, WSG could not apply for, let alone collect, U.S. retransmission royalties as to the 2007 calendar year for more than one year as ***a matter of law***. *See* 37 C.F.R. § 360 ("During the month of July each year, any party claiming to be entitled to cable compulsory license royalty fees for secondary transmissions of one or more of its works during the ***preceding calendar year*** shall file a claim to such fees with the Copyright Royalty Board.") (emphasis added); 37 C.F.R. § 360.11 ("During the month of July each year, any party claiming to be entitled to compulsory license royalty fees for secondary transmissions by satellite carriers during the ***previous calendar year*** of television broadcast signals to the public shall file a claim to such fees with the Copyright Royalty Board.") (emphasis added); *see* ER 0884 & n.3. Moreover, since WSG claims that "all WSG agreements" give it a "perpetual post-Term collection right" for each calendar-year royalty claim (AOB 23), WSG again admits a violation of the statute of frauds. *W. Chance No. 2, Inc. v. KFC Corp.*, 957 F.2d 1538, 1542 (9th Cir. 1992) ("[I]f the term was . . . perpetual . . . then there would be no possibility of full performance within a year and the agreement would fall within the statute of frauds.").

See Sterling, 40 Cal. 4th at 766 (noting that a memorandum must identify the subject of the parties' agreement, show that they made a contract, and state the essential contract terms with reasonable certainty); *see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585 (1986) (The non-moving party responding to a summary judgment motion "must do more than simply show that there is some metaphysical doubt as to the material facts."). Grasping at straws, the only writing WSG offered was a pair of 2007 Worldwide Pants declarations that expressly and indisputably addressed only Canadian royalties and did not in any way evidence a purported worldwide agreement. These narrow documents fail to satisfy the statute of frauds.

There can be no dispute that the determination of whether a writing satisfies the California statute of frauds is a question of law and that the District Court properly resolved it on summary judgment. The California Supreme Court has made clear that "[i]t is a question of law whether the memorandum, considered in light of the circumstances surrounding its making, complies with the statute of frauds." *Sterling*, 40 Cal. 4th at 772. It has further noted that "the issue is generally amenable to resolution by summary judgment." *Id.*

In reviewing the plain terms of the 2007 Canada declarations, the District Court correctly noted that the February 2007 declaration (consistent with the March 2007 declaration) "does not specify the shows WSG can collect for, is

geographically limited to just Canada, does not provide for WSG's commission, does not contain any minimum term, duration or termination terms, and states that this authority is revocable at any time." ER 1251-52.[6] In the District Court's words, it "does not demonstrate that WPI chose to be bound by the 2002 Agreement." ER 1252. Nor does it contain any of the "essential terms" of the purported oral agreement. *See id.* Thus, WSG failed to satisfy the statute of frauds' writing requirement as a matter of law.

The circumstances surrounding the creation of the Canada declarations strongly support the District Court's conclusion. As noted above, WSG reached out to Worldwide Pants in a January 19, 2007 letter about a matter "of an urgent nature" that conceded in its first sentence that "[i]t has been several years since we have spoken." ER 0246. WSG told Worldwide Pants that "in order that millions of dollars be distributed to Worldwide Pants," WSG sought the execution and return of a declaration prepared by the Canadian Copyright Collective ("CCC") "as soon as possible." ER 0247. That declaration gave no indication that it memorialized a worldwide 2007 oral agreement. In fact, the final signed version was virtually

[6] *See Munoz v. Kaiser Steel Corp.*, 156 Cal. App. 3d 965, 975 (1984) ("[W]hen the aspect of the oral contract that brings it within the statute of frauds relates to its duration . . . both common sense and controlling authority indicate that to constitute a sufficient memorandum the writing must at least contain language indicating the duration promised was as claimed.").

identical (with one key exception discussed below) to the CCC form that WSG sent to Worldwide Pants almost two weeks ***before*** WSG alleges that the parties entered into that oral agreement. *See* ER 0006 ("In or around *January 31, 2007*, WSG was re-engaged by WPI under the Agreement . . . .") (emphasis added); *compare* ER 0252 (draft declaration sent on January 19, 2007) *with* ER 0018 (executed February 1, 2007 declaration). Indeed, as WSG conceded, it was the CCC that "insisted on the receipt of such declaration," and it did so to be sure that it did not distribute the money it had available to further another one of Raul Galaz's crimes. *See* ER 0247.

Worldwide Pants did make one significant change to the draft CCC declaration, however. The CCC draft that WSG sent to Worldwide Pants stated: "I hereby confirm that Worldwide Subsidy Group LLC ***is authorized*** on behalf of [name of WSG client] to register claims, resolve disputes by withdrawing claims, execute warranty agreements, collect and generally represent [name of WSG client] with respect to all matters pertaining to Canadian re-transmission copyright royalties." ER 0252 (emphasis added). The February 1, 2007 declaration executed by Worldwide Pants modified the "is authorized" language, stating instead: "I hereby confirm that Worldwide Pants Incorporated ***hereby authorizes*** Worldwide Subsidy Group LLC to register claims, resolve disputes by withdrawing claims, execute warranty agreements, collect and generally represent Worldwide Pants

Incorporated with respect to all matters pertaining to Canadian re-transmission royalties." ER 0018 (emphasis omitted and added).

Worldwide Pants' modification shows WSG had no pre-existing authorization to collect royalties; the declaration did not "affirm" any oral agreement or "repudiate" Worldwide Pants' December 2003 letter. *See* AOB 31 n.30. It merely gave a circumscribed right related only to Canadian royalties. *See Sterling*, 40 Cal. 4th at 767 ("[T]he memorandum itself must include the essential contractual terms, it is clear that extrinsic evidence cannot *supply* those required terms) (emphasis in original); *id.* at 771 ("[E]xtrinsic evidence cannot be employed to prove an agreement at odds with the terms of the memorandum."). That limited declaration does not reflect any broader agreement. *See, e.g.*, *Harshad & Nasir Corp. v. Global Sign Sys., Inc.*, 14 Cal. App. 5th 523, 540 (2017) (finding that evidence of an agreement as to one store did not support the existence of a contract as to 66 stores).[7]

[7] WSG contends that the District Court "relied on evidence and arguments to which WSG was never afforded an opportunity to address." AOB 38. This is inaccurate. Among other things, Worldwide Pants argued in its motion for summary judgment that the February 2007 declaration "permitted WSG to collect royalty proceeds only in Canada, and nowhere else." ER 0066 (emphasis in original). Moreover, WSG attached both the 2002 Agreement and the February 1, 2007 declaration to its complaint; the District Court's comparison of the two was in no way unforeseeable or prejudicial to WSG. *See* ER 0013-18. In any event, this Court has held that "a district court may grant summary judgment on any legal ground the record supports." *Glenn K. Jackson Inc. v. Roe*, 273 F.3d 1192, 1202 (9th Cir. 2001) (quotations omitted).

WSG spends all of its time saying what the alleged 2007 oral agreement's terms are not without once pointing to any evidence saying what they actually are. *See* AOB 35 (claiming that "neither in its complaint nor elsewhere has WSG ever asserted that the Term of the 2007 Oral Agreement was for a period 'no shorter than four years,'" without citing any evidence showing what the term of the purported oral agreement is); *see Summers v. Teichert & Son, Inc.*, 127 F.3d 1150, 1152 (9th Cir. 1997) (affirming summary judgment and noting that "the nonmoving party must introduce some ***significant probative evidence*** tending to support the complaint") (quotations omitted, emphasis added); *see also* Cal. Civ. Code § 1598 ("[W]here a contract has but a single objective and such objective is . . . so vaguely expressed as to be wholly unascertainable, the entire contract is void.").

The whole purpose of the statute of frauds is to bar claims based on precisely such an undefined oral agreement. *See Sterling*, 40 Cal. 4th at 766 ("As the drafters of the Second Restatement of Contracts explained: 'The primary purpose of the Statute is evidentiary, to require reliable evidence of the existence and terms of the contract and to prevent enforcement through fraud or perjury of contracts never in fact made.'") (quoting Rest.2d Contracts, § 131, com. C., p. 335); *see, e.g.*, *Capital Dev. Co. v. Port of Astoria*, 109 F.3d 516, 517 (affirming grant of summary judgment based on statute of frauds) (9th Cir. 1997); *Showcase Realty, Inc. v. Whittaker*, 559 F.2d 1165, 1167 (9th Cir. 1977) (same).

The same concern articulated by the California Supreme Court applies here, where WSG did not take one deposition (*see* ER 0066, 0584) and did not offer one document showing that WPI ever acknowledged the existence of an agreement for WSG "to pick up exactly where it had picked up before." *See* ER 158:23-25 (Q. "And did you sign anything or print it out?" Galaz: "If I had it, then I would have produced it, but I haven't found it yet.").

The only evidence of this purported oral agreement comes from convicted fraudster Raul Galaz, who claims there were no written comments in the "negotiation" of this purported agreement and who admits that he cannot locate any writing evidencing it. *See* ER 1022-23 (Copyright Royalty Board March 2015 order noting that Galaz "did not testify truthfully") (quotations omitted).[8] It is undisputed that WSG contends the oral agreement renewed an agreement with a four-year term and that it gave WSG a "perpetual" post-term collection right. The District Court thus correctly concluded that the statute of frauds bars any claim that Worldwide Pants breached a purported 2007 oral agreement.

[8] To be clear, Galaz's repeated failures to tell the truth were not a basis for the District Court's order dismissing WSG's claims. They also are not the reason why that order should be affirmed. But Galaz's past misstatements *do* show why WSG's protestations against the application of "non substantive defenses" and "overly technical conclusions" ring hollow. *See* AOB 41. The statute of frauds and statute of limitations are meant to protect defendants from stale and fraudulent claims. WSG's claims are exactly that, and the undisputed facts show that the District Court correctly relied on these defenses to dismiss WSG's case.

III. Worldwide Pants' March 2007 Declaration Triggered The Applicable Two-Year Statute of Limitations Seven Years Before WSG Filed Suit.

Even if the statute of frauds did not bar any claims arising from the purported 2007 oral agreement (which it does), the statute of limitations would foreclose them. *See Love*, 221 Cal. App. 3d at 1142-43 ("Where the operative facts are undisputed, the question of the application of the statute of limitations is a matter of law, and summary judgment is proper where the facts show the action is time barred as a matter of law.") (internal citations omitted). The District Court correctly held that the two-year statute of limitations for oral contracts already had run before WSG filed suit in 2014. *See* Cal. Code Civ. Proc. § 339; ER 1252.[9]

WSG cites two supposed "problems" with the District Court's holding, the first being that "it should only apply to WSG rights to collect WPI royalties arising in Canada from 2005 forward." AOB 39. This argument is particularly incongruous given that WSG argues four pages earlier that the same declaration (along with the February 1, 2007 declaration) sets forth the "essential terms" that establish an oral agreement between WSG and Worldwide Pants to renew a *worldwide* 2002 Agreement. *See* AOB 35. But while WSG's futile effort to overcome the

[9] WSG concedes it is relying on an oral (as opposed to a written) 2007 agreement. AOB 39. To the extent WSG contends that a 2007 declaration is evidence of that purported oral agreement, the two-year limitations period applies. *See Sterling*, 40 Cal. 4th at 766 (noting that "a written memorandum is not identical with a written contract; it is merely evidence of it . . . .") (brackets and quotations omitted).

statute of frauds requires an absurdly expansive reading of the declarations regarding Canadian royalties, WSG's statute-of-limitations argument requires a narrow view. So WSG changes course entirely, arguing that the March 2007 declaration "cannot be held to be a breach of the 2007 agreement with regard to royalties outside of Canada." AOB 39.

This self-serving argument ignores WSG's own allegations and testimony. WSG claims that the parties entered into an oral agreement for worldwide royalties on approximately January 31, 2007. ER 0006. It then concedes that only one month later Worldwide Pants terminated WSG's right to collect royalties from the very jurisdiction that WSG claimed to have "millions of dollars" ready for collection. ER 0247. WSG further concedes that it (1) collected a $60,215 distribution from the CCC for Worldwide Pants royalties in October 2010 and (2) kept the whole thing without forwarding one dollar of it to Worldwide Pants. ER 0581. In fact, from June 2002 through July 2015, the only money WSG claims it ever collected on Worldwide Pants' behalf was Canadian royalties from the CCC. ER 0265; ER 169:22-24 (Q. "Has IPG [aka, WSG] received any retransmission royalties disbursed by the Library of Congress?" Galaz: "No.").

Thus, the March 2007 declaration and resulting payments from the CCC directly to Worldwide Pants would represent a significant breach of the unsubstantiated, undefined, and (allegedly) unqualified rights that Worldwide Pants

purportedly gave to WSG. *See Love v. Fire Ins. Exch.*, 221 Cal. App. 3d 1136, 1143 (1990) ("[T]he statute of limitations commences when a party knows or should know the facts essential to his claim."). Severing WSG's rights as to the most lucrative territory through 2015 indisputably informed WSG that Worldwide Pants had no intention of adhering to any purported oral agreement. *See Fed. Deposit Ins. Corp. v. Dintino*, 167 Cal. App. 4th 333, 350 (2008) ("'[T]he plaintiff discovers the cause of action when he at least suspects a factual basis, as opposed to a legal theory, for its elements, even if he lacks knowledge thereof ….'").

Moreover, WSG's complaint alleged a breach where Worldwide Pants "collect[ed] Distributions Proceeds directly." ER 00008. WSG's complaint defined "Distribution Proceeds" to be royalty payments by "various agencies around the world." ER 0004. Thus, from its very first pleading, WSG has claimed that any direct payment to Worldwide Pants by ***any*** worldwide agency (including the CCC) is a breach giving rise to WSG's claims. Its contention here that direct payments by the CCC to Worldwide Pants is not a breach of the parties "Agreement" is directly contrary to WSG's complaint. *See also* ER 0528 (WSG MSJ Opp'n: "WSG's claims are not limited to U.S. royalties.").

The second purported "problem," according to WSG, is that the CCC (and not Worldwide Pants) sent the terminating declaration to WSG. AOB 39. WSG conceded in the District Court that "[o]n March 1, 2007, Worldwide Pants executed

[a] declaration that terminated WSG's right to collect Canadian retransmission royalties for any period after December 31, 2004." ER 0580. WSG likewise conceded that WSG possessed the March 1, 2007 declaration, having produced it in this case. ER 0581. But WSG claims it had "no reason to scrutinize the [March 2007] declaration or investigate whether it differed in any respect from the declaration that had previously been provided to WSG directly from WPI." AOB 40. The record shows that this contention is false on its face.

No matter who sent it to WSG, the one-page March 2007 declaration clearly notified WSG that Worldwide Pants revoked its authorization for WSG to collect Canadian royalties. This notice was even clearer due to the context in which WSG received it. Specifically, CCC indisputably sent the March 2007 declaration to WSG in response to WSG's emails demanding an explanation for why CCC had not provided royalties and claims forms to WSG regarding Worldwide Pants Programs. ER 254. In doing so, CCC twice referred to the March 2007 declaration as a "revised" declaration from Worldwide Pants. *Id.* Even the file name of the March 2007 declaration that the CCC sent to WSG drew attention to a change: "Declaration – Worldwide Pants – Revised.pdf." *Id.*

The significance of a "revised" declaration belies WSG's suggestion that it needed Worldwide Pants to alert WSG to the contents of a document WSG produced from its own files. The CCC sent the March 2007 declaration to WSG in lieu of

certain royalties at issue in ongoing discussions between CCC and WSG, making the March 2007 declaration's impact clear. *See* ER 254.

Moreover, on January 21, 2011, Raul Galaz sent an email to Worldwide Pants counsel stating that, "per our correspondence with you one year ago, we still have an outstanding issue." ER 0302. According to Galaz, "Worldwide Pants has apparently directed the CCC to make 2005 and subsequent distributions directly to Worldwide Pants, and I can only presume that this has occurred." *Id.* He further admitted that "[s]uch direction from Worldwide Pants to the CCC was never provided to WSG, and we were only informed of its existence a year ago." *Id.* By its own admission, WSG thus was on "notice" of the terms of the March 2007 declaration no later than January 2010. *See* AOB 42.

WSG received the March 2007 declaration twice in 2007, acknowledged it "was informed of its existence" as of January 2010, and protested this "outstanding issue" in January 2011. ER 0254, ER 0302. It even admits to having kept Worldwide Pants royalties in 2010 as a purported "offset for monies that may have been inappropriately collected by WPI," and having communicated with Worldwide Pants "regarding such matter in 2011." ER 1191; ER 302-03; ER 0160 (Galaz: "That was the circumstance in which we had informed Mr. Weissler that we were withholding that as a result of responses he had provided to us indicating that monies had been collected by Worldwide Pants that might not have been remitted to

us."). The applicable two-year statute of limitations thus barred WSG's 2014 claim that Worldwide Pants breached a purported 2007 oral contract between the parties. *See Jolly v. Eli Lilly & Co.*, 44 Cal. 3d 1103, 1111 (1988) ("So long as a suspicion exists, it is clear that the plaintiff must go find the facts; she cannot wait for the facts to find her.").

IV. WSG's Own Breach of Its Alleged Agreements With Worldwide Pants Also Justifies Affirming the District Court's Order

WSG argues that the District Court "reject[ed]" Worldwide Pants' other arguments in favor of summary judgment (AOB 44), but that is simply not true. The District Court did not need to address those arguments, as it dismissed WSG's claims on other grounds. But these alternative grounds provide additional independent reasons to dismiss WSG's claims.

For example, WSG did not contest the legal conclusion that a "party complaining of the breach of a contract is not entitled to recover therefor unless he has fulfilled his obligations." (ER 0587 (quoting *Pry Corp. of Am. v. Leach*, 177 Cal. App. 2d 632, 639 (1960)).) Similarly, WSG also did not dispute that it "cannot breach the 2002 Agreement by withholding funds it owes Worldwide Pants and at the same time recover from Worldwide Pants under a breach of contract theory." (*Id.*) But WSG conceded that it "collected $60,215 from the CCC on October 29, 2010" and "withheld the full amount" without giving "any portion of that $60,215 to Worldwide Pants." *Id.* at 9. Thus, by its own admission, WSG

breached the contract, and WSG's breach of contract claim fails on its face because it seeks to enforce an agreement that WSG concedes it already breached.[10]

V. Additional Grounds Support Affirming the District Court's Order Granting Worldwide Pants' Motion for Summary Judgment

WSG does not challenge the District Court's holding that "[b]ecause WSG's claims from the 2007 oral contract (and 2002 Agreement . . .) are barred by the statute of limitations and statute of frauds, the rest of WSG's causes of action are also barred. (ER 1253.) Thus, if the Court affirms the District Court's dismissal of WSG's breach of contract claim, there is no dispute that WSG's other claims should be dismissed as well. *See Greenwood v. F.A.A.*, 28 F.3d 971, 977 (9th Cir. 1994) ("We review only issues which are argued specifically and distinctly in a party's opening brief," and "will not manufacture arguments for an appellant.").

WSG's remaining claims are independently subject to dismissal for other reasons. (*See generally* ER 0083-88.) WSG's claim for breach of the implied covenant of good faith and fair dealing fails as a threshold matter because it is

[10] WSG breached the 2002 Agreement (and any "re-engagement" under that agreement) in myriad other ways. For example, WSG conceded that "[t]he Copyright Royalty Board has penalized WSG, and in turn Worldwide Pants, based on conduct it attributes to Galaz." (ER 0584.) WSG also bargained away any right Worldwide Pants had to collect cable royalties for the 1999 year without telling Worldwide Pants. *See Indep. Producers Grp. v. Library of Cong.*, 759 F.3d 100, 104 (D.C. Cir. 2014) ("As part of that settlement, IPG [aka, WSG] 'agree[d] to withdraw its notice(s) of intent to participate in the proceeding to distribute the 1997, 1998, and 1999 Cable Royalty Funds[.]'"); ER 583, ER 561.

duplicative of WSG's breach of contract claim. *Compare* ER 0008 ¶ 21 *with* ER 0008 ¶ 24 (alleging identical bases for causes of action). Because WSG's allegations of breach of the covenant of good faith "do not go beyond the statement of a mere contract breach and, relying on the same alleged acts, simply seek the same damages or other relief already claimed in a companion contract cause of action, they may be disregarded as superfluous as no additional claim is actually stated." *Careau & Co. v. Security Pac. Bus. Credit, Inc.*, 222 Cal. App. 3d 1371, 1395 (1990); *Bionghi v. Metro. Water Dist.*, 70 Cal. App. 4th 1358, 1370 (1999) (granting summary adjudication as to duplicative breach of implied covenant claim). In addition, WSG's contractual breaches mean it cannot establish the requisite element that WSG "fulfilled its obligations under the contract." *Rosenfeld v. JPMorgan Chase Bank, N.A.*, 732 F. Supp. 2d 952, 968 (N.D. Cal. 2010) (citing Judicial Council of Cal., Civil Jury Instruction 325).

Regarding WSG's quantum meruit claim, California law bars that claim because WSG has simultaneously sought recovery based on both an implied contract and an express contract. Whether or not an enforceable agreement actually exists, California law prohibits a plaintiff from simultaneously pursuing both contractual and quasi-contractual remedies. *See Klein v. Chevron U.S.A., Inc.*, 202 Cal. App. 4th 1342, 1389-90 (2012) ("Although a plaintiff may plead inconsistent claims that allege both the existence of an enforceable agreement and the absence of an

enforceable agreement, that is not what occurred here. Instead, plaintiffs' breach of contract claim pleaded the existence of an enforceable agreement and their unjust enrichment claim did not deny the existence or enforceability of that agreement. Plaintiffs are therefore precluded from asserting a quasi-contract claim . . . .").[11]

For these reasons, in addition to the grounds stated in the District Court's well-reasoned order, WSG's remaining claims should be dismissed.

VI. The District Court Properly Denied WSG's Motion to Strike

All of the facts and arguments stated in Worldwide Pants' summary judgment briefing were proper and well-supported. Contrary to WSG's claim, Worldwide Pants never "abandoned" any position it took in those briefs. *See* AOB 45. It emphasized the numerous damning concessions that WSG made rather than focus on what proved to be immaterial disputes in light of those WSG admissions. But Worldwide Pants stands by its evidence that, for example, WSG's accounting reflects a shortfall of hundreds of thousands of additional dollars that WSG did not send to Worldwide Pants. (*See* ER 1205.)

In any event, the District Court correctly held that WSG's motion to strike under Federal Rule of Civil Procedure 12(f) was procedurally improper. *See* ER 1253 ("A motion to strike under Rule 12(f) only applies to pleadings.") (citing

[11] WSG's declaratory relief claim likewise fails because there is no dispute regarding the questions raised in its declaratory judgment cause of action.

Sidney-Vinstein v. A.H. Robins Co., 697 F.2d 880, 885 (9th Cir. 1983)).[12] Even if there were some basis to grant WSG's motion to strike the challenged portions of Worldwide Pants' summary judgment motion (there is not), WSG has repeated in multiple public filings the same statements it sought to strike. The absurdity of WSG's motion cannot be overstated: the statements it sought to strike even included a quote from an opinion of the California Court of Appeal. (*See* ER 1208.). Any error by the District Court in denying WSG's motion to strike thus would be harmless. *See* Fed. R. Civ. Proc. 61.

CONCLUSION

For the foregoing reasons, the Court should affirm District Court's order granting Worldwide Pants motion for summary judgment and denying WSG's motion to strike.

[12] Numerous other courts have denied a motion to strike a non-pleading on that ground. *See, e.g., Shields v. Frontier Tech, LLC,* 2012 WL 12538951, at *2 (D. Ariz. June 12, 2012) (denying motion to strike a non-pleading under Rule 12(f)); *O'Brien v. Wisnewski*, 2012 WL 1118076, at *3 (D. Conn. Apr. 3, 2012) (same); *Hrubec v. Nat'l R.R. Passenger Corp.*, 829 F. Supp. 1502, 1506 (N.D. Ill. 1993) (same).

Dated: November 22, 2017

Respectfully submitted,

/s/ *Theane Evangelis*

Theane Evangelis
Michael H. Dore
Abbey Hudson
Theodore M. Kider
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, California 90071-3197
Telephone: (213) 229-7000
Facsimile: (213) 229-7520
tevangelis@gibsondunn.com
mdore@gibsondunn.com
ahudson@gibsondunn.com
tkider@gibsondunn.com

Orin Snyder
GIBSON, DUNN & CRUTCHER LLP
200 Park Avenue
New York, NY 10166-0193
Telephone: (212) 351-4000
Facsimile: (212) 351-4035
osnyder@gibsondunn.com

Counsel for Defendant-Appellee

STATEMENT OF RELATED CASES

Defendant-Appellee is not aware of any related cases.

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Ninth Circuit Rule 32-1(a) because this brief contains 10,965 words or less, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Fed. R. App. P. 37(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word 2016 with 14 point, Times New Roman font.

/s/ *Theane Evangelis*
Theane Evangelis
Counsel of Record

CERTIFICATE OF SERVICE

I hereby certify that, on November 22, 2017, a true and correct copy of the foregoing brief was served via the Court's CM/ECF system on all counsel of record.

/s/ *Theane Evangelis*
Theane Evangelis
Counsel of Record

EXHIBIT C

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WORLDWIDE SUBSIDY GROUP, LLC, a Texas Limited Liability Company,

Plaintiff,

v.

FÉDÉRATION INTERNATIONAL DE FOOTBALL ASSOCIATION, a California Corporation, and DOES 1 through 10, inclusive,

Defendants.

Case No. CV 14-00013-AB (JCx)

ORDER DENYING PLAINTIFF'S MOTION FOR JUDGMENT AS A MATTER OF LAW, OR, IN THE ALTERNATIVE, NEW TRIAL

I. INTRODUCTION

Pending before the Court is Plaintiff Worldwide Subsidy Group, LLC's ("WSG") Motion for Judgment as a Matter of Law, or, in the Alternative, New Trial. (Dkt. No. 148 ("Mot.").) For the following reasons, the Court **DENIES** WSG's Motion.

II. BACKGROUND

WSG originally filed its Complaint on October 16, 2013, in Los Angeles County Superior Court, alleging claims for breach of contract, breach of the covenant of good faith and fair dealing, and declaratory relief against Defendant Fédération International de Football Association ("FIFA"). (Dkt. No. 1-1.) FIFA removed to federal court on January 2, 2014, and the case was assigned to Judge Margaret M. Morrow. (Dkt. No. 1.) On June 9, 2014, the Court granted FIFA's Motion to Dismiss under Federal Rule of Civil Procedure 12(b)(2), with leave to amend, concluding that when viewing the facts in the light most favorable to WSG, no contract existed between WSG and FIFA, such that the forum selection clause in the alleged contract was unenforceable, and there was no basis for this Court to exercise personal jurisdiction over FIFA. (Dkt. No. 25.) WSG filed a First Amended Complaint on June 19, 2014. (Dkt. No. 28.) On October 27, 2014, the Court again granted Defendant's Motion to Dismiss under Federal Rule of Civil Procedure 12(b)(2). (Dkt. No. 44.)

WSG appealed the Court's decision, and the Ninth Circuit reversed and remanded the case for further proceedings. (Dkt. No. 46, 52–53.)

After the Ninth Circuit issued its Memorandum Disposition, the case was assigned to Judge Beverly Reid O'Connell. (Dkt. No. 54.) On October 19, 2017, the case was transferred to this Court. (Dkt. No. 70.)

After a three-day jury trial, the jury returned a verdict in favor of FIFA, finding that WSG and FIFA did not enter into a contract. (Dkt. No. 143.) WSG filed the instant Motion on May 30, 2018. (Dkt. No. 148.) FIFA opposed on June 29, 2018. (Dkt. No. 158.) WSG replied on July 6, 2018. (Dkt. No. 160.)

The Court held a hearing on July 20, 2018.

III. LEGAL STANDARD

A motion under Rule 50(b) challenges the sufficiency of the evidence presented at trial to support the prevailing party's case. Judgment as a matter of law following a

jury verdict is proper "if the evidence, construed in the light most favorable to the nonmoving party, permits only one reasonable conclusion, and that conclusion is contrary to the jury's." *Vollrath Co. v. Sammi Corp.*, 9 F.3d 1455, 1460 (9th Cir. 1993). Judgment as a matter of law is improper if there is substantial evidence to support the jury's verdict. *See Transgo, Inc. v. Ajac Transmission Parts, Corp.*, 768 F.2d 1001, 1014 (9th Cir. 1985). "Substantial evidence means 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Id.* The "standard for granting summary judgment 'mirrors' the standard for judgment as a matter of law, such that 'the inquiry under each is the same.'" *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000) (internal citation omitted). The Court may not substitute its judgment of the facts for the judgment of the jury. *Tennant v. Peoria & Pekin Union Ry. Co.*, 321 U.S. 29, 33 (1944). A party seeking judgment as a matter of law must meet a "very high" standard. *Costa v. Desert Palace, Inc.*, 299 F.3d 838, 859 (9th Cir. 2002). "We can overturn the jury's verdict and grant such a motion only if there is no legally sufficient basis for a reasonable jury to find for that party on that issue." *Id.* (internal quotation marks omitted). "The Supreme Court cautions us to disregard all evidence favorable to the moving party that the jury is not required to believe." *Id.* (internal quotation marks omitted). "This high hurdle recognizes that credibility, inferences, and fact[-]finding are the province of the jury, not this court." *Id.*

Rule 59 governs motions for a new trial. Pursuant to Rule 59(a)(1), "[t]he court may, on motion, grant a new trial on all or some of the issues . . . after a jury trial, for any reason for which a new trial has heretofore been granted in an action at law in federal court." Fed. R. Civ. P. 59(a)(1)(A). Although Rule 59 does not enumerate specific grounds for a new trial, the Ninth Circuit has held that "the trial court may grant a new trial only if the verdict is contrary to the clear weight of the evidence, is based upon false or perjurious evidence, or to prevent a miscarriage of justice." *Molski v. M.J. Cable, Inc.*, 481 F.3d 724, 729 (9th Cir. 2007) (quoting *Passantino v.*

Johnson & Johnson Consumer Prods., 212 F.3d 493, 510 n.15 (9th Cir. 2000)) (internal quotation marks and brackets omitted). A district court "enjoys considerable discretion in granting or denying the motion." *Jorgensen v. Cassiday*, 320 F.3d 906, 918 (9th Cir. 2003).

When the movant claims that a verdict was against the clear weight of the evidence at trial, a new trial should be granted "[i]f, having given full respect to the jury's findings, the judge . . . is left with the definite and firm conviction that a mistake has been committed." *Landes Const. Co., Inc. v. Royal Bank of Canada*, 833 F.2d 1365, 1371–72 (9th Cir. 1987). "A trial court may grant a new trial only if the verdict is against the clear weight of the evidence, and may not grant it simply because the court would have arrived at a different verdict." *Pavao v. Pagay*, 307 F.3d 915, 918 (9th Cir. 2002).

IV. DISCUSSION

WSG's Motion is centered upon the Ninth Circuit's Memorandum Disposition in this case, in which the Ninth Circuit reversed the district court's dismissal for lack of personal jurisdiction. (*See* Mot.) WSG contends that because the Ninth Circuit concluded that certain documents established that WSG made a prima facie showing that a contract had been formed, the burden shifted to FIFA to disprove the existence of a contract. (Mot. at 15.) WSG argues that because FIFA did not meet its burden of disproving the contract, WSG is entitled to judgment as a matter of law.

Alternatively, WSG requests that the Court grant its Motion for a New Trial on the basis that the jury's conclusion "that no contract was formed between WSG and FIFA goes against the clear weight of the evidence." (Mot. at 15.)

A. MOTION FOR JUDGMENT AS A MATTER OF LAW

The Court rejects Plaintiff's arguments for two primary reasons. First, WSG misreads and overstates the Ninth Circuit's holding. Second, Plaintiff's burden shifting argument is misguided.

In its Memorandum Disposition, the Ninth Circuit determined that WSG had made a prima facie showing of an enforceable contract, not that WSG had conclusively established that a contract exists. (*See* Dkt. No. 52 at 6 ("[T]aking the uncontroverted allegations in the complaint as true and construing the evidentiary materials in the light most favorable to the plaintiff, Worldwide has made a prima facie showing of an enforceable contract and thus, of personal jurisdiction.").)

The Ninth Circuit's decision did not mean that WSG no longer had to meet its burden of proving the existence of a contract at trial. *See Peralta v. Dillard*, 744 F.3d 1076, 1088 (9th Cir. 2014) ("Pretrial rulings, often based on incomplete information, don't bind district judges for the remainder of the case. Given the nature of such motions, it could not be otherwise."); *Pearson v. Dennison*, 353 F.2d 24, 28 (9th Cir. 1965) (denial of a motion to dismiss is not the "law of the case"); *Andrews Farms v. Calcot, Ltd.*, 693 F. Supp. 2d 1154, 1166 (E.D. Cal. 2010) ("A denial of a motion to dismiss establishes only that the claims are plausible; it does not establish the merits of the claim."); *Casumpang v. Int'l Longshore, & Warehouse Union, Local 142*, 297 F. Supp. 2d 1238, 1249 (D. Haw. 2003) ("an appellate ruling on a motion to dismiss does not establish the law of the case for purposes of summary judgment[] when the complaint has been supplemented by discovery") (internal quotation marks omitted). WSG was still required to prove the existence of a contract by a preponderance of the evidence at trial. *Wells Fargo & Co. v. Wells Fargo Express Co.*, 556 F.2d 406, 430 n.24 (9th Cir. 1977) ("It is clear that plaintiffs bear the burden both of making an initial, prima facie showing of jurisdictional facts at the pleading stage and of proving those facts by a preponderance at trial."). Thus, the Court rejects WSG's argument that the Ninth Circuit's decision conclusively established the existence of a contract at trial.

Second, WSG's argument that the burden of proof shifted to FIFA is unsupported by applicable case law. WSG does not cite any authority demonstrating

that the *McDonell Douglas* burden shifting, or any similar burden shifting, is applicable to commercial contracts. (*See* Mot.; Reply.)

Thus, WSG's Motion for Judgment as a Matter of Law is **DENIED**.

B. MOTION FOR NEW TRIAL

WSG argues, in the alternative, that it is entitled to "a new trial pursuant to FRCP 59(a) on the grounds that the jury's verdict finding that no contract was formed between WSG and FIFA goes against the clear weight of the evidence, specifically Exhibits 1 through 6 and 8 through 11, which, according to the Ninth Circuit, establishes a prima facie case of the formation of a contract between WSG and FIFA." (Mot. at 15–16 (emphasis omitted).) That is the extent of WSG's argument for a new trial in its Motion. Again, as explained above, WSG misreads and overstates the Ninth Circuit's finding. In its Memorandum Disposition, the Ninth Circuit concluded, that "taking the uncontroverted allegations in the complaint as true and *construing the evidentiary materials in the light most favorable to the plaintiff,* Worldwide has made a *prima facie showing* of an enforceable contract and, thus, of personal jurisdiction." (Dkt. No. 52 at 5–6.) The Ninth Circuit did not conclude that WSG established the existence of a contract by a preponderance of the evidence. WSG has not established that "the verdict is against the great weight of the evidence" or that "it is quite clear that the jury has reached a seriously erroneous result." *Digidyne Corp. v. Data Gen. Corp.*, 734 F.2d 1336, 1347 (9th Cir. 1984) (internal quotation marks omitted).

WSG's Motion centers upon Exhibits 1 through 6 and 8 through 11—the communications upon which the Ninth Circuit concluded that WSG alleged a prima facie existence of a contract. (*See* Mot.; Reply.) However, Exhibits 1 through 6 and 8 through 11 are not the only evidence that the jury considered, and regardless, the Ninth Circuit's conclusion that those documents constituted a prima facie contract when accepting WSG's assertions as true and making all reasonable inferences in favor of WSG, is beside the point at trial. It is WSG's burden to prove the existence of a contract by a preponderance of the evidence. And the jury's decision that no

contract existed was not "against the great weight of evidence," nor was it "quite clear that the jury . . . reached a seriously erroneous result." *Digidyne Corp.*, 734 F.2d at 1347 (internal quotation marks omitted).

As FIFA highlighted in its Opposition, the jury did not hear from any witnesses who communicated with FIFA regarding the purported contract negotiations or who had personal knowledge about whether a meeting of the minds occurred. (Opp'n at 8.) Mr. Galaz, WSG's only witness, admitted he never communicated with anyone at FIFA prior to 2011, and the contract was allegedly entered into in 2001. (*See* Opp'n at 8 (citing Dkt. No. 158-1 (Declaration of Jennifer L. Roche ("Roche Decl.")), Ex. B (Tr. 231:6-15; 238:11-15; 259:7-260:23; 271:23-272:9)).) FIFA stated in several emails that it held the position that the parties never formed a contract in 2001. (Roche Decl., Ex. B (Tr. 274:12-275:15; 278:13-19).) Additionally, the jury is tasked with making credibility determinations. *See Winarto v. Toshiba Am. Elec. Components, Inc.*, 274 F.3d 1276, 1288 n.9 (9th Cir. 2001). In its Reply, WSG argues that Mr. Galaz's credibility does not "come[] into play" because "none of the facts on which the Ninth Circuit Court of Appeals relied in order to find that WSG had established a prima facie case for the existence of a contract relied, at all, on testimony by Mr. Galaz." (Reply at 14 (emphasis omitted).) WSG's argument is confused. Mr. Galaz's credibility is relevant because Mr. Galaz was WSG's only witness. And the documents that WSG contends formed the alleged contract only came into evidence through Mr. Galaz's testimony.

In short, WSG's reliance on the Ninth Circuit's decision on a motion to dismiss for purposes of seeking a new trial is misplaced.

//

//

//

//

//

V. CONCLUSION

For the foregoing reasons, the Court **DENIES** Plaintiff's Motion for Judgment as a Matter of Law, or, in the Alternative, New Trial.

IT IS SO ORDERED.

Dated: July 24, 2018

HONORABLE ANDRÉ BIROTTE JR.
UNITED STATES DISTRICT COURT JUDGE

EXHIBIT D

MacLean, Matthew J.

From: Murzinski, Vincent <vimur@copyright.gov>
Sent: Thursday, April 18, 2019 8:33 AM
To: Arnie Lutzker
Cc: Keita, Maty
Subject: RE: Available Balances in the 1999-2003 Cable Royalty Distribution Proceedings
Attachments: image001.gif

Arnie,

I've been told that the original calculations are correct.

Using the Growth of Funds Report will not produce an accurate result due to the timing differences of distributions. The later distributions earn additional compounded interest. Also, the judge's order required us to compute the interest of IPG's share going back to the beginning of each fund year.

I have asked a 3rd person to look at the calculations.

Vince

From: Arnie Lutzker [mailto:arnie@lutzker.com]
Sent: Wednesday, April 17, 2019 4:10 PM
To: Murzinski, Vincent
Cc: Keita, Maty
Subject: RE: Available Balances in the 1999-2003 Cable Royalty Distribution Proceedings

HI Vince – Any update yet? If not, do you have an projected timeframe when we should know?
Arnie

From: Murzinski, Vincent [mailto:vimur@copyright.gov]
Sent: Friday, April 12, 2019 1:59 PM
To: Arnie Lutzker <arnie@lutzker.com>
Cc: Keita, Maty <mkeit@copyright.gov>
Subject: RE: Available Balances in the 1999-2003 Cable Royalty Distribution Proceedings

Arnie

Kathy retired in June. Please cc emails to Maty Keita (mkeit@copyright.gov).

I have asked two staff members to review the numbers.

Vince

Vincent M. Murzinski, CGFM
Head, Fiscal Section
Licensing Division
http://www.copyright.gov/licensing/index.html
Office Hours 6:30 AM to 3:00 PM

Notice: Please be aware that any email correspondence associated with the examination of licensing documents may be considered part of the office's public record and may be subject to disclosure to other parties upon request.

From: Arnie Lutzker [mailto:arnie@lutzker.com]
Sent: Friday, April 12, 2019 1:23 PM
To: Murzinski, Vincent
Cc: Tsai, Kathy
Subject: RE: Available Balances in the 1999-2003 Cable Royalty Distribution Proceedings

Vince – In 2017, I sent you the email to figure out whether the balance in the 2000-2003 Cable Reserves were all available for the Devotional Claimants. As it turned out, I never got an answer, and now I need to address this question again.

As of today, it is my understanding that all claimant categories EXCEPT DEVOTIONAL CLAIMANTS have received their share of all funds for 2000-2003. As a result, 100% of the funds in the accounts should belong entirely to the Devotional Claimants. However, based on my analysis, there are major discrepancies in the balances for 2000 and 2003 and minor discrepancies for 2001-2002. As I communicated previously, based on the only partial distributions made to the Devotional Claimants for each of the years, I was able to estimate the portion of each fund which remained owing to the Devotional Category as of June 30, 2015. My estimated shares remaining for the Devotional category in June 2015 were as follows:

Year	Estimated Remaining Devotional Balance as of 6/30/15
2000	[redacted]
2001	
2002	
2003	

In reviewing the last Growth of Funds Report I had from **October 31, 2018**, the amounts in the funds are as follows:

Year	Balance in funds on 10/31/2018
2000	[redacted]
2001	
2002	
2003	

Recognizing that the funds earned interest over the years, there should be somewhat more in the accounts today than I estimated for June 30, 2015. (I don't know if there were deductions that might reduce the balances.) However, interest and deductions alone would not account the differences for 2000 and 2003, and perhaps understates the amounts for 2001 and 2002.

Year	Differences in balance estimated for 6/30/2015 and available on 10/31/2018
2000	**$1,132,517.11 (in effect, $1.1MM more than expected)**
2001	$11,615.93

2002	$7,867.23
2003	**-$200,457.14 (in effect $200K less than expected)**

Can you enlighten me why 2000 is so high, and 2003 is so low? Perhaps if you send me the annual growth of funds reports for 2014-present, it might be evident when balances changed, and knowing that we might be able to trace why. I need this as soon as practical as we are trying to figure out how to address additional distributions from these accounts.
Thanks for your prompt attention.

Arnie

Arnold P. Lutzker
Lutzker & Lutzker LLP
1233 20th Street, NW
Suite 703
Washington, DC 20036
Telephone: 202-408-7600 ext. 1
Cell: 202-321-9156
Fax: 202-408-7677
Email: arnie@lutzker.com
Website: www.lutzker.com

Be sure to check out our new firm website – https://www.lutzker.com

Proof of Delivery

I hereby certify that on Wednesday, May 01, 2019 I provided a true and correct copy of the Comment in Opposition to IPG's Motion for Partial Distribution to the following:

MPAA, represented by Lucy H Plovnick served via Electronic Service at lhp@msk.com

Independent Producers Group (IPG), represented by Brian D Boydston served via Electronic Service at brianb@ix.netcom.com

Signed: /s/ Matthew J MacLean