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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

KEVIN SORBO et al., Plaintiffs and Appellants, v. UNIVERSAL CITY STUDIOS, LLLP, L.P., Defendant and Respondent.	B205936 (Los Angeles County Super. Ct. No. BC303275)

APPEAL from a judgment of the Superior Court of Los Angeles County, Robert L. Hess, Judge. Affirmed.

Lavely & Singer, Martin D. Singer, Michael D. Holtz, Allison Hart Sievers; Cole Pedroza, Curtis A. Cole, Matthew S. Levinson, and Ashfaq G. Chowdhury for Plaintiffs and Appellants.

Katten Muchin Rosenman, Gail Migdal Title, Joel R. Weiner, and Yuval M. Rogson for Defendant and Respondent.

Plaintiff Kevin Sorbo,[1] an actor, sued defendant Universal City Studios, LLLP, L.P. (Universal), for breach of contract, breach of the implied covenant of good faith and fair dealing, fraud, and an accounting. The trial court entered judgment for Universal after sustaining its demurrer without leave to amend as to the fraud and breach of implied covenant claims, and then granting its motion for summary judgment of the remaining claims. In his appeal from the judgment, Sorbo challenges the rulings on demurrer and summary judgment. We reject his contentions and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

From 1993 to 1999, Sorbo starred in "Hercules," Universal's weekly action-adventure television series (Series). Universal compensated Sorbo according to their September 13, 1993 written agreement (Agreement). The Agreement was amended in 1996 to include a contingent profit participation clause that entitled Sorbo to a percentage of the Series' adjusted gross revenue, if any, as calculated under the Adjusted Contingent Participation (ACP) formula set forth in the Agreement.[2] Alternatively, the Agreement's "favored nation" provision gave Sorbo the benefit of the Modified Gross Profit (MGP) formula for adjusted gross revenue, should that be more favorable than the ACP formula.

In 1997, Sorbo suffered an aneurysm and multiple strokes, allegedly caused by the grueling production schedule of the Series' first four seasons, which were filmed in New Zealand.[3] Before beginning the fifth season, Sorbo notified Universal in late 1997

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[1] Sorbo's loan-out corporation, Kamakazee Kiwi Corp., Inc., is also a plaintiff in this action. For purposes of this appeal, because it is not necessary to distinguish between plaintiffs, we will refer to them jointly as Sorbo.

[2] Although the Agreement and the 1996 amendment were not included with the complaint, they were presented to the trial court for the demurrer and summary judgment hearings.

[3] The complaint alleged that "[a] typical day for Sorbo included approximately ten (10) to twelve (12) hours on the set shooting the Series, often six (6) or seven (7) days per

or early 1998 that he no longer wanted to perform in the Series because he had health problems and wanted to pursue a film career. In response, Universal executives Ned Nal, Greg Meidel, and Dan Philly represented to Sorbo "that if he agreed to commit to two (2) additional seasons of the Series, the Series could be sold in syndication and, as a result of that sale, Sorbo would receive guaranteed profits on the backend, since the Series would be worth substantially more money in syndication if there were at least six (6) full seasons of the Series." Similarly, the Series' executive producers Sam Raimi and Rob Tapert, whose contingent participation clauses were based on the MGP formula of adjusted gross revenue, informed Sorbo that if he continued for at least two more seasons, they "would each earn profit participations and make guaranteed 'big money' on the backend above and beyond their guaranteed compensation." Sorbo relied on these representations and remained for the Series' final two seasons.

After completing the Series' sixth and final season in 1999, Sorbo sought to renegotiate his contingent participation clause. In response, Universal executive Juliana Carnassale assured Sorbo that he had the same "very favorable" MGP formula of adjusted gross revenue that had been negotiated for Raimi and Tapert. Carnassale's April 23, 1999 letter stated that "'the "Modified Gross" definition referenced [in Paragraph 4 of the New Sorbo Agreement] is that of Sam Raimi and Rob Tapert, the executive producers of HERCULES. This is a definition which Craig Jacobson extensively negotiated on his clients' behalf. *As a result of those efforts, Kevin now has the benefit of a very favorable definition.* (Emphasis added.)'" In reliance upon Carnassale's April 23, 1999 letter, Sorbo abandoned his attempts to renegotiate his contingent participation clause.

In 2002, Sorbo exercised his right to audit Universal's books and financial records for the Series. The 2002 audit led Sorbo to request further information, including a copy

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week. In addition, Sorbo was required to do weight training and cardio training at the gym at least two (2) hours every day in order to maintain the physique required to play the role of the Greek god Hercules. Sorbo also spent several hours per day studying lines for the following day's shoot. As a result, it was not unusual for Sorbo to get an average of four (4) to four and [a] half (4 1/2) hours sleep per night."

of Universal's agreement with Raimi and Tapert (the Raimi/Tapert Agreement).[4] Sorbo received a copy of the Raimi/Tapert Agreement, which was redacted to conceal their right to additional compensation, to be charged as advances against their contingent participation, upon their completion of a certain number of episodes at a cost not to exceed 105 percent of budget. Sorbo did not have a similar provision in his Agreement.

By 2003, the Series had yet to show a profit under either the ACP or MGP formula of adjusted gross revenue. However, Raimi and Tapert received $8,325,000 in additional compensation, charged as an advance against their contingent participation, for meeting the production and budget requirements set forth in their contract. On Sorbo's 2003 profit participation statement, the $8,325,000 payment was listed as a deduction from gross revenue for "Other Participations and Payments." Sorbo, who had yet to receive any contingent participation, questioned this and other deductions listed on his 2003 statement.

On September 30, 2003, Sorbo filed this lawsuit against Universal based on the disputed $8,325,000 deduction and other alleged accounting errors and irregularities revealed by the 2002 audit. The complaint alleged claims for breach of contract,[5] breach of the implied covenant,[6] declaratory relief, and an accounting.

During discovery, Sorbo learned that the $8,325,000 deduction reflected the Raimi/Tapert advances against contingent participation. Sorbo took the position that because the Raimi/Tapert advances were listed as "Other Participations and Payments,"

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[4] The Raimi/Tapert Agreement was submitted for the summary judgment hearing.

[5] Sorbo alleged that Universal had breached the Agreement by: (1) failing to provide accurate and proper participation statements; (2) providing participation statements that understated the Series' gross receipts and overstated the Series' expenses, thereby understating the Series' profits and depriving Sorbo of his share of adjusted gross revenue; (3) improperly accounting for Sorbo's merchandising royalties; and (4) entering into below market value agreements with related or affiliated entities.

[6] The breach of implied covenant claim was based on the same allegations stated in the breach of contract claim.

he was entitled under his favored nation clause to a proportionate share of advances against contingent participation. Universal disagreed. Universal contended that although he was entitled to the most favorable formula for calculating adjusted gross revenue, he was not entitled to an advance against contingent participation.

In February 2006, Sorbo sought to amend the complaint to add claims for promissory fraud and promissory estoppel. In the proposed amendment, Sorbo added allegations that he had been fraudulently induced to remain for the final two seasons by false promises of future profits. He alleged that Tapert, Raimi, Meidel, Nal, and Philly had falsely represented that he "'would make big money above and beyond his guaranteed compensation' and . . . 'would make a fortune on the backend'" if he stayed for the Series' final two seasons. The representations were knowingly false, he claimed, because Universal knew he "would never see a penny of contingent participation."

The proposed amendment also added allegations that Sorbo had been fraudulently induced by Carnassale's 1999 letter to accept the MGP definition of adjusted gross revenue in his Agreement. He alleged that he was misled by the false assurance that he had the same "very favorable definition" of MGP as Raimi and Tapert. Sorbo alleged that this representation was knowingly false because Universal knew that: "(i) the Series was not likely to ever show a profit; (ii) the principal benefit that Raimi and Tapert had secured as a result of negotiating their 'very favorable definition' was that they were going to receive millions of dollars in advances against their contingent compensation; (iii) Universal was not going to pay Plaintiffs any advances against Plaintiffs' contingent compensation; and (iv) Universal was actually going to deduct Raimi's and Tapert's advances from the gross revenues when preparing [Sorbo's] participation statements, thereby assuring that [Sorbo] would never be paid any contingent compensation in connection with the Series."

In June 2006, Sorbo filed the first amended complaint. In September 2006, the trial court sustained Universal's demurrer with leave to amend.

In October 2006, Sorbo filed the second amended complaint, which, like the previous pleading, alleged claims for breach of contract, breach of the implied covenant,

fraud, and an accounting. The fraud claim was based on the allegedly false representations of future profits and Carnassale's 1999 letter regarding the favorable definition of MGP. Sorbo calculated that because Raimi and Tapert, who were entitled to 12 1/2 percent of MGP, had received $8,325,000, the total MGP must be $66,600,000, of which he was entitled to 8 percent or $5,328,000. (The mathematical computations are Sorbo's, not ours.)

Universal demurred to the claims for breach of contract, breach of the implied covenant, and fraud. The trial court sustained the demurrer without leave to amend as to the fraud and breach of implied covenant claims, but overruled the demurrer as to the breach of contract claim.

Universal then moved for summary judgment or, alternatively, summary adjudication of the remaining claims for breach of contract and an accounting. The trial court granted the motion in its entirety and entered judgment for Universal. This appeal followed.

DISCUSSION

I. Demurrer

"'In reviewing the sufficiency of a complaint against a general demurrer, we are guided by long-settled rules. "We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed." [Citation.] Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.] And when it is sustained without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm. [Citations.] The burden of proving such reasonable possibility is squarely on the

plaintiff.' (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) 'To meet [the] burden of showing abuse of discretion, the plaintiff must show how the complaint can be amended to state a cause of action. [Citation.] However, such a showing need not be made in the trial court so long as it is made to the reviewing court.' (*William S. Hart Union High School Dist. v. Regional Planning Com*. (1991) 226 Cal.App.3d 1612, 1621.) '[W]e may affirm a trial court judgment on any basis presented by the record whether or not relied upon by the trial court.' (*Day v. Alta Bates Medical Center* (2002) 98 Cal.App.4th 243, 252, fn. 1.)" (*Blumhorst v. Jewish Family Services of Los Angeles* (2005) 126 Cal.App.4th 993, 999.)

A. Fraud

In order to state a claim for fraud, the plaintiff must plead the following elements: "(1) a false representation as to a material fact, (2) knowledge of the falsity, (3) intent to defraud, (4) justifiable reliance, and (5) resulting damage." (*Fraker v. Sentry Life Ins. Co.* (1993) 19 Cal.App.4th 276, 285.)

Sorbo contends the demurrer should have been overruled as to the fraud claim because : (1) the producers and executives made knowingly false representations that he "'would make big money above and beyond his guaranteed compensation' and . . . 'would make a fortune on the backend,'" when they knew that the Series would never show a profit; (2) he detrimentally relied on the false representations by giving up his right to withdraw under the force majeure clause of the Agreement; and (3) he detrimentally relied on Carnassale's false representation that he had the same "very favorable definition" of MGP as Raimi and Tapert by accepting the definition of MGP in his Agreement.

1. <u>Promises of Future Profits</u>

Universal argued below that the promises of future profits were so uncertain and vague that, as a matter of law, they were not misrepresentations of fact but mere expressions of opinion about future events. (Citing *Gentry v. eBay, Inc.* (2002) 99

Cal.App.4th 816, 83l; *Neu-Visions Sports, Inc. v. Soren/McAdam/Bartells* (2000) 86 Cal.App.4th 303, 309-310.) The trial court sustained the demurrer on this ground, stating that the complaint failed to "set forth any knowingly false statements about past events, as opposed to future possibilities."

On appeal, Sorbo contends that because the false promises of future profits were made by persons with special knowledge that the Series would never show a profit, the jury must decide whether the statements were mere statements of opinion or actionable misstatements of fact. (Citing *Furla v. Jon Douglas Co.* (1998) 65 Cal.App.4th 1069, 1080-1081; *Borba v. Thomas* (1977) 70 Cal.App.3d 144, 153.) We need not decide this issue. Even assuming, for the sake of discussion, that the representations contained false statements of fact, we conclude that the demurrer was properly sustained for lack of detrimental reliance, as discussed below.

2. Detrimental Reliance

Universal argued below that because Sorbo had a preexisting Agreement to perform in the Series, his continued performance of the Agreement did not constitute actionable reliance as a matter of law. (Citing *Cadlo v. Owens-Illinois, Inc.* (2004) 125 Cal.App.4th 513, 519 ["Actual reliance occurs when the defendant's misrepresentation is an immediate cause of the plaintiff's conduct, altering his legal relations, and when, absent such representation, the plaintiff would not, in all reasonable probability, have entered into the transaction"].)

Universal further argued that Sorbo could not rely on the force majeure clause to state a claim of fraud. Universal stated that "[f]orce majeure is a shield, to be used [as] a *defense* to a failure to perform a contract. It cannot be used as a *sword* to state a fraud claim. Universal is not aware of any authority stating that a claim of force majeure can be used as a substitute for detrimental reliance on a fraud claim." Universal also pointed out that Sorbo's performance was not impossible (Civ. Code, § 1511), given his successful completion of the final two seasons.

On appeal, Sorbo contends that his allegations of "devastating health issues [were sufficient to] establish that he could have relied on *force majeure* or the doctrine of impossibility to excuse him from his contract . . . . He gave up those rights based on [Universal's] false guarantees that he would share in the show's profits; [Universal's] misrepresentations induced Sorbo to continue on the show for two more years," which exacerbated his health problems and delayed his recovery. We are not persuaded.

Sorbo has cited no authority to support his position that the force majeure clause may be used to support a fraud claim. Although Sorbo alleges that he "gave up" his contractual right to withdraw from the Agreement under the force majeure clause, this was a legal conclusion that was not supported by the allegations of the complaint. Sorbo was not unable to perform in the Series, as shown by his successful completion of the final two seasons. Moreover, Sorbo did not "give up" the clause in the sense that he relinquished his legal right to withdraw from the Series. Even though Sorbo agreed to continue with the Series, the force majeure clause in his contract remained intact, and he was not prevented from exercising his right under that clause had he truly been unable to perform. Sorbo's decision to remain in the Series did not alter his legal rights, and therefore was not detrimental.

It is well established that the continued performance of a preexisting agreement does not support a claim of detrimental reliance. As was stated in *Auerbach v. Great Western Bank* (1999) 74 Cal.App.4th 1172, 1185-1186: "Generally speaking, a commitment to perform a preexisting contractual obligation has no value. In contractual parlance, for example, doing or promising to do something one is already legally bound to do cannot constitute the consideration needed to support a binding contract. (1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, § 221, p. 227; 2 Corbin on Contracts (rev. ed. 1995) § 7.1 et seq.; 3 Williston on Contracts (4th ed. 1992), § 7:36 et seq.) [¶] The same understanding has carried over to the tort area. In *Conrad v. Bank of America* (1996) 45 Cal.App.4th 133, . . . the court rejected the notion that a bank's 'false promise' to approve a new loan made to induce the plaintiffs to allow the bank to use certain proceeds to pay down their existing loan balance supported a claim of fraud. As the court

explained: 'It was established that the Bank had an existing security agreement with [plaintiffs' company] that gave it the right to use the . . . proceeds as payment for its existing loans. . . . Thus, well before the alleged promise of a loan, the Bank had the legal right to use the . . . proceeds for payment of its loans and plaintiffs had no legal right to prevent that procedure.' (45 Cal.App.4th at p. 158.) Due to the fact that their purported reliance damages were based on an existing obligation, the court concluded that '[p]laintiffs failed to show damage specifically attributable to the short-lived promise of a loan and accordingly failed to establish a cause of action for fraud based upon that promise.' (*Id.* at p. 160; see *Molko v. Holy Spirit Assn*. (1988) 46 Cal.3d 1092, 1108 ['Justifiable reliance [for purposes of fraud in the inducement] exists when the misrepresentation or nondisclosure was an immediate cause of the plaintiff's conduct which alters his legal relations, and when without such misrepresentation or nondisclosure he would not, in all reasonable probability, have entered into the contract or other transaction']; *Service by Medallion, Inc. v. Clorox Co*. [(1996)] 44 Cal.App.4th [1807,] 1818-1819 [cleaning company's purchase of materials in preparation for performing contractual promise 'were essential to its subsequent performance of the service agreement and therefore could not have been considered detrimental'].)"

Moreover, even if Sorbo had adequately pled the element of detrimental reliance in the second amended complaint, the demurrer was properly sustained when we consider the inconsistent allegations in the first amended complaint. In the earlier pleading, Sorbo alleged that when he "experienced serious health problems as a result of his work on the Series in 1997, he reevaluated his career objectives and determined that he no longer wanted to perform on the Series and instead wanted to pursue a career performing in feature films, something which was not possible while [he] was committed to the Series." After setting forth that he had suffered certain health problems, he stated that "[i]n addition, at that time, [he] wanted to pursue a feature film career, but the Series' demanding production schedule precluded [him] from committing to work in feature films. Accordingly, in 1997, [he] informed Universal that he no longer wanted to perform on the Series."

In contrast, in the operative pleading, Sorbo alleged that he "believed and understood that because continuing to perform on the Series would likely result in serious adverse health consequences, and possibly cost him his life, he had the right to cease performing on the Series based on the force majeure clause in the Agreement." Thus, "prior to the commencement of the fifth (5th) season of the Series, Sorbo informed representatives of Universal that as a result of his health problems, [he] had a physical disability which precluded him from continuing to perform on the Series." The earlier allegations concerning Sorbo's desire to pursue a feature film career were eliminated without explanation.

We find the explanation obvious. The operative pleading claimed that Sorbo was physically unable to perform his role in the Series. Thus, he believed his health problems allowed him to invoke the force majeure clause in the contract. It was his willingness to forego that option that allegedly constituted the consideration for the false promise of profits generated by syndication of the Series. Sorbo's allegations in the first amended complaint demonstrate, not that he was *incapable* of performing under the contract, but that he no longer *wanted* to. Moreover, his admission that he wanted to leave the series to pursue a feature film career undermined his alleged claim of consideration in the second amended complaint. Sorbo's admitted ability to work in feature films would have rendered the force majeure clause inapplicable. More significantly, even if Sorbo had been successful in invoking the force majeure clause, he would have been prevented from rendering services for others. Thus, the allegation that he was prevented from pursuing a different career in acting would have rendered meaningless his claim that he passed up the opportunity to invoke the force majeure clause. Put simply, there would have been no consideration for the alleged promise of future profits if he continued performing in the Series.

Although we generally must assume the truth of factual allegations contained in a complaint, "an exception exists where a party files an amended complaint and seeks to avoid the defects of a prior complaint either by omitting the facts that rendered the complaint defective or by pleading facts inconsistent with the allegations of prior

pleadings." (*Owens v. Kings Supermarket* (1988) 198 Cal.App.3d 379, 383-384.) This case is an example of the latter. For purposes of this appeal, we may assume, as alleged in Sorbo's first amended complaint, that he was healthy enough, willing, and able to act, albeit in a different medium. (*Id.* at p. 384.) Thus, force majeure clause or not, he was obligated to perform in the Series. As we have discussed, continuing to render services under a preexisting contract does not constitute consideration.

We conclude that granting Sorbo leave to amend would not cure the defect. Given his admission from his earlier pleading, he cannot plead any basis for legally reneging on his promise to fulfill the contract. The demurrer was properly sustained.

3. Carnassale's Letter

Universal argued below that Carnasalle's 1999 letter did not support a promissory fraud claim because it contained no promises and did not alter the terms of Sorbo's Agreement. Promissory fraud, Universal asserted, requires a "promise" made "without any intention of performing it." (Civ. Code, § 1710.) Universal contended that the letter simply commented upon the "very favorable definition" of modified gross revenue in Sorbo's preexisting Agreement, without creating a new contract or altering the existing one. Universal asserted that because the letter did not modify the definition of modified gross revenue in Sorbo's Agreement, it did not alter Sorbo's legal rights and therefore could not support a claim of detrimental reliance.

Sorbo contends on appeal that he detrimentally relied on the letter by accepting the existing definition of MGP in his Agreement. We disagree. Even if Sorbo abandoned his attempt to renegotiate the definition of MGP in reliance on the letter, his reliance could not have been detrimental in the absence of an allegation that Sorbo would have succeeded in renegotiating his contract. No such allegation exists in the complaint.

B. Breach of the Implied Covenant of Good Faith and Fair Dealing

Sorbo alleges that Universal breached the implied covenant of good faith and fair dealing by: (1) improperly concealing and deducting the $8,325,000 Raimi/Tapert

advances from adjusted gross revenue; and (2) wrongfully denying him commensurate advances against contingent participation under the favored nation clause of his Agreement. In its demurrer, Universal argued that the breach of implied covenant claim was duplicative of the breach of contract claim. Universal pointed out that in the noninsurance context, the sole remedy for the breach of an agreement is contractual. (Citing *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 352-353 [in the noninsurance context, the remedy for breach of an agreement, including breach of the implied covenant of good faith and fair dealing, is solely contractual].) Based on this rationale, the trial court below sustained the demurrer without leave to amend.

On appeal, Sorbo contends that the trial court misapplied the law and stripped the breach of implied covenant doctrine of all meaning. We disagree. Sorbo's breach of implied covenant claim is essentially a claim for tortious breach of contract, which does not exist in the noninsurance context without a violation of an independent duty arising from principles of tort law. (*Freeman & Mills, Inc. v. Belcher Oil Co.* (1995) 11 Cal.4th 85 [overruling *Seaman's Direct Buying Service, Inc. v. Standard Oil Co.* (1984) 36 Cal.3d 752].) The gist of Sorbo's breach of implied covenant claim is that Universal wrongfully refused to pay him the contingent participation that he was owed under the Agreement, which is indistinguishable from a breach of contract claim. The implied covenant claim does not allege a violation of an independent duty arising from principles of tort law. Accordingly, the demurrer was properly sustained without leave to amend.

II. Summary Judgment

Universal moved for summary judgment or, alternatively, summary adjudication of the remaining claims for breach of contract and an accounting. Universal contended that of the disputed issues identified in Sorbo's contention interrogatory responses, there were no triable issues of material fact and it was entitled to judgment as a matter of law.

On appeal, only the following issues remain contested: (1) Sorbo's right under the favored nation clause to a commensurate share of the Raimi/Tapert advances; (2) the deduction of barter sales fees; (3) the deduction of foreign distribution fees; (4) the

inflation of production costs; (5) the failure to report revenue from the sale of the Series in New Zealand; (6) the licensing of rerun broadcast rights to a related entity for less than market value; (7) the failure to report revenue from the sale of the Series to a related entity; (8) the improper deduction of advertising costs from home video receipts; (9) the improper deduction of vault storage charges, convention charges, Nielsen research charges, film clip distribution fees, and raw stock rebates; (10) the right to damages; and (11) the right to an accounting.

The standard of review for summary judgment is well established. The motion "shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c).) A moving defendant has met his burden of showing that a cause of action has no merit by establishing that one or more elements of a cause of action cannot be established or that there is a complete defense. (*Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 849-850; *Lackner v. North* (2006) 135 Cal.App.4th 1188, 1196.)

We independently review an order granting summary judgment, viewing the evidence in the light most favorable to the nonmoving party. (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768; *Lackner v. North*, *supra*, 135 Cal.App.4th at p. 1196.) In performing our independent review of the evidence, "we apply the same three-step analysis as the trial court. First, we identify the issues framed by the pleadings. Next, we determine whether the moving party has established facts justifying judgment in its favor. Finally, if the moving party has carried its initial burden, we decide whether the opposing party has demonstrated the existence of a triable, material fact issue." (*Chavez v. Carpenter* (2001) 91 Cal.App.4th 1433, 1438.)

In determining whether there are triable issues of material fact, we consider all the evidence set forth by the parties, except that to which objections have been made and properly sustained. (Code Civ. Proc., § 437c, subd. (c); *Guz v. Bechtel National, Inc.*, *supra*, 24 Cal.4th at p. 334.) We accept as true the facts supported by the nonmoving party's evidence and the reasonable inferences therefrom (*Sada v. Robert F.*

Kennedy Medical Center (1997) 56 Cal.App.4th 138, 148), resolving evidentiary doubts or ambiguities in the nonmoving party's favor (*Saelzler v. Advanced Group 400*, *supra*, 25 Cal.4th at p. 768).

A. Advances Against Contingent Participation

Under his Agreement, Sorbo is entitled to contingent participation in adjusted gross revenue, as defined under the ACP formula. The Agreement defines ACP to be "the Gross Receipts, if any, remaining after deduction from Gross Receipts, in the following order, on a continuing basis, of (1) Distribution Fees, (2) Distribution Charges, (3) Other Participations and Payments, (4) Imputed Interest Equivalent, and (5) Production Charges." In addition, the Agreement contains a favored nation clause[7] that allows the use of the MGP formula if that provides a more favorable result.

1. The Raimi/Tapert Advances

The Raimi/Tapert Agreement permitted the executive producers to receive additional compensation, to be charged as "advances against . . . profits," upon the completion of a certain number of episodes at a cost not to exceed 105 percent of budget. Their additional compensation was to be paid as follows: "Upon completion of the 79th episode of either series, $25,000 per episode for that series; upon completion of the 90th episode this advance will be increased to $50,000 retroactively."

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[7] The favored nation clause stated: "It is understood that other individuals rendering services on the 'HERCULES' Series have been granted a percentage participation in 'Modified Gross' derived from such series, which is to be calculated pursuant to a definition of 'Modified Gross' contained in an exhibit attached to the individuals' respective contracts . . . . If the 'Modified Gross' derived from the 'HERCULES' Series under such other definition is greater than the 'Adjusted Contingent Participation' as defined in Exhibit 'A' attached hereto, then the amount of such 'Modified Gross' shall be deemed the Adjusted Contingent Participation hereunder. For example, if such Modified Gross is $100,000 and Adjusted Contingent Participation is $80,000, then Performer would be entitled to 8% of 100% of $100,000."

After meeting the stated production and budget goals, Raimi and Tapert received $8,325,000 in additional compensation, which was deducted from Sorbo's 2003 profit participation statement under the heading "Other Participations and Payments." Universal states that this was a proper deduction under both the ACP and MGP formulas of adjusted gross revenue, but that it reversed this deduction in a good faith attempt to resolve this litigation.

Sorbo contends that by treating the $8,325,000 advance as a nonrefundable participation payment, Universal conceded there were profits, which triggered his right under the favored nation clause to a commensurate advance against contingent participation. He argues that the trial court erred in resolving this issue on summary judgment notwithstanding the triable issues of material fact identified in the expert declaration of Philip Hacker, an entertainment industry accounting expert.

2. Expert Declaration

Sorbo contends that the trial court erroneously excluded Hacker's declaration, which was proffered to explain an ambiguity in the Agreement regarding the application of the favored nation clause to the advances against contingent participation. According to Hacker's declaration, "[t]he advances in the Raimi/Tapert Agreement are an integral part of the Modified Gross profit definition. The advances are in effect saying that the participation payments to Raimi and Tapert under the Modified Gross definition in the Raimi/Tapert Agreement will be no less than the amount of the advances." "The custom and practice in the entertainment industry dictates that based on Sorbo's favored nations status, and because the advances [to Raimi and Tapert] are an integral part of the definition of Modified Gross, if Raimi and Tapert received non-refundable advances against the Modified Gross, then Sorbo also should have received advances against the Modified Gross."

Sorbo contends that the trial court erred in failing to provisionally receive Hacker's declaration in order to consider whether, in light of the declaration, the Agreement was susceptible to the interpretation urged by Hacker.[8] We find no error.

Because Hacker's declaration failed to consider that the additional compensation paid to Raimi and Tapert was contingent on their compliance with budget and production goals, which was unrelated to the calculation of MGP, his opinion that the advances "are an integral part of the Modified Gross profit definition" is not supported by the facts. (See *Barragan v. Lopez* (2007) 156 Cal.App.4th 997, 1007 ["An expert's opinion is only as good as the facts upon which it is based"].) We therefore conclude that Hacker's declaration is not relevant to our interpretation of the Agreement and was properly excluded by the trial court.[9]

3. The Favored Nation Clause

The interpretation of a contract is purely a legal issue for the court unless the interpretation turns on the credibility of extrinsic evidence. (*Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 865.) In order for there to be a triable issue of material fact, there must be a conflict of evidence. (*Sinai Memorial Chapel v. Dudler* (1991) 231 Cal.App.3d 190, 196-197.) Here, the evidence is undisputed that the

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[8] "As has been explained in numerous cases, when a party contends the language of a contract is ambiguous the test for the admissibility of extrinsic evidence to explain the meaning of the contract is not whether the contract appears to the court to need interpreting 'but whether the offered evidence is relevant to prove a meaning to which the language of the instrument is reasonably susceptible.' Therefore, the court must provisionally receive all credible evidence concerning the parties' intentions to determine whether the contract language is reasonably susceptible to the interpretation urged by a party. If in light of the extrinsic evidence the language is reasonably susceptible to the interpretation urged, then the extrinsic evidence is admitted to aid in interpreting the contract. 'If it is not, the case is over.'" (*Wagner v. Columbia Pictures Industries, Inc.* (2007) 146 Cal.App.4th 586, 589-590, fns. omitted.)

[9] *Wolf v. Superior Court* (2004) 114 Cal.App.4th 1343 is distinguishable. Unlike the Agreement in this case, the contract in *Wolf* failed to define the term gross receipts, so the expert testimony was relevant to interpret a term not defined in the contract.

producers' additional compensation was based not on the existence of adjusted gross revenue, but their compliance with production and budget goals. Accordingly, the interpretation of the favored nation clause presents solely a legal issue.

Universal contends that the favored nation clause "simply ensures that Sorbo has a participation 'definition' that is on par with those of other participants, not that he will be paid sums proportional to the sums paid to others rendering services on the Series." We agree. According to the plain language of the Agreement, the favored nation clause applies only to the formula used to determine adjusted gross revenue. It does not apply to the producers' right to additional compensation for meeting production and budget goals.

Given that Sorbo had no similar right to additional compensation, his reliance on the favored nation clause is misplaced. As the producers' additional compensation was not based on the existence of adjusted gross revenue, the favored nation clause was not triggered by their advance against contingent participation.[10] Similarly, because the additional compensation was not related to the existence of adjusted gross revenue, the heading under which the advances were listed on accounting statements does not create a triable issue of material fact. On this record, it is not reasonable to infer from the mere headings on the accounting statements (e.g., "Other Participations and Payments") that the Series had shown a profit, when profit was a defined term in the Agreement.

B. Barter Sales Fee

Universal deducted from gross revenue an $18.4 million barter sales fee. According to the declaration of Universal senior executive Steve Rosenberg, a barter sale

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10 As stated in Universal's brief, "The fact that the Raimi/Tapert Advances are offset 'against' any potential future participation that would otherwise be due to them is of no moment. The language of paragraph 4(D) of the Raimi/Tapert Agreement provides that 'PTV will pay Lender [*i.e.*, Raimi/Tapert] advances <u>against</u> its profits,' not <u>of</u> its profits. In other words, Universal is simply entitled to recoup the amount it pays Raimi/Tapert in Advances before it makes any participation payments to them. Recoupment rights do not (and cannot) transmute the advance payment into a participation payment." "Moreover, the Advances were provided to the Series' executive producers in exchange for controlling production costs – consideration Sorbo could never have provided."

involves the exchange of a license to exhibit a product for the receipt of air time, and the distributor's subsequent sale of that air time to advertisers. "Such sales of air time by distributors are known as 'barter sales.'"

According to Rosenberg, a barter sales fee is the commission that Universal was charged by outside advertising agencies that participated in the sale of air time received from barter sales. Rosenberg attested that with regard to the Series, the "'[b]arter sales' were conducted by a staff of experienced personnel at Universal and USA who were wholly separate from those who distribute television product for exhibition on stations or cable outlets. . . . Universal and USA sold the advertising time they acquired from television stations to advertisers who generally were represented by advertising agencies. The advertising agencies charged their clients a commission for their services. Universal and USA received payments for the air time sold net of any fees taken by the outside advertising agency."

Notwithstanding the fact that the Agreement allowed Universal to deduct "a barter sales fee of 15%" from the calculation of ACP and MGP, Sorbo disputes the $18.4 million deduction for barter sales fees, contending that no third party commissions were paid in this case.

Universal submitted the declaration of Robert Bradley, the senior executive responsible for preparing the Series' accounting statements in accordance with the respective participants' contracts and participations definitions. Regarding Sorbo's claim "that a Universal division allegedly purchased air time from Universal's barter sales division without the use of an advertising agency, and that Universal nonetheless and improperly charged the Series with advertising agency commissions on the transactions," Bradley stated that "Sorbo does not identify any such transactions, nor am I aware of any such transactions, nor is there any reason to believe that any took place. A similar claim was made on behalf of Lucy Lawless in connection with Universal's reporting on the television series 'Xena.' In that instance, Lawless identified a purchase of air time by Universal's film division; Universal provided her auditors with documentation establishing that an outside advertising agency had in fact been used by the film division

to buy the air time and had paid for the air time net of the advertising agency's commission for its services."

On appeal, Sorbo contends that a triable issue of material fact was created by the deposition testimony of accountant William Adelmann, who testified that according to his understanding of the Agreement, Universal may only deduct a barter sales fee when it uses a third party distributor. In addition, Sorbo contends that the barter sales fees were distribution fees, which may not be deducted from gross revenue under the Agreement. In support of this assertion, Sorbo points out that Universal listed barter sales fees on accounting statements under the heading of distribution fee.

We conclude Sorbo's evidence failed to create a triable issue of material fact. Sorbo failed to contradict Universal's evidence that the deductions were appropriately taken for commissions charged by third party advertising agencies involved in the barter sales transactions. The manner in which the commissions were listed on the accounting statements is at best speculative and does not contradict the evidence that the commissions were paid to third party advertising agencies. Accordingly, we conclude there were no triable issues of material fact and Universal was entitled to deduct the barter sales fee under the Agreement as a matter of law.

C. *Foreign Syndication Distribution Fees*

From 1998 to 2002, Universal deducted foreign syndication distribution fees from gross revenue, based on the provision allowing deductions for fees charged by a distributor that is not a producer company. Universal presented evidence that between 1998 and 2002, it was a distributor but not a producer company, as a result of its transfer of assets, including the Series, to USA Networks, Inc., in 1998. From 1998 to 2002, Universal was the foreign distributer of USA Networks, Inc.'s television products, including the Series, and received a 10 percent foreign distribution fee, which was deducted from gross revenue. After Universal reacquired the Series in 2002 and again became a producer company, it ceased deducting the foreign distribution fee.

Sorbo contends that a triable issue of material fact exists as to whether Universal remained a producer company from 1998 to 2002 based on evidence that, in 1996, Universal owned 50 percent of USA Networks, Inc. Although there is some confusion in the record as to whether the company involved was USA Network or USA Networks, Inc., the evidence at best shows only that Universal owned a 50 percent interest in USA Networks, Inc. in 1996. The period in question, however, is 1998 to 2002, for which there is no evidence of Universal's ownership interest in USA Networks, Inc. Accordingly, the evidence is insufficient to create a triable issue of material fact. (*Sinai Memorial Chapel v. Dudler*, *supra*, 231 Cal.App.3d at pp. 196-197.)

D. Production Costs

Universal presented evidence that the production costs incurred by Raimi and Tapert were properly deducted from gross revenue. Universal's attorney, Joel Weiner, attested that Universal had produced over 12,000 pages of production cost reporting (known as "production bibles") to Sorbo during discovery. Weiner further declared that "Sorbo did not object to any of the specific cost entries on the production bibles."

Sorbo disputes the deduction of more than $10 million in production costs incurred at the Los Angeles office of Raimi and Tapert, arguing that the costs incurred in Los Angeles were not related to the production of the Series in New Zealand. Sorbo cites a string of record references in support of the assertion that "Ross [presumably an employee of Raimi and Tapert] admitted that many of the costs charged to the Los Angeles office related to other shows and projects." The problem, however, is that the cited record references do not support Sorbo's assertion. The references to Ross's deposition testimony do not assist Sorbo, in that he repeatedly answered, "I do not know."

Sorbo contends that the trial court misplaced the burden of persuasion and granted the motion without any evidence to show that the production charges originating from the Los Angeles office were related to the Series. We disagree. The trial court granted the motion based on evidence that Sorbo had received, without objection, production bibles

containing 12,000 pages of itemized costs for the Series. Under the summary judgment statute, once the moving party defendant has met its burden of showing that a cause of action has no merit, the burden shifts to the plaintiff to show that a triable issue of one or more material facts exists as to that cause of action. (Code Civ. Proc., § 437c, subd. (p).) The plaintiff may not rely upon the mere allegations "of its pleadings to show that a triable issue of material fact exists but, instead, shall set forth the specific facts showing that a triable issue of material fact exists as to that cause of action or a defense thereto." (*Ibid.*; *Union Bank v. Superior Court* (1995) 31 Cal.App.4th 573, 579-594 [a defendant seeking summary judgment need only demonstrate the plaintiff's case has no merit to shift the burden to the plaintiff to demonstrate the existence of a triable issue of material fact].)

E. Sale in New Zealand

Allegedly, Universal understated gross revenue by excluding proceeds received from the sale of the Series in New Zealand. In its summary judgment motion, Universal presented evidence that the New Zealand transaction was not a sale of its entire ownership interest in the Series, but a transfer of a lesser interest for tax purposes.[11] Universal argued that it was allowed to deduct from gross revenue "monies received from any foreign subsidies, tax shelter financing transactions, or similar receipts."

Sorbo contends on appeal that a triable issue of material fact exists as to whether the transaction was a sale of Universal's entire ownership interest in the Series. Universal responds that even assuming, for the sake of argument, that the transaction constituted a sale, Sorbo is incapable of showing that he was injured. According to Universal, if it had included the "sale" revenue in gross receipts, it would have excluded from gross receipts any further revenues earned from those episodes. In reality, Universal excluded the "sale" revenue but continued to include further revenues earned

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11 Universal states in its brief that it "transferred certain rights to one season of the Series but retained various other rights in that season's episodes, and retained only ten percent of the sale price."

from those episodes, which was to Sorbo's benefit. Universal points out that because "Sorbo does not claim that Gross Receipts generated from the season of the Series that was the subject of this tax-related transaction were not reported to him after 1998[, he] therefore has no basis for complaint." (Citing *Thompson v. Halvonik* (1995) 36 Cal.App.4th 657, 662 [plaintiff must state facts demonstrating actual damages to avoid summary judgment].) Sorbo does not respond to this contention in his reply brief.

Even assuming there is a triable issue as to whether Universal sold its entire ownership in the Series, Sorbo does not dispute that Universal's accounting in this regard did not cause him to suffer any harm. Thus, the fact allegedly remaining in dispute is not material, and the court properly found that Sorbo did not carry his burden of proof.

F. Rerun Broadcast Rights

Sorbo contends that Universal understated revenue by licensing the Series' rerun broadcast rights to one of the USA affiliates (USA) for less than fair market value. Sorbo argues that the trial court was required to infer in his favor that the licensing agreement was for less than fair market value, based on his evidence that: (1) Universal had a 50 percent ownership interest in USA; (2) Universal did not charge the agreed-upon-per-episode license fee of $400,000; and (3) Universal did not receive any negotiated performance-based bonus from USA.

In its respondent's brief, Universal points out that it produced the "declarations from the negotiators on each side of the transaction attesting that the rerun license agreement . . . was the product of extensive, arm's length negotiations; that the fee took into account the performance of the Series and the marketplace; and that each negotiator attempted to obtain the best deal possible for his company. [Record citations omitted.] [¶] Sorbo provided no evidence to contradict the negotiators' testimony and no evidence that any comparable television series had obtained any more favorable license." Universal further asserts that although "Sorbo mentions the absence of a 'performance-based bonus' [record citation omitted], [he] provides no evidence that such a bonus is standard or that its absence here is 'unfair.'" As for Sorbo's contention that the agreed-

upon-per-episode license fee was not collected, Universal responds that this contention is irrelevant in light of the fact that the full fee was reported as revenue in Sorbo's participation accountings. Sorbo does not address these issues in his reply brief.

We conclude that Sorbo has failed to meet his burden on appeal of demonstrating the existence of reversible error. It is not enough for Sorbo to identify the inferences not drawn in his favor, without addressing the evidence in support of the motion. "It is a fundamental rule of appellate review that the judgment appealed from is presumed correct and '"'all intendments and presumptions are indulged in favor of its correctness.'" [Citation.]' (*State Farm Fire & Casualty Co. v. Pietak* (2001) 90 Cal.App.4th 600, 610.) An appellant must provide an argument and legal authority to support his contentions. This burden requires more than a mere assertion that the judgment is wrong. 'Issues do not have a life of their own: If they are not raised or supported by argument or citation to authority, [they are] . . . waived.' (*Jones v. Superior Court* (1994) 26 Cal.App.4th 92, 99.) It is not our place to construct theories or arguments to undermine the judgment and defeat the presumption of correctness. When an appellant fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority, we treat the point as waived. (*Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784-785.)" (*Benach v. County of Los Angeles* (2007) 149 Cal.App.4th 836, 852, fn. omitted.)

G. Sale to a Related Entity

Sorbo contends that Universal understated revenue by failing to report its sale of the Series to USA in 1998, and failing to include the receipts from that sale in his participation statements. Universal contends that the evidence fails to show that there was a sale of its entire ownership interest in the Series. Moreover, Universal argues that even if there had been such a sale, Sorbo would not have been entitled to any further revenue from the episodes at issue. In Universal's view, Sorbo could not have been injured by the omission of the "sale" revenue because he does not dispute that he continued to receive accountings after the 1998 transfer of assets. Sorbo does not address

this contention in his reply brief. We conclude that Sorbo failed to meet his burden of establishing that there was a triable issue of material fact in this regard.

H. Video Advertising Costs

In opposition to the summary judgment motion, Sorbo argued that Universal had understated home video receipts by improperly deducting over $1.5 million in advertising costs. The trial court stated that although there might be a triable issue of material fact as to the propriety of the deduction, this did not preclude Universal from obtaining summary judgment because the issue was "not properly framed by the pleadings as supplemented by the responses to the interrogatories." Although Sorbo argues on appeal that his interrogatory response was prepared when discovery was incomplete, he does not contend that the trial court abused its discretion in denying his request for a continuance for further discovery. On this record, we are compelled to conclude that Sorbo has failed to meet his burden of showing that he has established the existence of prejudicial error.

I. Other Charges

In opposition to the summary judgment motion, Sorbo argued that Universal improperly deducted from gross revenue the costs incurred by the Series for vault storage, sales conventions, and Nielsen research. The Agreement allows these deductions, as explained in Robert Bradley's declaration. But Sorbo argues, based on Philip Hacker's declaration, these are administrative expenses that should not have been charged to the Series. Given that Hacker's declaration expresses no factual basis for his conclusion, which is contrary to the terms of the Agreement, we will not rely on it.

Sorbo also argued below that Universal failed to account for raw stock rebates that were received for the Series. In support of this contention, Sorbo relied on the deposition testimony of Robert Bradley. His testimony, however, is inconclusive on this point ("I can't speak specifically to that"). Moreover, in his subsequent declaration, Bradley denied that raw stock rebates were received for the Series.

Sorbo contends that Bradley's declaration may not be used to evade his prior testimony. Sorbo cites *D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 21-22, which held that when a plaintiff makes a clear and unequivocal admission at his deposition and later issues a contrary affidavit, the affidavit cannot be used to create a triable issue of material fact. In this case, however, Bradley's prior testimony was inconclusive and did not constitute a clear and unequivocal admission regarding the receipt of raw stock rebates. Accordingly, Sorbo's reliance on *D'Amico* is misplaced.

As for the film clip distribution fees, we conclude that Sorbo has failed to provide an argument and legal authority to support his contentions. "When an appellant fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority, we treat the point as waived. (*Badie v. Bank of America*[, *supra*,] 67 Cal.App.4th 779, 784-785.)" (*Benach v. County of Los Angeles*, *supra*, 149 Cal.App.4th at p. 852.)

J. Damages

Sorbo contends that there are triable issues of material fact as to damages. He argues that the record contains evidence to support his claim for advances against contingent participation and other withheld payments. The contention lacks merit. Given that Sorbo's damages claims are based on contract interpretations and fraud claims that we have rejected, we conclude there are no triable issues of material fact as to damages.

K. Right to an Accounting

Sorbo contends that he is entitled to an accounting and that the trial court erred in failing to address this issue in the summary judgment ruling. We disagree. Although Sorbo identified numerous issues regarding alleged accounting violations and fraud, the evidence failed to support Sorbo's claim that Universal engaged in misconduct or fraud, or owed any money to Sorbo. By establishing through the demurrer and summary judgment proceedings that it did not deprive Sorbo of any payments owed to him, Universal also established that Sorbo has no right to an accounting. (*Union Bank v.*

Superior Court, *supra*, 31 Cal.App.4th at pp. 593-594.) Any failure to address this issue below could not have been prejudicial to Sorbo because, as a matter of law, the accounting claim must be dismissed.

DISPOSITION

The judgment is affirmed. Universal shall recover its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

SUZUKAWA, J.

We concur:

EPSTEIN, P. J.

WILLHITE, J.