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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

DON JOHNSON PRODUCTIONS, INC., Plaintiff, Cross-Appellant, and Respondent, v. RYSHER ENTERTAINMENT et al., Defendants, Appellants and Cross-Respondents.	B227304 (Los Angeles County Super. Ct. No. BC407796)

APPEAL from an order of the Superior Court of Los Angeles County, Michael Stern, Judge. Affirmed in part; reversed in part.

Kirkland & Ellis, Mark Holscher, Jeffrey S. Sinek, Christopher Landau and Michael Shipley for Plaintiff, Respondent and Cross-Appellant.

Horvitz & Levy, Frederic D. Cohen, Lisa Perrochet and John A. Taylor, Jr.; Munger Tolles & Olson, Bart H. Williams, Manuel F. Cachán and Soraya C. Kelly for Defendant and Appellant, Rysher Entertainment, LLC.

Gibson, Dunn & Crutcher, Theodore J. Boutrous, Jr., and Theane Evangelis Kapur for Defendant, Appellant and Cross-Respondent, 2929 Entertainment, LP.

O'Melveny & Myers, Charles P. Diamond, Alicia Hancock and Amy R. Lucas for Defendant, Appellant and Cross-Respondent, Qualia Capital, LLC.

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* Pursuant to California Rules of Court, rules 8.1100 and 8.1110, this opinion is certified for publication with the exception of parts III(1)(A)(d) through III(B).

I. INTRODUCTION

Defendants, Rysher Entertainment, LLC, 2929 Entertainment, LP, and Qualia Capital, LLC, appeal from a judgment entered in favor of plaintiff, Don Johnson Productions, Inc. On December 7, 1994, plaintiff and Rysher Entertainment, LLC entered into a contract for the services of an actor, Don Johnson. Entitled the "Term Agreement" (the contract), it provided for production of the "Nash Bridges" television series (the series). In the published portion of this opinion, we address defendants' contention that a tolling agreement is governed by Code of Civil Procedure[1] section 360.5. As will be discussed, section 360.5 has a requirement that a waiver of the statute of limitations be renewed every four years. Defendants argue an agreement to toll the statute of limitations is governed by the section 360.5 requirement that it *be renewed every four years*. We conclude the agreement to toll the statute of limitations in this case is not subject to section 360.5. In the unpublished portion of the opinion, we will explain why we modify the damage award and dismiss plaintiff's cross-appeal.

II. FIRST AMENDED COMPLAINT

On November 1, 1994, CBS Television and plaintiff entered into development agreements to air 22 episodes of the series. On December 7, 1994, plaintiff and Rysher Entertainment, LLC entered into the contract governing the production of the series. Pursuant to paragraph II-12 of the contract, plaintiff owned a 50 percent interest in the series copyright. During the course of the production of the series, the contract was extended in 1997, 1998 and 1999. CBS Television aired the final episode on May 4, 2001. Rysher Entertainment, LLC was contractually obligated to fund production of the series.

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[1] Future statutory references are to the Code of Civil Procedure unless otherwise noted.

In 2001, 2929 Entertainment, LP purchased Rysher Entertainment, LLC which owned an extensive catalogue of television programs. According to the first amended complaint, Rysher Entertainment, LLC "was a mere shell corporation with no employees or offices" which was operated by 2929 Entertainment, LP. In 2006, 2929 Entertainment, LP sold Rysher Entertainment, LLC to Qualia Capital, LLC the present owner. As in the case of 2929 Entertainment, LP, Qualia Capital, LLC operated Rysher Entertainment, LLC. Prior to 2008, Qualia Capital, LLC dissolved Rysher Entertainment, LLC. Both 2929 Entertainment, LP and Qualia Capital, LLC were the alter egos of Rysher Entertainment, LLC.

In 1999, Rysher Entertainment, LLC sold the syndication rights of the series to USA Networks. Plaintiff was not a party to the syndication agreements. Since then, the series has been syndicated worldwide. As noted, pursuant to paragraph II-12, plaintiff is a 50 percent owner of the series copyright. Plaintiff is entitled to a 50 percent exploitation of the copyright. Rysher Entertainment, LLC, which was obligated to remit 50 percent of any profit to plaintiff, failed to do so.

Under the terms of the contract with Rysher Entertainment, LLC, plaintiff is entitled to 50 percent of the profits of contingent compensation. The first amended complaint describes plaintiff's contingent compensation rights in paragraph II-4 of the contract: "In addition to providing [plaintiff] 50% ownership in the Series copyright, the [contract], under Section II-4, also guaranteed [plaintiff] 50% of all gross receipts (AGR), which is defined as all gross receipts from all sources received by Rysher [Entertainment, LLC] or any affiliated entity after the deduction of (i) a 15% distribution fee to Rysher [Entertainment, LLC], (ii) distribution costs, (iii) direct production costs, and (iv) interest on the net deficited portion of the direct production costs." Despite the fact Rysher Entertainment, LLC reported $316 million in receipts, it claimed a deficit of $150 million existed. This provision, according to the first amended complaint, had no effect on plaintiff's rights as a 50 percent copyright owner. Rather, paragraph II-4 provides a right to additional compensation beyond that guaranteed by the copyright ownership language

paragraph II-12. Finally, the contract provides plaintiff access to the series masters so that it may exploit the program on interactive devices.

On May 16, 2002, the plaintiff and Rysher Entertainment, LLC entered into a tolling agreement. The agreement states the tolling period began on May 15, 2002. Neither party had rescinded the tolling agreement.

Based on the foregoing, the first cause of action alleges Rysher Entertainment, LLC breached the contract by failing to: document plaintiff's copyright interest so as to insure its enforceability; pay plaintiff 50 percent of all profits from the series; and provide access to the series masters so plaintiff could exploit them through interactive devices. The second cause of action for conversion alleges defendants have converted the masters and the revenue from the series. The third cause of action alleges defendants have been unjustly enriched because they have retained 50 percent of the series profits. The fourth cause of action seeks an accounting so plaintiff can receive 50 percent of the series profits utilizing generally accepted accounting principles. The final cause of action alleges defendants interfered with plaintiff's prospective economic advantage by denying it access to the series masters. The prayer for relief seeks: compensatory damages; injunctive relief; attorney fees; punitive damages; and interest. Defendants' first amended answers allege plaintiff's claims were barred by various statutes of limitations. We will discuss the pertinent facts when discussing the parties' relevant contentions.

III. DISCUSSION

A. Appeal

1. Statute of limitations

a. overview

Defendants argue that plaintiff's complaint was untimely filed. The complaint was filed on February 17, 2009. Defendants' first amended answers allege plaintiff's claims are barred by the section 337, subdivision (1) four-year statute of limitations for written contracts.

Both plaintiff and defendants agree the contract based claims in the first amended complaint vested on March 17, 1998. On that date, an accountant employed by Rysher Entertainment, LLC provided Marc Granier, an employee of plaintiff, with a "participation/distribution statement" for the period ending December 31, 1997. This statement detailed the income for the series. The accountant held the title of "Director Participations and Residuals" of Rysher Entertainment, LLC.

On May 16, 2002, Samuel R. Pryor, an attorney representing plaintiff, sent a letter to Frank Stewart who represented Rysher Entertainment, LLC. Mr. Pryor's May 16, 2002 letter confirmed an agreement to toll the statute of limitations for potential claims against Rysher Entertainment, LLC. Mr. Pryor's letter states in part: "This letter will confirm our conversation on Wednesday, May l5th, in which you courteously agreed that Don Johnson's time in which to bring any action relating to the series 'Nash Bridges' against Rysher Entertainment will be tolled from, at least, our conversation on Tuesday, May 14th until and unless you give us reasonable notice (30 days) rescinding this tolling agreement (the 'tolling period'). [¶] You also mentioned that you would 'work with me' if I requested a reasonable earlier date. I am informed there was a statement dated March

17, 1998. Accordingly, I would appreciate your agreeing that the tolling period begins on March 16, 2002. [¶] Under this agreement, all statutorily prescribed periods of limitations (and the doctrine of laches to the extent based upon the time period being tolled pursuant to this agreement) will be tolled during the tolling period. The conduct of any party in entering into this agreement will not be used against any party for any purpose in any subsequent litigation except with respect to the tolling of the period of limitations and the doctrine of laches." The May 16, 2002 letter was executed by Mr. Stewart on behalf of Rysher Entertainment, LLC. As noted, the complaint was filed on February 17, 2009.

Defendants present two statute of limitations contentions. First, defendants argue that suit was filed after the tolling agreement expired by operation of law. Defendants assert section 360.5 requires that a tolling agreement be renewed in writing every four years. Since the tolling agreement was executed by Mr. Pryor more than four years before suit was filed, defendants argue plaintiff's claims are barred by section 337, subdivision (1).[2] Section 337, subdivision (1) is the statute of limitations for written contracts. We will discuss in the published portion of this opinion the first issue as to whether section 360.5 applies to a tolling agreement. Second, defendants argue that the tolling agreement does not apply to plaintiff as it refers only to the actor, Mr. Johnson. This second statute of limitations issue will be discussed in the unpublished portion of this opinion.

b. the circumstances leading to the adoption of section 360.5 in 1951 and its amendment in 1953

Defendants argue section 360.5 requires that an indefinite tolling agreement be renewed every four years. We begin with an analysis of section 360.5 and the circumstances which gave rise to its enactment in 1951 and amendment in 1953.

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[2] Section 337, subdivision (1) states in part: "Within four years. [¶] 1. An action upon any contract, obligation or liability founded upon an instrument in writing . . . ."

Defendants rely on section 360.5 which states: "No waiver shall bar a defense to any action that the action was not commenced within the time limited by this title unless the waiver is in writing and signed by the person obligated. *No waiver executed prior to the expiration of the time limited for the commencement of the action by this title shall be effective for a period exceeding four years from the date of expiration of the time limited for commencement of the action by this title and no waiver executed after the expiration of such time shall be effective for a period exceeding four years from the date thereof,* but any such waiver may be renewed for a further period of not exceeding four years from the expiration of the immediately preceding waiver. Such waivers may be made successively. The provisions of this section shall not be applicable to any acknowledgment, promise or any form of waiver which is in writing and signed by the person obligated and given to any county to secure repayment of indigent aid or the repayment of moneys fraudulently or illegally obtained from the county." (Italics added.) It is the italicized language referring to the four-year renewal requirement that is at issue.

Section 360.5 was originally enacted in 1951. (Stats. 1951, ch. 1106, § 1, p. 2863.[3]) The Legislative Counsel's June 12, 1951 report on section 360.5 states: "Invalidates any form of waiver of statutes of limitations unless in writing signed by the person obligated. Provides such waiver is effective for not more than 4 years from expiration of time limited. Authorizes successive renewals of such waivers." (Legis. Counsel, Rep. on Assem. Bill No. 370 (1951 Reg. Sess.) p. 1.) The June 12, 1951 report of the Attorney General reiterated the position of the Legislative Counsel but added, "We

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[3] When adopted in 1951, section 360.5 stated: "No acknowledgment, promise or any form of waiver shall bar a defense to any action that the action was not commenced within the time limited by this title unless the acknowledgment, promise or any form of waiver is in writing and signed by the person obligated. No such acknowledgment, promise or any form of waiver executed prior or subsequent to the expiration of the time limited for the commencement of the action by this title shall be effective for a period exceeding four years from the date of expiration of the time limited for commencement of the action by this title, but such waiver may be renewed for a further period of not exceeding four years upon the expiration of the immediately preceding waiver. Such waivers may be made successively." (Stats. 1951, ch. 1106, § 1, p. 2863.)

believe that this bill is subject to no substantial legal objections." (Rep. of Deputy Attorney General Marcus Vanderlaan on Assem. Bill No. 370 (1951 Reg. Sess.) p. 1.) Governor Earl Warren's Legislative Secretary, Beach Vasey, stated in a June 15, 1951 memorandum: "I recommend approval. The general purpose of statutes of limitations is to prevent the enforcing of stale claims. The purpose would appear furthered by this legislation. There appears to be no objection." (Legislative Memorandum from Beach Vasey to Governor Earl Warren on Assem. Bill No. 370 (1951 Reg. Sess.) p. 1.)

Section 360.5 was amended in 1953 to state as it does now. (Stats. 1953, ch. 655, § 1, p. 1906.) In *Carlton Browne & Co. v. Superior Court* (1989) 210 Cal.App.3d 35, 42-43, our colleagues in Division Four of this appellate district digested the report of the Senate Interim Judiciary Committee concerning the 1953 amendment. We recite our Division Four colleagues' summary of that interim committee report prepared in connection with Senate Bill No. 671 (1953 Reg. Sess.) in detail: "'In 1947 Section 360 of the Code of Civil Procedure was amended so as to provide that the statute of limitations on a promissory note should not commence to run until the last payment of principal or interest made by the party to be charged prior to the time when the statute of limitations would otherwise have run. The purpose of this amendment was to make unnecessary the successive renewal of promissory notes and recording of mortgages or deeds of trust every four years in those cases in which the borrower continued to regularly make payments on account of principal or interest. The rule theretofore was that a payment on account of interest or principal would toll the statute only if in addition to the mere fact of payment there existed some acknowledgment of the debt or promise to pay it. This amendment has made it possible for lenders to carry borrowers without either commencing suit or compelling a renewal of the obligation so long as the borrower kept up his payments. [¶] In 1951 Section 360.5 was added to the code, designed to prevent the exaction for purchasers or borrowers of an unlimited and indefinite waiver of the statute of limitations at the time credit was extended or a loan made. This amendment was intended not only to require that waivers of the statute be in writing but that no one

waiver could waive the statute for a period of more than four years beyond the time when the statute would otherwise have run."' (*Carlton Browne & Co. v. Superior Court, supra*, 210 Cal.App.3d at pp. 42-43.)

In 1951, the drafters of section 360.5 had included some language from section 360. (*Carlton Browne & Co. v. Superior Court, supra*, 210 Cal.App.3d at pp. 42-43.) Section 360, as it was viewed in 1951 and 1953, allowed for tolling of the statute of limitations in the case of written acknowledgment of or a promise to pay a debt. (*Western Coal & Min. Co. v. Jones* (1946) 27 Cal.2d 819, 822 ["The statutory rule in respect to the tolling of the statute by a subsequent writing . . . ." is § 360]; *Bank of America etc. v. Hunter* (1937) 8 Cal.2d 592, 594-595 [debt acknowledgments were sufficient to toll statute of limitations pursuant to § 360].) As originally adopted in 1951, section 360.5 created some confusion concerning the meaning of section 360. (*Carlton Browne & Co. v. Superior Court, supra*, 210 Cal.App.3d at pp. 42-43; *California Code of Civil Procedure Section 360.5*, 1951-1952, 4 Stan. L.Rev. 415, 417-418.) The Senate Interim Judiciary Committee identified the effect of Senate Bill No. 671 (1953 Reg. Sess.) on that uncertainty, '"The confusion can easily be clarified by limiting Section 360.5 to the subject of waivers."' (*Carlton Browne & Co. v. Superior Court, supra*, 210 Cal.App.3d at p. 43.)

The Legislative Counsel's May 1, 1953 report states: "Changes subject matter of the section from 'acknowledgment, promise, or any form of waiver' to simply 'waiver.' [¶] Changes limitation on effectiveness of waiver of statute of limitations executed after the statutory period has run from four years from the dates of termination of the period to four years from the date of the waiver. [¶] Permits renewal for the same period from, rather than upon, the expiration of the immediately preceding waiver. [¶] Provides that the section shall not be applicable to any acknowledgment, promise or any form of waiver which is in writing and signed by the person obligated and given to any county to secure repayment of indigent aid or the repayment of moneys fraudulently or illegally

obtained from the county." (Legis. Counsel, Rep. on Sen. Bill No. 681 (1953 Reg. Sess.) p. 1.)

The May 4, 1953 report of the Attorney General states: "Amends Section 360.5 of the Code of Civil Procedure by eliminating acknowledgments of an existing debt and promises to pay an existing debt from the effect of this section. As amended, the section is confined to waivers of the statute of limitations. [¶] Amends Section 360.5 so as to provide that a waiver of the statute of limitations made after the expiration of the time to sue may be effective for a period of four years from the date of the waiver, under the existing section such a waiver would be effective only for a [four-year] period commencing upon the date that the statute of limitations would expire on the original obligation. [¶] Amends Section 360.5 so as to exempt from the provisions thereof written waivers, acknowledgements and promises made by a person obligated to repay moneys fraudulently or [illegally] obtained from a county or to secure repayment of the indigent aid. [¶] Comment: There appears to have been some conflict between the existing Section 360.5 and Section 360 of the [Code of Civil Procedure section] insofar as promissory notes were concerned. Under Section 360 payment of the interest or principal due on a promissory note would constitute a promise or acknowledgment (*Steiner v. Croonquist* [(1951)] 108 Cal.App.2d [Supp.] 895), while under Section 360.5 such a payment would be ineffective unless accompanied by a written promise." (Deputy Attorney General William J. Power, letter on Sen. Bill No. 681 (1953 Reg. Sess.) to Gov. Earl Warren, p. 1.)

On April 30, 1953, Edward D. Landels, counsel for the California Bankers Association, which originally sponsored Senate Bill No. 681, wrote Governor Warren: "Section 360.5 was added to the Code of Civil Procedure in 1951 so as to invalidate indefinite and perpetual waivers of the Statute of Limitations. To that no one took exception. The Section was so drafted, however, as to possibly repeal the provisions of Section 360 which provides that payment of principal or interest on a promissory note should be deemed to toll the Statute if made before the Statute had run. This was

unintended and Senate Bill [No.] 681 will make it clear that Section 360.5 applies only to waivers and does not affect the provisions of the preceding section dealing with what constitutes a sufficient acknowledgment to toll the Statute of Limitations." (Edward D. Landels, Counsel for Cal. Bankers Assoc., letter to Gov. Earl Warren, Sen. Bill No. 681 (1953 Reg. Sess.) p. 1.)

Finally, the May 11, 1953 report of Governor Warren's Legislative Secretary, Mr. Vasey, stated: "Amends Section 360.5, Code of Civil Procedure, relating to waiver of statute of limitations. [¶] Eliminates acknowledgments of, and promises to pay an existing debt from the coverage of the section, confining it to waivers of the statute of limitations. [¶] Provides that a waiver of the statute of limitations made after the statutory period has run, may be made effective for a period of four years from the date of the waiver, rather than four years from the date that the statutory period would expire on the original obligation. [¶] Provides that the limitation of the section upon the period of effectiveness of any waiver or statute of limitation, shall not be applicable to any acknowledgment, promise or waiver which is in writing and signed by the person obligated and given in any county to secure repayment of indigent aid or the repayment of monies fraudulently or illegally obtained from the county. [¶] . . . This section was added in 1951 to validate indefinite and perpetual waivers of the statute of limitations. To that no one took exception. As drafted, however, it would possibly repeal Section 360 providing the payment of principal or interest on a promissory note should be deemed to toll a statute if made before the statute of limitations had run. This was unintended. This amendment will make it clear that Section 360.5 applies only to waivers and does not affect the provisions of Section 360 dealing with what constitutes a sufficient acknowledgment to toll the statute of limitations." (Beach Vasey, Legis. mem. to Gov. Earl Warren, Sen. Bill No. 681 (1953 Reg. Sess.) pp. 1-2.)

c. section 360.5 does not apply to the tolling agreement in this case

Defendant's contention section 360.5, with its four-year renewal requirement, is the controlling statute of limitations provision is without merit. Section 360.5 involves the *waiver* of the statute of limitations. The present case does not involve *waiver* of the right to assert the statute of limitations. Rather, the parties entered into a tolling agreement. Tolling agreements are a comparatively recent development in law. Prior to 1977, only one federal or state opinion contains both the phrases "statute of limitation" and "tolling agreement." (*U.S. v. Harris Trust and Sav. Bank* (7th Cir. 1968) 390 F.2d 285, 288.) A tolling agreement, executed as the one here to permit efforts to be made to settle the matter without litigation, furthers the highly favored public policy of settling disputes. (See *Neary v. Regents of University of California* (1992) 3 Cal.4th 273, 277; *Salmon Protection & Watershed Network v. County of Marin* (2012) 205 Cal.App.4th 195, 201 [tolling agreement in a California Environmental Quality Act dispute].)

Under California law, tolling generally refers to a suspension of a statute of limitations. (*Pearson Dental Supplies, Inc. v. Superior Court* (2010) 48 Cal.4th 665, 674 citing *Woods v. Young* (1991) 53 Cal.3d 315, 326, fn. 1 ['"Tolling may be analogized to a clock that is stopped and then restarted. Whatever period of time that remained when the clock is stopped is available when the clock is restarted, that is, when the tolling period has ended.'"]; *Cuadra v. Milan* (1998) 17 Cal.4th 855, overruled on a different point in *Samuels v. Mix* (1999) 22 Cal.4th 1, 16, fn. 4, citing 3 Witkin, Cal. Procedure (4th ed. 1996) Actions, § 407, p. 513 ['"The statute [of limitations] may be tolled (i.e., *its operation suspended*) by various circumstances, events or acts."'].) Federal decisional authority is in accord. (*Chardon v. Soto* (1983) 462 U.S. 650, 652, fn. 1; *Board of Regents v. Tomanio* (1980) 446 U.S. 478, 486.) Various California statutory provisions permit the statute of limitations to be tolled; i.e., suspended for a specified period. (E.g., §§ 352, subd. (a) [minors, insanity], 352.1 [imprisonment], 366.1 [plaintiff's death], 366.2, subd. (a) [defendant's death].) Decisions from other jurisdictions state that a

tolling agreement suspends or interrupts the operation of the statute of limitations. (*Camico Mutual Insurance Company v. Citizens Bank* (7th Cir. 2007) 474 F.3d 989, 993 [both parties agreed tolling meant suspension]; *Hunter-Boykin v. George Washington Univ.* (D.C.Cir. 1998) 132 F.3d 77, 83-84 [relying on legal dictionary definitions--tolling means suspension or interruption of the statute of limitations]; *Clark v. Milam* (S.D.W.Va. 1994) 847 F.Supp. 409, 421 [describing tolling agreement as suspending the running operation of the statute of limitations].)

Our duty is to implement the Legislature's intent. (*People v. Gonzalez* (2008) 43 Cal.4th 1118, 1125; *Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1386-1387.) We turn now to section 360.5. Section 360.5 applies to *waivers* of the statute of limitations. One could intelligently argue that waiver includes a tolling agreement. After all, the defendant waives the right to assert the tolling period counts as part of the time during which the statute of limitations is running. On the other hand, tolling involves the suspension of the statute of limitations. It is plausible that a defendant has not waived the right to assert the statute of limitations when a tolling agreement is entered into by potential litigants. The defendant can litigate the statute of limitations issue but is barred from including the tolling period in the time to bring suit. Thus, there is some ambiguity as to the reach of section 360.5 and we may examine extrinsic aids to determine its application to the case before us which includes: legislative history; the Legislature's purposes; the context in which language is used; the entire statutory scheme; and the evils to be remedied. (*Baker v. Workers' Comp. Appeals Bd.* (2011) 52 Cal.4th 434, 446; *People v. Gonzalez*, *supra*, 43 Cal.4th at p. 1126.)

The most important indicators of legislative intent are the words appearing in section 360.5. (*Pineda v. Williams-Sonoma Stores, Inc.* (2011) 51 Cal.4th 524, 529-530; *People v. Watson* (2007) 42 Cal.4th 822, 828.) Section 360.5, as adopted in 1951, and amended in 1953, makes no reference to tolling agreements. Further, relevant legislative and executive branch documents promulgated in 1951 and 1953, as the Legislature was contemplating the pending bills, make no reference to tolling agreements. And this

absence of discussion of tolling agreements in official memoranda in 1951 and 1953 makes sense--they are a recent development in litigation practice. Also, section 360.5 was not designed to address issues concerning tolling agreements. As explained in the 1953 interim judicial committee report, "'In 1951 Section 360.5 was added to the code, designed to prevent the exaction for purchasers or borrowers of an unlimited and indefinite waiver of the statute of limitations at the time credit was extended or a loan made.'" (*Carlton Browne & Co. v. Superior Court, supra*, 210 Cal.App.3d at p. 42-43.) And in 1953, the interim judicial committee report explicitly indicated that year's legislation was limited to waivers. (*Id.* at p. 43.) To sum up, there is no evidence the Legislature intended section 360.5 to apply to tolling agreements. (See *Salmon Protection & Watershed Network v. County of Marin, supra*, 205 Cal.App.4th at pp. 203, 208 [recognizing the difference between a waiver pursuant to § 360.5 and a tolling agreement which "extend[s] the statutory period for filing suit"].) The pertinent legislative intent materials demonstrate the Legislature never intended that section 360.5 apply to tolling agreements.

The section 360.5 four-year renewal requirement has no application to the May 16, 2002 tolling agreement. There was no requirement the May 16, 2002 tolling agreement be renewed after four years. The May 16, 2002 tolling agreement therefore tolled the section 337, subdivision (1) statute of limitations. The February 17, 2009 filing of the complaint was timely.

[Parts III(A)(1)(d) through III(B) are deleted from publication.]

d. substantial evidence supports the finding the May 16, 2002 tolling agreement applies to plaintiff

On July 6, 2010, defendants moved for a directed verdict on the statute of limitations issue. Counsel for 2929 Entertainment, LP wrote: "Even if the limitations period applicable to the present action was four years, the letter on which [plaintiff] relies

to toll the statute of limitations was prepared by the attorney for [Mr.] Johnson, and it references only Mr. Johnson individually. . . . Thus, Mr. Johnson's right to audit under the [Screen Actors Guild] Agreement, or to pursue any individual claims, is preserved by the agreement. Mr. Johnson, however, is not a party to this action. Mr. Pryor testified as to his uncommunicated intent and understanding of the letter, but did not testify as to *communicated* intent." Rysher Entertainment, LLC joined in the directed verdict motion brought by 2929 Entertainment, LP. Also, on July 6, 2010, plaintiff moved for a directed verdict on defendants' statute of limitations affirmative defenses. The trial court granted plaintiff's directed verdict motion. The directed verdict motion of 2929 Entertainment, LP, which was joined in by Rysher Entertainment, LLC, was denied.

On appeal, defendants do not argue, on any procedural grounds, that the trial court incorrectly granted plaintiff's directed verdict motion. Rather, defendants assert, "The tolling agreement does not extend to [plaintiff]." Defendants assert as a matter of law that the tolling agreement applies only to Mr. Johnson and not plaintiff.

Here, there is substantial evidence the parties negotiated the tolling agreement on behalf of plaintiff *and* Mr. Johnson. Mr. Pryor, who negotiated the tolling agreement, represented both plaintiff and Mr. Johnson. Plaintiff was a client of Mr. Pryor's law firm, Alschuler, Grossman, Stein & Kahan LLP. Plaintiff is a loan-out corporation. Mr. Pryor testified, "A loan-out corporation is an entity that's usually formed by transactional lawyers to be the entity that actually signs contracts for a - - an artist or a celebrity and agrees to provide his or her services under the contract."

Mr. Pryor telephoned Mr. Stewart, who was the "Senior Vice-President, Business and Legal Affairs" of Rysher Entertainment, LLC. At the time of the call, Mr. Pryor had been representing plaintiff and Mr. Johnson for a matter of weeks. Mr. Pryor telephoned Mr. Stewart in an effort to secure a tolling agreement. Mr. Pryor testified he wanted to toll the statute of limitations so that he could explore a settlement rather than file a lawsuit. Mr. Pryor was concerned about the running of the statute of limitations. Mr. Pryor was asked how he identified himself at the beginning of the telephone

conversation. Mr. Pryor testified, "Well, I don't have an independent recollection of the words that I used, but I had the contract in front of me and would have referred to Don Johnson and [plaintiff]." Mr. Pryor was confident he had the contract before him when he made the telephone call. Mr. Pryor testified: "I told him that I was just beginning to get familiar with the matter. That I thought it made sense for him to agree to toll the running of the statute of limitations so I had a chance to get further involved without the pressure of having to file a lawsuit right away." Mr. Pryor and Mr. Stewart discussed the parties' claims and disputes but not in any great detail.

Mr. Pryor was asked, "Did you have a discussion with him about whose -- on whose behalf there would be a tolling agreement?" Mr. Pryor testified in response, "[M]y clients who had the claims under the agreement." Mr. Pryor was asked: "Based on your discussions with Mr. Stewart, who did -- did you understand would be the parties to the tolling agreement?" Mr. Pryor answered, "My clients, Don Johnson and Don Johnson Productions." During their conversation, Mr. Stewart never distinguished between plaintiff and Mr. Johnson.

Mr. Pryor was asked whether he intended to only toll Mr. Johnson's claims and not plaintiff's. Mr. Pryor denied any intention to enter into a tolling agreement only on behalf of Mr. Johnson. When asked why, Mr. Pryor testified: "Don Johnson Productions was the party to the agreement. That letter refers to the - - his courteous agreement that the time in which to bring any action relating to the series Nash Bridges will be tolled. I'm paraphrasing. The claims that related to the series were claims that at least, in good part, related to the contract. The contract was with Don Johnson Productions. Those were the claims that [are] . . . largely being referred to. [¶] When I say 'largely,' I don't recall if there were other claims, but the claims that were being discussed were the claims that Rysher had breached [in] that contract." Mr. Pryor could not remember if Mr. Johnson, as distinguished from plaintiff, had any potential claims against Rysher Entertainment, LLC. According to Mr. Pryor, the effect of the agreement was to allow

the parties to have time to investigate and discuss settlement. Mr. Pryor testified, "The time pressure no longer ran for the filing of a claim."

As noted, the May 16, 2002 letter allows any party to rescind the tolling agreement. Mr. Pryor never received any notification that defendants were exercising their rights to rescind the tolling agreement. Mr. Pryor only secured a tolling agreement from Rysher Entertainment, LLC.

Our colleagues in Division Two of this appellate district have explained: "When parties dispute the meaning of contractual language, the trial court must provisionally receive extrinsic evidence offered by the parties and determine whether it reveals an ambiguity, i.e., the language is reasonably susceptible to more than one possible meaning. If there is an ambiguity, the extrinsic evidence is admitted to aid the interpretative process. 'When there is no material conflict in the extrinsic evidence, the trial court interprets the contract as a matter of law. [Citations.] . . . If, however, there is a conflict in the extrinsic evidence, the factual conflict is to be resolved by the jury.' ([Citations.]' (*Wolf v. Walt Disney Pictures & Television* (2008) 162 Cal.App.4th 1107, 1126-1127, fn. omitted.)" (*Lonely Maiden Productions, LLC v. GoldenTree Asset Management, LP* (2011) 201 Cal.App.4th 368, 376-377.)

Here, the uncontroverted testimony indicates: Mr. Pryor represented plaintiff, as well as Mr. Johnson; when Mr. Pryor telephoned, he had the contract between Rysher Entertainment, LLC and plaintiff in front of him; the conversation involved claims by plaintiff against Rysher Entertainment, LLC; Mr. Pryor telephoned counsel for Rysher Entertainment, LLC, which entered into the contract with plaintiff; Mr. Pryor's letter refers to tolling the time to bring "any action relating to the series"; they agreed the tolling agreement extended to both plaintiff and Mr. Johnson; Mr. Johnson conducted his business operations utilizing plaintiff, a loan-out corporation; the letter refers to a statement dated March 17, 1998, which was issued to plaintiff; the contract at issue was between plaintiff and Rysher Entertainment, LLC; Mr. Johnson is not a party to the

contract; and there is reference in the letter to conduct "by any party" without further elaboration.

No doubt, the reference to "Don Johnson" in the May 16, 2002 letter can be construed to refer only to him and to the complete exclusion of plaintiff. But the foregoing demonstrates the parties to the tolling intended the "Don Johnson" language to include his loan out corporation, plaintiff. (*Los Angeles City Employees Union v. City of El Monte* (1985) 177 Cal.App.3d 615, 623.) As noted, no evidence to the contrary was presented by defendants. Finally, to repeat, defendants raise no procedural objection to the trial court having resolved this issue in the directed verdict context.

2. Sufficiency of the evidence

a. contact interpretation

Defendants argue the contract is unambiguous in the following respects. The contract provides plaintiff is to receive guaranteed compensation for acting and acting as the series executive producer. The guaranteed compensation is contained in paragraphs II-1 through II-3 of the contract.[4] There is no dispute as to the guaranteed compensation. The issue relates to contingent compensation.

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[4] Paragraphs II-1 through II-3 of the contract state: "1. "**Executive Producing Services**: [Mr.] Johnson shall have the right to function on any program or series hereunder as the sole Executive Producer (subject to network requirements) thereof for the life of the series. [Mr.] Johnson's services shall be non-exclusive. [¶] 2. **Acting Services**: [Plaintiff] shall furnish [Mr.] Johnson's services as the star of a television series to be produced for CBS pursuant to the CBS Agreement (the 'Starring Series'). If the Starring Series is produced, [plaintiff] agrees that [Mr.] Johnson will be committed to render services thereon for the first four (4) production seasons, subject to any network option requirements set forth in the Starring Series License Fee Agreement. [¶] 3. **Guaranteed Compensation - Television**: [¶] a. Acting – Series - - $125,000 for each 60 minute series episode, negotiate in good faith for episodes or television projects in excess of 60 minutes, with a floor of prorata. [¶] b. Executive Producing - Series

According to defendants, the contract's adjusted gross receipts provision in paragraph II-4 unambiguously controls plaintiff's contingent compensation rights. Paragraph II-4 states: "**Contingent Compensation - Television**: 50% of the AGR. AGR defined as all gross receipts from all sources received by [Rysher Entertainment, LLC] or any affiliated entity (subject to the penultimate sentence of this Section II-4) after deduction of (i) a 15% distribution fee to [Rysher Entertainment, LLC] in those media where [Rysher Entertainment, LLC] directly distributes (excluding the network or other domestic 'onestop' end-user license fee for the initial domestic runs, for which there shall be no distribution fees charged), (ii) distribution costs directly attributable to the distribution of the applicable production, (iii) direct production costs, and (iv) interest on the net deficited portion of the direct production costs. In any media where [Rysher Entertainment, LLC] doesn't directly distribute and/or pays a third party a distribution, sub-distribution or administration fee or the like, [Rysher Entertainment, LLC] will not charge any distribution fee or distribution fee override. Notwithstanding the foregoing, with respect to any territory and/or media in which [Rysher Entertainment LLC] generally distributes directly, if [Rysher Entertainment, LLC] determines in its reasonable, good faith demonstrable business judgment that it is more economically advantageous to both [Rysher Entertainment, LLC] and [plaintiff] to have a third party distribute in media or territories in which [Rysher Entertainment, LLC] would ordinarily distribute itself (e.g., because of blocked funds, a particularly advantageous packaging opportunity, etc.), [Rysher Entertainment LLC] shall be entitled to charge the aforesaid 15% distribution fee. As part of the production costs, [Rysher Entertainment LLC] shall charge a $75,000 per hour overhead/production fee in lieu of any other overhead fees or charges ('[Rysher Entertainment, LLC]] Overhead Fee'). No interest shall be charged on the [Rysher Entertainment, LLC] Overhead Fee. Third party participations and packaging commissions shall be subject to [plaintiff's] approval and shall be deducted off

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$42,500 for each 60 minute series episode, negotiate in good faith for episodes or television projects in excess of 60 minutes, with a floor of prorata. [¶] c. Executive Producing - MOWs/Minis $62,500 per hour."

the top. [Plaintiff] shall be entitled to customary annual audit rights. If an entity with whom [Rysher Entertainment, LLC] contracts is a [Rysher Entertainment, LLC] affiliate but is also a so-called 'end-user', such entity shall not be treated as an affiliate for purposes of the first sentence of this Section II-4 with respect to any monies received by such affiliate in its capacity as end-user (as opposed to as a distributor or sales agent); provided however, that any agreements [Rysher Entertainment, LLC] makes with such entity shall be done in good faith on an arm's length basis. Additionally, [Rysher Entertainment, LLC] shall not include any production produced hereunder in a package for sale, license or other disposition in such a manner as discriminates against or in any way fails to maximize the profitability of said production."

By contrast, plaintiff argues the contract provides for an additional compensation stream based on its 50 percent ownership of the copyright rights. Plaintiff argues that paragraph II-12, the copyright provision, defines a separate compensation right which defendants have violated. As a result, plaintiff reasons there is at least an ambiguity as to its rights to compensation under paragraph II-12. To demonstrate this ambiguity, plaintiff relies on the contract's copyright ownership provision in paragraph II-12 which states: "[Plaintiff] and [Rysher Entertainment, LLC] will share the copyright in the Starring Series on a 50/50 basis; provided, however, that [plaintiff's] interest in the copyright as aforesaid shall only vest in the event that CBS orders the Starring Series for three (3) full broadcast seasons (or 66 episodes). [Plaintiff] will execute and deliver to [Rysher Entertainment, LLC] an irrevocable Power of Attorney in a form to be worked out in good faith between the parties hereto to enable [Rysher Entertainment, LLC] (and/or [its] assignee, licensee or designee) to deal with the distribution rights in the Starring Series. The parties will also work out in good faith an appropriate way to document the provisions of this Section II-12 so that [plaintiff's] copyright interest will be legally valid pursuant to the requirements of applicable copyright laws." Plaintiff argues that there are two compensation provisions, paragraphs II-4 (adjusted gross receipts) and 11-12 (copyright rights), which create a contractual ambiguity such that

testimony may be presented. Stated differently, plaintiff contends it is entitled to contingent compensation under both provisions.

We independently review whether the contract is reasonably susceptible to more than one possible interpretation. (*Benach v. County of Los Angeles* (2007) 149 Cal.App.4th 836, 847; *Pacific Gas & Elec. Co. v. Zuckerman* (1987) 189 Cal.App.3d 1113, 1140-1141.) As can be noted, paragraph II-4 involves contingent compensation for the television series. Paragraph II-4 makes no reference to paragraph II-12. Paragraph II-4 makes no mention of the equal division of copyright rights in paragraph II-12. And as plaintiff notes, copyright owners are presumed to be entitled to a pro rata share of profits in copyrighted work. (*Zuill v. Shanahan* (9th Cir. 1996) 80 F.3d 1366, 1369; *Community for Creative Non-Violence v. Reid* (D.C. Cir. 1988) 846 F.2d 1485, 1498.) It is presumed the parties had these established rules of copyright law in mind when the contract was negotiated. (*Edwards v. Arthur Andersen LLP* (2008) 44 Cal.4th 937, 954; *Torrance v. Workers' Comp. Appeals Bd.* (1982) 32 Cal.3d 371, 378.) Paragraphs II-4 and II-12 are ambiguous in terms of contingent compensation.

Substantial evidence supports plaintiff's view of the contract. There was testimony: Mr. Johnson knew there would be little payout under the adjusted gross receipts provision in paragraph II-4; in a prior successful series, Mr. Johnson had received no adjusted gross receipts compensation; there was extensive negotiation of the copyright ownership provision; during the negotiations, Rysher Entertainment, LLC resisted granting plaintiff the copyright rights; Rysher Entertainment, LLC demanded during the negotiations that no copyright rights arise until the series was eligible for syndication; and Rysher Entertainment, LLC's chief executive officer doubted the series would ever even be eligible for syndication. Further, Kathleen Hallberg, who negotiated on behalf of plaintiff, testified there was no relationship between paragraphs II-4 and II-12. And, the aforementioned evidence of ambiguity likewise is proof there was no relationship between paragraphs II-4 and II-12. The foregoing constitutes substantial evidence supporting the judgment which compensates plaintiff for damages arising from

a breach of paragraph II-12. Defendants presented evidence indicating there may have been a relationship between paragraphs II-4 and II-12. But in conducting substantial evidence review, we are barred from reweighing the testimony. (*Scott v. Pacific Gas & Electric Co.* (1995) 11 Cal.4th 454, 465; *Hasson v. Ford Motor Co.* (1982) 32 Cal.3d 388, 398.)

b. damages

Defendants argue there is no substantial evidence to support the damage award. We review this contention for substantial evidence. (*Seffert v. Los Angeles Transit Lines* (1961) 56 Cal.2d 498, 506; *Westphal v. Wal-Mart Stores, Inc.* (1998) 68 Cal.App.4th 1071, 1078.) Defendants argue there were no profits from the series. Defendants argue the production costs of the series exceeded gross receipts by more than $40 million. Thus, defendants argue there were no "profits" resulting in any breach of plaintiff's copyright interests. However, there was evidence: Rysher Entertainment, LLC was owned by Cox Communications; Rysher Entertainment LLC operated under a credit line with Cox Communications; when Rysher Entertainment, LLC was sold, $71.4 million in production costs was owed to Cox Communications; this debt was forgiven when Rysher Entertainment, LLC was sold; and Rysher Entertainment, LLC then charged the forgiven $71.4 million owed to its owner as a production expense to offset plaintiff's copyright claim. Benjamin Sheppard testified under generally accepted accounting principles, the $71.4 million was not an expense because it was never paid. This testimony indicates Rysher Entertainment, LLC never paid the $71.4 million. Thus, there is substantial evidence the $71.4 million was not an expense which could offset the damages resulting from the breach of plaintiff's rights under paragraph II-12.

3. Juror misconduct

Defendants argue that the jurors committed misconduct because their verdict included prejudgment interest. The jurors were given no instructions concerning calculating prejudgment interest.[5] Defendants argued in their new trial motions the jury committed misconduct. Ordinarily, we review a new trial order for an abuse of discretion. (*Oakland Raiders v. National Football League* (2007) 41 Cal.4th 624, 636; *Lane v. Hughes Aircraft Co.* (2000) 22 Cal.4th 405, 412.)

The declarations in support of the new trial motion indicate the deliberations occurred in a multistep process. Bruce Dowd, the foreperson, declared that after receiving a clarifying instruction from the trial court: "[T]he jury considered and adopted only one method of calculating damages: revenue, less production costs, adding Cox [Communications] money back in to arrive at a profit number and then dividing by two. This resulted in the $15 million . . . damages figure. [¶] . . . Once we reached agreement on the $15 million figure, one juror who had an accounting background said that we should add interest to account for the passage of time. The jury verbally spoke abut the merits of different interest rates. Some jurors said that the higher interest rate of 10% was too high, but all 11 jurors showed visible agreement (by nodding or other facial

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[5] The damage instructions were: "If you decide that Don Johnson Productions, Inc. has proved its claim against Rysher Entertainment, LLC for breach of contract, you also must decide how much money will reasonably compensate Don Johnson Productions, Inc. for the harm caused by the breach. This compensation is called 'damages.' The purpose of such damages is to put Don Johnson Productions in as good a position as it would have been if Rysher Entertainment, LLC had performed as promised. [¶] To recover damages for any harm, Don Johnson Productions, Inc. must prove: [¶] 1. That the harm was likely to arise in the ordinary course of events from the breach of the contract; or [¶] 2. That when the contract was made, both parties could have reasonably foreseen the harm as the probable result of the breach. [¶] Don Johnson Productions, Inc. also must prove the amount of its damages according to the following instructions. It does not have to prove the exact amount of damages. You must not speculate or guess in awarding damages."

expressions showing agreement and/or saying or murmuring the word 'yes' or other audible agreement.)"

Another juror, Seth A. Rhine, declared: "One juror, Mr. Joe Marsh, said that [plaintiff] should be awarded additional money to account for the passage of time, since [plaintiff] could have been earning interest on the money if everything had gone according to plan. The majority of us agreed with this recommendation, and someone suggested using a ten percent interest rate. Some of us stated that a ten percent interest rate seemed too high. All eleven of us agreed to apply an interest rate of five percent instead." According to Mr. Rhine, 11 jurors voted to award $15 million in damages plus $8.2 million in prejudgment interest for a total of verdict of $23.2 million.

Another juror, Jason Scardamalia, described that jurors' statements and conduct concerning the interest issue thusly: "One juror suggested that since [plaintiff] had not had access to this money over the past several years, the award should be increased by an amount to cover interest. The majority . . . agreed with the suggestion, and discussed using a ten percent interest rate. I . . . said that I did not know why we were calculating interest. . . . Some jurors stated that a ten percent interest was too high, noting that they didn't know how much money would have come in at any specified time. To correct for this uncertainty, members of the jury discussed and eleven jurors (myself excluded) ultimately agreed to apply an interest rate of five percent." Mr. Scardamalia described the conduct during which the interest calculation was made: "A different juror took responsibility for calculating how much interest would be paid on the total amount of $15,000,000 between the years 2001 and 2010, and arrived at $8,200,000. The juror used a phone calculator to calculate the total amount." Mr. Scardamalia described the physical manifestations and conduct he observed when the jurors were agreeing to add the interest to the damage computation: "[T]he jurors showed their agreement to add interest to the $15,000,000 damages amount by showing discernable signs of agreement -- nodding, saying 'yes' and the like." Other hearsay evidence corroborated these declarations.

The outcome of this case is controlled by our Supreme Court's holding in *Krouse v. Graham* (1977) 19 Cal.3d 59, 79-83. In *Krouse*, the juror declarations showed the jury erroneously added attorney fees to their damage calculations: "In support of his motion for new trial, defendant offered the declarations of four jurors to the effect that the verdict for each of the plaintiffs had been increased by an amount the jurors estimated would be paid by plaintiffs in legal fees. Each of the four declarations is identical in content, alleging that 'several jurors commented' on their belief that plaintiffs' counsel would be paid one-third of the total award. The declarations further recite that the jury 'considered' this belief in its awards to the Krouse plaintiffs, and that the award to Mladinov was 'determined' by adding $30,000 for legal fees to the $60,000 the jury estimated Mladinov would require to hire a helper for 10 years." (*Id*. at pp. 79-80.)

Our Supreme Court held the declarations, which were more conclusory than those before us, were admissible. In doing so, our Supreme Court referred to its prior decisions: "We carefully explained in *People v. Hutchinson* (1969) 71 Cal.2d 342, that section 1150 properly distinguishes between 'proof of overt acts, objectively ascertainable, and proof of the subjective reasoning processes of the individual juror, which can be neither corroborated nor disproved, . . .' [Citation.] In *Hutchinson* we approved the admission of jurors' affidavits, for purposes defined and limited by section 1150, adding, however, that 'The only improper influences that may be proved under section 1150 to impeach a verdict, therefore, are those open to sight, hearing, and the other senses and thus subject to corroboration. [Citations.]' [Citation.] [¶] *Hutchinson* involved jurors' affidavits regarding a bailiff's improper statements to the jury, prompting them to reach a premature verdict. Since these remarks were 'likely to have influenced the verdict improperly' (Evid. Code, § 1150, subd. (a)), we vacated the order denying new trial and directed the trial court to redetermine the motion in the light of these affidavits. By similar reasoning, if the jurors in the present case actually discussed the subject of attorneys' fees and specifically agreed to increase the verdicts to include such fees, such discussion and agreement would appear to constitute matters objectively

verifiable, subject to corroboration, and thus conduct which would lie within the scope of section 1150. (See also *Clemens v. Regents of University of California* (1970) 8 Cal.App.3d 1, 19 [jurors' declarations *re* bias and misconduct of fellow juror].)" (*Krouse v. Graham, supra,* 19 Cal.3d at pp. 80-81.)

Our Supreme Court concluded: "An express agreement by the jurors to include such fees in their verdict, or extensive discussion evidencing an implied agreement to that effect, constitutes misconduct requiring reversal. (See *Dunn v. White* (1970) 206 Kan. 278[, 283-284]; *White Cabs v. Moore* (1947) 146 Tex. 101[, 105].) A plaintiff's obligation to pay attorneys' fees is so commonly understood by most jurors, however, that it would be undesirable to require that a verdict be set aside merely because some of the jurors admitted that they privately considered the matter of attorneys' fees in reaching their verdict. (See Comment (1958) 25 U.Chi.L.Rev. 360, 368.) [¶] Although the declarations before us are inconclusive regarding the nature and extent of any open discussion or agreement between the jurors regarding the subject of attorneys' fees, they do concur in alleging that the Mladinov verdict was inflated by $30,000 to compensate her for her attorneys' fees. This, of course, is serious matter and, without indicating our own views as to the merits, we conclude that the declarations, taken together, raise an issue of sufficient moment that, in fairness, the declarations should have been admitted and considered by the court in its ruling upon defendant's motion for new trial. Rather than set aside the Mladinov verdict, thereby necessitating a new trial, however, it is appropriate simply to vacate the order denying new trial and to direct the trial court to admit the declarations and, weighing them in conjunction with all other relevant matters, to reconsider the motion. [Citation.]" (*Krouse v. Graham, supra,* 19 Cal.3d at pp. 81-82**;** *Moore v. Preventive Medicine Medical Group, Inc.* (1986) 178 Cal.App.3d 728, 740 ["[T]o establish misconduct requiring reversal, juror declarations must establish '[an] express agreement by the jurors to include such fees in their verdict, or extensive discussion evidencing an implied agreement to that effect.'"]; see *Enyart v. City of Los Angeles* (1999) 76 Cal.App.4th 499, 506-507; *Iwekaogwu v. City of Los Angeles* (1999)

75 Cal.App.4th 803, 819-820; *Thompson v. Friendly Hills Regional Medical Center* (1999) 71 Cal.App.4th 544, 551; *Ford v. Bennacka* (1990) 226 Cal.App.3d 330, 336; *Garfoot v. Avila* (1989) 213 Cal.App.3d 1205, 1211; *De Vera v. Long Beach Pub. Transportation Co.* (1986) 180 Cal.App.3d 782, 796; *Tramell v. McDonnell Douglas Corp.* (1984) 163 Cal.App.3d 157, 172-174.)

Here, there are specific fact-based declarations describing the statements of the jurors on the subject of prejudgment interest. Further, the uncontroverted declarations describe an express agreement to award $8.2 million in prejudgment interest. As noted, in *Krouse*, our Supreme Court stated, "An express agreement by the jurors to include such fees in their verdict, or extensive discussion evidencing an implied agreement to that effect, constitutes misconduct requiring reversal." (*Krouse v. Graham, supra,* 19 Cal.3d at p 81.) Here there is evidence of both an express agreement and extensive discussion of the desirability of including prejudgment interest. Thus, the $8.2 million prejudgment interest award must be reversed.

Plaintiff has failed to overcome the presumption of prejudice as to the jurors' prejudgment interest award. However, no misconduct issue has been raised concerning the $15 million damage award. The presumption of prejudice has been overcome as to any liability issue and the $15 million damage award. Thus, the $15 million damage award may not be reversed on misconduct grounds. (*Ovando v. County of Los Angeles* (2008) 159 Cal.App.4th 42, 58-59; *Smoketree-Lake Murray, Ltd. v. Mills Concrete Construction Co.* (1991) 234 Cal.App.3d 1724, 1745.)

4. Prejudgment interest

On July 12, 2010, the trial court signed a judgment. The judgment did not include a prejudgment interest award.[6] When the judgment was signed, plaintiff had filed no

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6. The July 12, 2010 judgment states, "NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that plaintiff Don Johnson Productions Inc. shall have

motion for a prejudgment interest award. On July 27, 2010, plaintiff filed a notice of intent to file to file new trial motion which only sought a prejudgment interest award: "PLEASE TAKE NOTICE THAT Plaintiff Don Johnson Productions, Inc. intends to move the Court to set aside the partial judgment entered on July 12, 2010 against defendant Rysher Entertainment, Inc. and to issue a judgment that includes prejudgment interest under Civil Code section 3287(b) on the $23,200,000 judgment against defendant Rysher Entertainment, Inc." The notice of intent further stated: "The partial judgment entered on July 12, 2010 against defendant Rysher Entertainment, Inc[.], did not include prejudgment interest. By this motion, Plaintiff Don Johnson Productions, Inc. does not seek a new trial. Rather, Plaintiff only seeks a judgment that includes an award of prejudgment interest on the award of $23,200,000 against defendant Rysher Entertainment, Inc. under Civil Code section 3287[, subdivision] (b). Pursuant to *North Oakland Medical Clinic v. Rogers* (1998) 65 Cal. App. 4th 824, a request for prejudgment interest may be sought in the form of a motion for a new trial on the grounds of 'inadequate damages.'" On August 6, 2010, plaintiff filed its points and authorities in support of its new trial motion to request prejudgment interest. Plaintiff argued that Civil Code section 3287, subdivision (a) permitted the trial court to award prejudgment interest. Rysher Entertainment, LLC argued the $23.2 million judgment was not reasonably calculable within the meaning of Civil Code section 3287, subdivision (a). In its papers, Rysher Entertainment, LLC noted that any order including prejudgment interest must comply with the written specification of reasons requirement of section 657.[7]

On September 8, 2010, the trial court granted plaintiff's limited new trial motion which sought an award of prejudgment interest. In a minute order, the trial court ruled:

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and recover partial judgment from defendant Rysher Entertainment, Inc. in the amount of $23,200,000.00, plus interest at the legal rate of 10% per annum from the date of this judgment, and costs of suit pursuant to a timely-filed memorandum of costs."

[7] Section 657 states in part, "When a new trial is granted, on all or part of the issues, the court shall specify the ground or grounds upon which it is granted and the court's reason or reasons for granting the new trial upon each ground stated."

"Plaintiff's motion to seek prejudgment interest on damage award is called and argued. [¶] The motion is granted. The Court allows 10% per annum from May 22, 1998." On December 17, 2010, judgment was entered which states in part, "NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that plaintiff Don Johnson Productions, Inc. shall have and recover judgment, jointly, and severally, from defendants Rysher Entertainment, L.L.C., 2929 Entertainment, LP, and, and Qualia Capital LLC as follows: damages in the amount of $23,200,000, plus prejudgment interest (calculated on the principal sum of $23,200,000 from May 22, 1998 to the date hereof at the legal rate of 10 percent per annum) in the amount of $29,149,369.86 . . . ."

Defendants argue the order granting a partial new trial motion, which awarded prejudgment interest, must be reversed because of noncompliance with the section 657 specification of reasons requirement. We agree. The failure to state the grounds for granting a new trial motion requires the order at issue be reversed. (*Oakland Raiders v. National Football League, supra,* 41 Cal.4th at pp. 633-640; *Stevens v. Parke, Davis & Co.* (1973) 9 Cal.3d 51, 60-63; *Mercer v. Perez* (1968) 68 Cal.2d 104, 112-124.) Thus, the prejudgment interest award must be reversed.

There is no merit to plaintiff's argument the section 657 specification of reasons requirement does not apply to its new trial motion. Plaintiff admits that it sought a new trial because of inadequate damages; *viz.*, it was entitled to prejudgment interest. Because judgment had already been entered, compliance with the section 657 prerequisites is mandatory. (*Mercer v. Perez, supra,* 68 Cal.2d at p. 118; *Telefilm, LLC. v. Superior Court* (1949) 33 Cal.2d 289, 294.) The effect of the September 8, 2010 order was to provide a new trial on plaintiff's right to prejudgment interest. In the case of prejudgment interest, it is awarded pursuant to a motion. The decision to grant prejudgment interest under these circumstances would normally not result in new witnesses being called. Rather, the trial court typically decides whether to award prejudgment interest based on the trial testimony. But the additur of prejudgment interest

results from a partial new trial motion and there must be compliance with section 657. We need not address the parties' remaining contentions.

5. Alter ego

a. mootness

2929 Entertainment, LP and Qualia Capital, LLC argue the appeal is moot because a bond was posted. They cite no authority for the proposition the posting of a bond in a case with an alter ego liability issue renders an appeal moot.

b. sufficiency of the evidence

2929 Entertainment, LP, and Qualia Capital, LLC argue the evidence is insufficient to support the trial court's alter ego rulings. Alter ego liability can arise when: there is a unity of ownership between a corporation and an equitable owner; the unity of ownership is such that the separate personalities of the corporation and the equitable owner do not exist; and an inequity will result if the corporate fiction is upheld. (*Shaoxing County Huayue Import and Export v. Bhaumik* (2011) 191 Cal.App.4th 1189, 1198; *Sonora Diamond Corp. v. Superior Court* (2000) 83 Cal.App.4th 523, 538.) The factors which serve as the basis of the trial court's exercise of equitable discretion include: the commingling of funds and assets of the entities; identical equitable ownership in the entities; use of the same offices and employees; disregard of corporate formalities; identical directors and officers; and use of one as a mere shell or conduit for the affairs of another. (*Shaoxing County Huayue Import and Export v. Bhaumik, supra*, 191 Cal.App.4th at p. 1198; *Sonora Diamond Corp. v. Superior Court, supra*, 83 Cal.App.4th at pp. 538-539.) A court evaluates all of the circumstances and no one characteristic governs in the usual case. (*Shaoxing County Huayue Import and Export v.*

Bhaumik, supra, 191 Cal.App.4th at p. 1198; *Sonora Diamond Corp. v. Superior Court, supra,* 83 Cal.App.4th at p. 539.) The results will depend on the circumstances of each case. (*Mesler v. Bragg Management Co.* (1985) 39 Cal.3d 290, 300; *Shaoxing County Huayue Import and Export v. Bhaumik, supra,* 191 Cal.App.4th at p. 1198.) Our Supreme Court has explained, "The essence of the alter ego doctrine is that justice be done." (*Mesler v. Bragg Management Co.*, *supra*, 39 Cal.3d at p. 301; see *Greenspan v. LADT LLC* (2010) 191 Cal.App.4th 486, 511.) We review this contention for substantial evidence. (*H. A. S. Loan Service, Inc. v. McColgan* (1943) 21 Cal.2d 518, 524; *Cooperman v. Unemployment Ins. Appeals Bd.* (1975) 49 Cal.App.3d 1, 8.)

The following is the evidence which supports the alter ego judgment against 2929 Entertainment, LP. Two businesspersons, Todd Wagner and Mark Cuban, pledged all of the assets of Rysher Entertainment, LLC as collateral for a credit line. Mr. Wagner owned a two-thirds interest in Rysher Entertainment, LLC. Mr. Cuban owned the remaining one-third interest. The chief financial officer for Rysher Entertainment, LLC and 2929 Entertainment, LP was the same person. The assets included the video library of Rysher Entertainment, LLC as collateral for a $25 million credit line. The credit line could be used by both Rysher Entertainment, LLC and 2929 Entertainment, LP which shared the same address. Both Rysher Entertainment, LLC and 2929 Entertainment, LP were parties to the credit line agreement. At the time the credit line agreement was entered into, Rysher Entertainment, LLC was generating a cash flow. Rysher Entertainment, LLC never accessed the credit line. Mr. Cuban and Mr. Wagner authorized the use of the credit line secured with the assets of Rysher Entertainment, LLC by 2929 Entertainment, LP. Defendants never told any representative of plaintiff that its copyright rights were being used as collateral for the Rysher Entertainment, LLC by 2929 Entertainment, LP line of credit. The chief executive officer of Rysher Entertainment, LLC did not know about the use of its resources as collateral for the credit line.

Further, approximately $64 million in loans were made by Rysher Entertainment, LLC to 2929 Entertainment, LP. The loans were authorized by Mr. Cuban and

Mr. Wagner. The chief executive officer of Rysher Entertainment, LLC was unaware of the loans when they were made. The former chief financial officer of Rysher Entertainment, LLC testified: "[Mr. Cuban] and [Mr. Wagner] were the owners. Everything that came in went to them, and . . . they decided how to use those funds." [¶] . . . "[Mr. Wagner] and [Mr. Cuban] employed their assets however they wanted to employ them." The chief financial officer of both companies did not know whether Mr. Cuban and Mr. Wagner even discussed the loans with the chief executive officer of Rysher Entertainment, LLC. The chief financial officer worked for Mr. Cuban and Mr. Wagner and not the chief executive officer of Rysher Entertainment, Inc. Only if Mr. Cuban and Mr. Wagner did not authorize the loans would the chief financial officer seek approval from the Rysher Entertainment, LLC chief executive officer. No formal loan documents were prepared for the loans. The loan rate was selected by the chief financial officer of both companies. The interest was paid only when the loans were repaid.

As to Qualia Capital, LLC, the following constitutes substantial evidence which supports the alter ego findings. The operations of Rysher Entertainment LLC were conducted by three employees. These three persons were employed and paid by Qualia Capital, LLC. Rysher Entertainment, LLC had no employees or offices of its own. One witness described the Qualia Capital, LLC as the public face of Rysher Entertainment, LLC. When seeking a valuation report, the parties used the '"Rysher library"' and '"Qualia library"' interchangeably. And one e-mail states income from Rysher Entertainment, LLC properties were to be reflected as belonging to Qualia Capital, LLC. As to both 2929 Entertainment, LP and Qualia Capital, LLC, the foregoing constitutes substantial evidence they are the alter ego corporations of Rysher Entertainment, LLC.

B. Cross-appeal

Plaintiff filed a protective cross-appeal challenging the admissibility of letters and the testimony of a witness who testified as to damages. In its opening brief on cross-appeal, plaintiff acknowledges the protective cross-appeal is moot if no retrial is ordered: "[Plaintiff] believes that this Court can and should affirm the judgment below. If the Court does so, this protective cross-appeal will be moot. Nevertheless, [Plaintiff] presents its challenges to the two rulings described above out of an abundance of caution, to ensure that it will not be hobbled by the same errors in the event of a retrial." We have affirmed the $15 million damage award plus 10 percent interest on that sum from July 12, 2010. No retrial will occur. Thus, the cross appeal is moot on this ground only.

[The balance of the opinion is to be published]

IV. DISPOSITION

The judgment is affirmed insofar as it awards $15 million plus interest from July 12, 2010. The cost award is affirmed. The judgment is reversed in all other respects. The cross-appeal is dismissed. Plaintiff, Don Johnson Productions, Inc., is awarded costs on appeal from defendants, Rysher Entertainment, LLC, 2929 Entertainment, LP, and Qualia Capital, LLC.

CERTIFIED FOR PARTIAL PUBLICATION

TURNER, P. J.

I concur:

FERNS, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

I respectfully dissent.

A. Tolling Agreement

Defendant asserts that the Code of Civil Procedure section 360.5[1] renewal requirement applies to the "tolling agreement" between the parties, and therefore plaintiff's claim is untimely and barred by the statute of limitations. (§ 337.) The apparent purpose of section 360.5 was to prevent creditors from extracting perpetual waivers of the statute of limitations and thereby emasculating the defense of the statute of limitations. (See *California First Bank v. Braden* (1989) 216 Cal.App.3d 672, 677.) Moreover, such agreements would be contrary to the public interest in preventing stale claims. (See *Addison v. State of California* (1978) 21 Cal.3d 313, 317.) The same policy principles apply to agreements whether labeled as waivers of, or as tolling of, the statute of limitations.

A comment in the Stanford Law Review shortly after the enactment of section 360.5, stated as follows: "More likely 'waiver' was included in the first part of [section 360.5] as a generic term to prevent evasion of the section. It would then include acknowledgements, promises, and all other things similarly barring a defense of the statute of limitations. [¶] California courts have used the term 'waiver' when referring to promises or acknowledgments that *toll* the statute of limitations. 'Waiver' has been given many different meanings. But for the purposes of the statute of limitations in California, it should be construed as including acknowledgments and promises." (Comment, *California Code of Civil Procedure section 360.5* (1952) 4 Stanford L.Rev. 415, italics added.) The comment goes on to state, "The section seems to envision *tolling* the statute

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* Pursuant to California Rules of Court, rules 8.1100 and 8.1110, this opinion is certified for publication with the exception of part B.

1 All statutory references are to the Code of Civil Procedure unless otherwise noted.

only by a series of separate transactions. . . . Section 360.5 was to provide a maximum beyond which the statute could not be *tolled* by any means." (*Id.* at pp. 426-427, italics added.)

Another article provided, "In California, waiver [of the statute of limitations] is controlled by section 360.5 of the Code of Civil Procedure. For *tolling agreements* signed before the expiration of the limitations period, the California code allows a four-year waiver running from the date of expiration. For agreements signed after the limitations period, the statute may be *tolled* for four years from the date of signing. California's four year limit appears to be aimed at avoiding 'perpetual contracts.'" (Chaplin, *Reviving Contract Claims Barred by the Statute of Limitations: An Examination of the Legal and Ethical Foundation for Revival* (2000) 75 Notre Dame Law Rev. 1571, 1586, italics added.)[2] A prominent authority, citing section 360.5, said, "By law, a *tolling agreement* is not effective for a period exceeding four years from the expiration of the time otherwise required for commencement of the action, although the parties may execute successive *tolling agreements* each of which is effective for up to another four years." (1 Schwing, Cal. Affirmative Defenses (2012) § 25:67, p. 1770, italics added); see also, Moskowitz, Environmental Liability and Real Property Transactions (2012) Appendix A: Annotated Forms, Form A-21 [referring to section 360.5 in connection with a tolling agreement].) Thus, it appears that legal writers have used "waiver" and "tolling" interchangeably in connection with section 360.5.

Judicial opinions have likewise used the terms interchangeably in connection with the statute of limitations. (See, e.g., *ABF Capital Corp. v. Berglass* (2005) 130 Cal.App.4th 825, 835 [describing section 360.5 as concerning "California's . . . four-year tolling limit"]; *Abramson v. Brownstein* (9th Cir. 1990) 897 F.2d 389, 393 [tolling and

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[2] The Legislative Counsel reported on the proposed section 360.5 as follows: "Invalidates *any form of waiver* of statutes of limitation unless in writing signed by person obligated. Provides such waiver is effective for not more than 4 years from expiration of time limit. Authorizes successive renewals of such waivers." (Legis. Counsel, Rep. on Assem. Bill No. 370 (1951 Reg. Sess.) June 12, 1951, italics added.)

waiver used interchangeably]; *United States v. Stewart* (E.D. Va. 2006) 425 F.Supp.2d 727, 737 ["defendant knowingly and voluntarily executed a waiver of indictment for the purposes of tolling the statute of limitations"]; *Hexcel Corporation v. Ineos Polymers, Inc.* (9th Cir. 2012) 681 F.3d 1055, 1060 [party argues tolling agreement lapsed under section 360.5].) In *Hunter-Boykin v. George Washington University* (D.C. Cir. 1998) 132 F.3d 77, at page 80, the court said, "The defendant purports to see an important distinction between a 'suspension' [tolling] and a 'waiver' of a statute of limitations. We do not, at least as the parties use the words in this case."

Prominent legal authorities have noted the imprecise meaning of the word "waiver." Williston has said "waiver" has "different meanings." (5 Williston on Contracts (3d ed. 1961) § 679, p. 246.) He notes that a promise "to excuse performance of an obligation not due at the time when a promise is made . . . might perhaps also be called 'waiver' . . . ." (*Id. at* § 679, pp. 246-253.) Williston added, "In view of these different meanings of the word 'waiver' it is obviously futile to attempt to define the requirements of a valid waiver unless its use is first confined to some one or more of its ordinary applications wherein the requirements of the law are identical. Until that is done there will be constant confusion of expression. [¶] Thus, one court will say 'No question of estoppel as distinguished from waiver arises'; another will say 'The basis of waiver is estoppel'; . . . [¶] An understanding of the law requires, however, that each of these legal transactions be looked at separately and its requirements determined." (*Id.* at pp. 257-258, fns. omitted; see also 13 Williston on Contracts (4th ed. 2000) § 39:14, pp. 560-564.)

Corbin on Contracts (rev'd ed. 1999) section 40.1, page 514 states, "The term 'waiver' has been given various definitions and is used under many varying circumstances. Lawyers might like greater definition but judges are not precise, perhaps deliberately leaving flexibility in the concept and use of waiver. There is no one 'correct' definition. Waiver cannot be defined without reference to the kind of circumstances to which it is being related. Nor can we determine the legal operation of a 'waiver' without

knowing the facts that the term is being used to describe." Garner has said "*Waiver* is 'an imprecise and generic term.'" (Garner, A Dictionary of Modern Legal Usage (2d ed. 1995) 923 (Garner).) Thus, defendant argues that "waiver" can be used in different contexts and is consistent with the use of tolling in this situation.

On the other hand, tolling generally has been viewed as technically different than waiver—the position of plaintiff in arguing that the tolling agreement is not subject to section 360.5. A tolling agreement 'extend[s] the statutory limitations period on the plaintiff's claim." (Black's Law Dictionary (9th ed. 2004) 1625 (Black's).) Tolling "means 'to abate' or 'to stop the running of (the statutory period).'" (Garner, *supra,* at p. 884.) When the statute of limitations is tolled, it is "suspended." (Mellinkoff's Dictionary of American Usage (1992) 616.) Commonly, a statute of limitations is tolled when a plaintiff is a minor or has disabilities or when defendant is absent from the jurisdiction or in other comparable situations. (See *Ibid.*; Black's, *supra,* at p. 1625; §§ 340.4-340.6, 352, 354.) But there can be a "tolling agreement," which has been defined as one in which the potential defendant "agrees to extend the statutory limitations period on the plaintiff's claim." (Black's, *supra,* at p. 1625.) The Legislature has used the words "toll" or "tolled" (see, e.g., §§ 340.5, 340.6, subd. (3), 340.7) and thus knows how to use that word when applicable. In section 360.5, the Legislature used the word "waiver" and not "toll." "Waiver is the intentional relinquishment of a known right after knowledge of the facts." (*Roesch v. DeMota* (1944) 24 Cal.2d 563, 572, and extends the time to sue (Rylaarsdam and Turner, Cal. Practice Guide: Civil Procedure Before Trial, Statute of Limitations (The Rutter Group 2012) ¶ 1:101, p. 1-18) rather than suspending the applicable statute of limitations (see *Ashou v. Liberty Mut. Fire Ins. Co.* (2006) 138 Cal.App.4th 748, 757 [distinguishing waiver, tolling and estoppel]; *State v. Blackburn* (Ohio 2008) 887 N.E.2d 319, 323 ["Unlike waiver, statutory tolling does not necessarily require an informed tactical decision"].) Absent legislative intent to the contrary, or other evidence of a different meaning, legal terms in a statute are presumed to have been used in their legal sense. (2A, Singer and Singer, Sutherland Statutes and Statutory

Construction (7th ed. 2007) § 47:30, pp. 478-479.) The words used both in the statute and the agreement generally are suppose to govern unless there is some ambiguity or unless contrary to the intent of the statute or agreement. (See Civ. Code, § 1638; *Waller v. Truck Ins. Exchange* (1995) 11 Cal.4th 1, 18-19; *Delaney v. Superior Court* (1990) 50 Cal.3d 785, 798; *MacIsaac v. Waste Management Collection and Recycling, Inc.* (2005) 134 Cal.App.4th 1076, 1082-1084 (*MacIsaac*); Scalia and Garner (2012), Reading Law: The Interpretation of Legal Texts [textualism].) "Technical words are to be interpreted as usually understood by persons in the profession or business to which they relate, unless clearly used in a different sense." (Civ. Code, § 1645.)

In order to resolve these conflicting views, because of the imprecise meaning of "waiver" in section 360.5, the task here is to ascertain if the "tolling agreement" appropriately fits within the logical meaning of waiver in that statute. "The words of a contract are to be understood in their ordinary and popular sense, rather than according to their strict legal meaning; unless used by the parties in a technical sense, or unless a special meaning is given to them by usage, in which case the latter must be followed." (Civ. Code, § 1644.) Similarly, if there is any ambiguity in the statute, we should interpret and apply it in a reasonable manner to effectuate its purpose. (*Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1165-1166, superseded by statute on another ground ["When uncertainty arises in a question of statutory interpretation, consideration must be given to the consequences that will flow from a particular interpretation. [Citation.] In this regard, it is presumed the Legislature intended reasonable results consistent with its expressed purpose, not absurd consequences. [Citations.] '"[W]here the language of a statutory provision is [susceptible] of two constructions, one of which, in application, will render it reasonable, fair and harmonious with its manifest purpose, and another which would be productive of absurd consequences, the former construction will be adopted."' [Citation.]"].)

Allowing parties to circumvent easily the policy behind section 360.5 by using the word "toll" instead of "waive" would be an absurd consequence and would contravene

public policy. The tolling agreement should be interpreted in a reasonable fashion. (See *Pacific Tel. & Tel. Co. v. City of Lodi* (1943) 58 Cal.App.2d 888, 892 ["literal interpretation . . . tends to make . . . paragraph inoperative and to involve an absurdity. Such interpretation is to be avoided if said paragraph can be given an interpretation which will make it operative and reasonable"]; Rest.2d Contracts, § 203(a), p. 92.) Also reading section 360.5 "waiver" literally to exclude tolling does not "comport[]with its purpose" (*California School Employees Assn. v. Governing Board* (1994) 8 Cal.4th 333, 341; *MacIsaac, supra,* 134 Cal.App.4th at p. 1083) and would frustrate the purpose of the statute. (*California School Employees Assn. v. Governing Board, supra,* at p. 341.) Section 360.5 should be interpreted to cover the tolling agreement in this case. Such an interpretation would be consistent with "reason, practicality, and common sense." (*Halbert's Lumber, Inc. v. Lucky Stores, Inc.* (1992) 6 Cal.App.4th 1233, 1239.)

Perhaps legal authorities perhaps incorrectly, use tolling and waiver interchangeably. The use of the word "toll" in its strict legal meaning does not make sense here. Tolling is normally tied to some specific phenomenon and is not used to involve an indefinite period or a period in the discretion of one party. Generally, tolling is provided for by statute or is an equitable doctrine created judicially. (See Rylaarsdam and Turner, Cal. Practice Guide: Civil Procedure Before Trial, Statute of Limitations, *supra,* ¶ 6:1, p. 6-1; *IPF Recovery Co. v. Illinois Ins. Guar. Fund* (Ill.App. 2005) 826 N.E.2d 943, 947-948.) It would appear that here the intent of the parties was not to use "toll" in the strict legal sense, but instead to have plaintiff waive the statute of limitations until notice was given. If, as the legislative history suggests, section 360.5 was to apply to any type of waiver, what was designated as tolling here should be viewed as a type of waiver covered by the statute. There is no meaningful difference here between suspending the statute of limitations and waiving it in this context.

The tolling agreement provided for tolling until "you give us reasonable notice (30 days) rescinding this tolling agreement." If the words of the tolling agreement are to be applied literally, "rescinding" the tolling agreement would render it a nullity (*Holmes v.*

Steele (1969) 269 Cal.App.2d 675, 677) and the statute of limitations would likely have run. There is no reason to apply the term "tolling" literally and not "rescinding." The purpose of the agreement was to waive the statute of limitations as provided in section 360.5.

Section 360 has no applicability here because that provision deals with acknowledgments of debt and promises of payment. Plaintiff made no such acknowledgment or payment.

It is true that the "statute of limitations should not be characterized by courts as either 'favored' or 'disfavored.' The two public policies . . . the one for repose and the other for disposition on the merits—are equally strong, the one being no less important or substantial than the other." (*Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 396.) But section 360.5 evinces a public policy of precluding agreed-upon, indefinite periods of limitations.

Accordingly, I would reverse the judgment by holding that the plaintiff's claims are barred by the statute of limitations.

B. Other Issue

In view of my conclusion on the statute of limitations, I do not have to reach the other issues. Parenthetically, I have reservations about a term providing a 50 percent copyright ownership somehow overriding the explicit provision defining adjusted gross receipts, especially as the copyright provision was drafted by plaintiff. The copyright provision does not specify that the 50-50 split is to be computed any way other than by applying the existing adjusted gross receipts formula. Plaintiff for years never made a contention as to the adjusted gross receipts provision being superseded by the copyright provision.

C. Conclusion

I would reverse the judgment.

MOSK, J.