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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

ILSHIN INVESTMENT CO., LTD., Plaintiff and Appellant, v. BUENA VISTA HOME ENTERTAINMENT, INC., Defendant and Appellant.	B208839 (Los Angeles County Super. Ct. No. BC347911)

APPEAL from a judgment of the Superior Court of Los Angeles County. Aurelio Munoz, Judge. Reversed in part and remanded with directions.

White O'Conner Fink & Brenner, Andrew M. White, Tami Kameda; Horvitz & Levy, Frederico D. Cohen and Julie L. Woods for Defendant and Appellant.

Gibson, Dunn & Crutcher, Scott A. Edelman, Daniel M. Flores; Tantalo & Adler and Michael S. Adler for Plaintiff and Appellant.

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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 IA, IB, and II.

Ilshin Investment Co., Ltd. (Ilshin), a Korean company, loaned funds to Last Patriot Productions, Inc. (Last Patriot) to enable production of The Patriot, a film starring Steven Seagal. Last Patriot obtained the necessary bank financing and completed the film, but was unable to repay its obligations to Ilshin and others.[1]

When the completed film failed to obtain theatrical distribution, Last Patriot entered into an exclusive agreement (the Agreement) for its home video distribution by Buena Vista Home Entertainment, Inc. (Buena Vista), for an eight-year term ending approximately June 2007. The Agreement provided that Buena Vista's fee would be a percentage of the distribution proceeds, and permitted Buena Vista to recoup its expenses before paying the balance of the proceeds to Last Patriot. But the Agreement expressly required Buena Vista to obtain Last Patriot's consent before incurring recoupable distribution expenses in excess of $900,000.[2]

Buena Vista distributed The Patriot from mid-1999 until October 2005, with sales far exceeding the parties' expectations.[3] Between May 1, 1998 and September 30, 2006, United States distribution receipts were almost $13.5 million, from which Buena Vista earned fees of $3 million and paid over $4.7 million to Last Patriot and its creditors. But when distribution costs reached the $900,000 threshold early in the venture, Buena Vista did not seek or obtain Last Patriot's consent to continue incurring expenses, as the Agreement required.

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[1] Unless otherwise significant, this opinion refers to Last Patriot collectively along with the various creditors, subsidiaries, agents, and others that obtain their rights through Last Patriot, that joined with Last Patriot or acted on its behalf, or that otherwise need no individual identification here.

[2] We omit and disregard terms of the Agreement and facts not at issue here, concerning The Patriot's theatrical and other media distribution, and its distribution in markets outside of the United States.

[3] Last Patriot's representative based his negotiations for the Agreement on his projection that the film might generate about $4 million in gross domestic home video revenue. Buena Vista's draft pre-Agreement financial projections anticipated gross revenues of from under $5 million to about $7.8 million.

In February 2006, Ilshin filed suit against Buena Vista. As a judgment creditor standing in Last Patriot's shoes, Ilshin alleged that Buena Vista had breached the Agreement by incurring and recouping distribution costs above the $900,000 threshold without Last Patriot's consent, and by ending the film's distribution before the natural expiration of the Agreement's eight-year term. Its complaint also included a cause of action for conversion. For its contract claims Ilshin sought to recover the excessive costs Buena Vista had deducted, and the profits Last Patriot would have earned from continuing sales; for its tort claim, Ilshin sought the same compensatory damages, plus punitive damages.

After bifurcation of the conversion claim and a bench trial of the contract claims, the trial court awarded Ilshin contract damages for all the costs above $900,000 that Buena Vista had deducted during the two years preceding Last Patriot's 2001 inquiry about the cost deductions, totaling $3,775,197 plus prejudgment interest. The court also awarded Ilshin another $800,000 for its lost profits from October 2005, when Buena Vista ended the film's distribution, until the end of the Agreement's eight-year term.

And it awarded Ilshin attorney fees and costs totaling $1,492,643.71.

Buena Vista appeals from these damage awards, and from the trial court's award of attorney fees. Ilshin, too, appeals from the judgment, challenging a ruling that limited the period for which Ilshin could recover excess costs, and rulings that prevented it from seeking punitive damages based on its tort claim against Buena Vista.

With respect to Buena Vista's appeal, we reverse the trial court's damage award in part with respect to the amount of contract damages, and lost profits damages. The attorney fee award must also be set aside, for the law does not authorize the award of attorney fees for a prevailing plaintiff in an independent creditor's suit.

With respect to Ilshin's appeal, we affirm the trial court's imposition of a two-year limitation on the period for which Ilshin could recover damages for Buena Vista's excessive recoupment of distribution costs. We find, however, that the trial court erred by refusing to enter a directed verdict against Buena Vista on the conversion claim.

These errors will require reversal of the judgment and remand to the trial court for its redetermination of appropriate damages and for further proceedings consistent with this opinion.

FACTUAL AND PROCEDURE BACKGROUND

Financing and Production of The Patriot

In 1993 Ilshin loaned funds to Last Patriot as seed money to obtain bank financing for the production of a film entitled The Patriot, starring Steven Seagal. Last Patriot obtained bank financing and completed the film, but did not repay its obligations to Ilshin and others.

1. The Distribution Agreement

When The Patriot failed to obtain theatrical distribution, Last Patriot entered into an agreement (the Agreement) for videocassette and DVD distribution of the film by Buena Vista. The Agreement granted exclusive U.S. home video distribution rights to Buena Vista for eight years, plus a six-month, non-exclusive, sell-off period.

a. Buena Vista's distribution fee

Under the Agreement, Buena Vista was entitled to a distribution fee, calculated as a percentage of "Defined Receipts." Defined Receipts consisted of gross billings after certain adjustments (primarily for refunds, rebates, and reserves, as discussed below in greater detail). Buena Vista's distribution fee was computed as 20 percent of the first $4.5 million of Defined Receipts, 22 percent of receipts from $4.5 million to 7 million, and 25 percent of receipts above $7 million.

b. Buena Vista's right to recoup distribution expenses

The Agreement provided that after payment of its distribution fee, Buena Vista could recoup "all actual distribution costs and expenses paid, accrued, or incurred" for the film's distribution. The Agreement broadly defines the distribution costs that are recoupable by Buena Vista, specifically including costs for rebates, sales incentives, and price protections, as well as for any "music [costs], talent clearances and residuals" that Buena Vista elected to pay.

"Rebates" are amounts typically paid by Buena Vista to subdistributors and retail sellers (or deducted from the payments due from them) as incentive to meet a particular sales volume. "Price protections" are amounts deducted by Buena Vista from amounts owed by sellers after Buena Vista has lowered the price of unsold videocassettes and DVDs, to obviate the expense of exchanging returned items for lower-priced replacements. The "music [costs], talent clearances and residuals" are royalty obligations, computed as a percentage of receipts, owed by Last Patriot to industry guild members (such as actors, directors, screen writers, musicians, etc.). Although they are undisputedly obligations of Last Patriot (the film's producer), not Buena Vista (the distributor), the Agreement expressly entitles Buena Vista to pay Last Patriot's residual obligations and recoup those amounts from Last Patriot's share of the proceeds, because Last Patriot's failure to pay residuals would jeopardize Buena Vista's ability to continue distributing the film.[4] The Agreement provides express indemnities by Last Patriot for any residual payments Buena Vista makes on its behalf.

c. Last Patriot's contingent compensation

The Agreement provided that after its fees and distribution expenses were deducted, Buena Vista would remit to Last Patriot 100 percent of the funds remaining—the "Contingent Compensation"—in installments. Under the Agreement, Buena Vista's periodic distribution statements "shall be deemed to be accounts stated and not subject to audit two (2) years after each statement is rendered" by Buena Vista.

[4] When Last Patriot became unable to pay its residual obligations and declared bankruptcy in October 2001, copyright laws and agreements permitted the guilds to enforce them directly against Buena Vista, the distributor. Buena Vista therefore paid the residuals on Last Patriot's behalf—as the Agreement permitted it to do—in order to prevent the guilds from seizing the film and ending its distribution.

d. The consent clause

During the negotiation of the Agreement, Last Patriot obtained Buena Vista's agreement to insert a "consent clause," providing that Buena Vista must obtain Last Patriot's consent before incurring more than $900,000 of "recoupable" distribution costs.[5] There was evidence that those negotiating the Agreement on Last Patriot's behalf intended the consent clause to protect it from the possibility that Buena Vista might incur excessive distribution expenses, thereby reducing Last Patriot's ultimate return under the Agreement. According to one of Last Patriot's negotiators, the consent clause also allocated risk between Buena Vista and Last Patriot as to how well sales would go under the Agreement. If sales were low (as Last Patriot's negotiator feared), Last Patriot would bear the risk that expenses might be a large proportion of revenue, while Buena Vista would bear the risk that the consent clause would cap recoupable expenses if sales were high.

The Agreement does not indicate the circumstances that would justify Last Patriot in either granting or withholding its consent to Buena Vista's incurring distribution expenses above the $900,000 threshold, nor the effect on the parties' rights and obligations if Last Patriot did not grant its consent. Nothing in the Agreement explicitly requires Buena Vista to devote any particular level of effort to the film's distribution, or to exert efforts or funds to maintain distribution during the Agreement's entire eight-year term.

2. Receipts and expenses during the film's distribution

When they negotiated the Agreement, the parties each anticipated that the film's U.S. home video distribution would generate receipts in the area of $4 million over the Agreement's eight-year term. But its distribution enjoyed far greater success. As early as September 1999, just a few months into the distribution enterprise, Buena Vista had

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[5] The provision's actual wording is: "It is understood and agreed that [Buena Vista] shall incur no more than Nine Hundred Thousand Dollars ($900,000) of recoupable U.S. Distribution Costs without your prior consent."

obtained about $3.7 million in Defined Receipts, with costs of slightly over $1.2 million and fees to Buena Vista of $742,000.

Each quarterly participation statement reported to Last Patriot the amount of distribution costs incurred by Buena Vista, and showed that those costs had been reimbursed before distributing Last Patriot's share. But Buena Vista did not at any time seek Last Patriot's consent under the Agreement's consent clause.

By the time Buena Vista issued its participation statement for the period ending March 31, 2001, the cumulative Defined Receipts had reached $7.3 million, from which Buena Vista had received fees of almost $1.5 million and had recouped costs of just under $1.9 million, yielding over $4.3 million in Contingent Compensation to Last Patriot and its creditors.

Buena Vista's final participation statement, for the period ending June 23, 2005, reported cumulative distribution receipts of almost $13.5 million, fees to Buena Vista of over $3 million, costs recouped by Buena Vista of $5.66 million, and over $4.7 million paid to Last Patriot and its creditors.

3. Ilshin obtains a lien against Last Patriot and serves a levy on Buena Vista.

In February 2001, Ilshin obtained a stipulated $6.6 million judgment against Last Patriot (and others) arising from Last Patriot's failure to satisfy its loan obligations arising from production of The Patriot.

4. The parties assert conflicting positions with respect to the meaning of the Agreement's consent clause.

In a July 2001 letter to Buena Vista, Last Patriot noted that as of March 31, 2001, about two years into the film's distribution, Buena Vista had incurred distribution costs totaling over $1.9 million, and charged that Buena Vista's deduction of amounts exceeding the $900,000 threshold was improper because Buena Vista had neither requested nor received Last Patriot's consent.

Buena Vista's internal analysis following Last Patriot's letter concluded that if it were to apply a $900,000 cap to all its distribution expenses, by the end of the

Agreement's eight-year term its net distribution fee—its only net return from the Agreement—would be wholly consumed. It estimated that distribution costs would entirely consume the almost $2 million it had so far earned, and another $1.9 million as well, leaving Buena Vista with an enormous loss for its highly successful distribution efforts. At the same time, Last Patriot's share of the proceeds, as of September 2001, would increase from $4.5 million to about $5.3 million, and would rise to more than $8.8 million during the Agreement's remaining term. In other words, the more videos Buena Vista sold, the more money it would lose.

Buena Vista soon afterward informed Last Patriot of its position that—notwithstanding the Agreement's literal definition of distribution costs—the parties had not intended that the consent clause's limit on "distribution" costs would incorporate the Agreement's broad definition of expenses that were recoupable by Buena Vista. While the listed items were recoupable by Buena Vista, the consent clause's reference to distribution costs was intended instead to refer only to advertising and marketing expenses, rather than adjustments to receipts such as to rebates and price protections, or to residual payments made by Buena Vista on Last Patriot's behalf.[6]

Buena Vista contended it informed Last Patriot at that time that Buena Vista would have to end its distribution of the film if Last Patriot were to seek reimbursement of the distribution expenses over $900,000; Last Patriot did not recall any such communication, and Buena Vista in any event received no response from Last Patriot. According to Buena Vista, it assumed Last Patriot had accepted its analysis and had dropped the issue.[7]

[6] Under this interpretation, Buena Vista contended, costs did not reach the $900,000 threshold until sometime in 2005. The trial court soundly rejected Buena Vista's position on this point in its statement of decision, and it is not at issue in this appeal.

[7] Buena Vista's representative testified that if Last Patriot had pressed the issue, Buena Vista would have terminated the distribution of the film in 2001, as it actually did when Last Patriot raised the issue in 2005.

In January 2002, Comerica Bank, along with the Screen Actors Guild and the Directors Guild of America, threatened to sue Last Patriot, Ilshin, and others, for failing to make required payments for loans and residuals with respect to The Patriot and other projects.

In early May 2002, the issue of the Agreement's consent clause and $900,000 expense reimbursement cap was again raised, this time in a letter to Buena Vista on behalf of a creditor of Last Patriot. The letter demanded reimbursement of $1,645,350 on Last Patriot's behalf, noting that Buena Vista had deducted distribution costs totaling almost $2.2 million by June 30, 2001, and by September 30, 2001, the total was over $2.5 million. Buena Vista responded in June 2002, explaining its position that there had been a mistake in the Agreement's language, because a deal capping all distribution costs at $900,000 would make no economic sense, and no one would have made it intentionally.

Buena Vista agreed during the parties' discussions to toll any unexpired statutes of limitation until September 30, 2002.

5. Ilshin asserts liens.

In June 2003, Ilshin, as a judgment creditor of Last Patriot, served Buena Vista with a levy seeking funds due Last Patriot, accompanied by a letter indicating it sought proceeds payments as they became due. In response, Buena Vista directed payments owed Last Patriot under the Agreement to Last Patriot's creditors, including various guilds, Comerica Bank, and Ilshin.

In June 2004, Ilshin claimed that Buena Vista had recouped more than $3.6 million in distribution costs that were excessive under the Agreement. The parties then entered into a formal agreement tolling any statutes of limitations. (The parties' tolling agreements do not affect any issues in this appeal.)

In August 2005, Ilshin renewed its claim that Buena Vista had recouped excessive distribution expenses in violation of the Agreement. Buena Vista's October 2005 response again explained that the parties intended the consent clause to apply just to advertising costs, but not to all distribution costs, and especially not to residual payments made by Buena Vista on Last Patriot's behalf. As Buena Vista explained, otherwise Buena Vista would have no incentive to continue making sales once distribution costs had reached $900,000, and that it would not have paid residuals owed by Last Patriot unless it could deduct those payments from the proceeds it distributed on Last Patriot's behalf.

6. Buena Vista terminates The Patriot's distribution.

In October 2005, Buena Vista concluded that it could not reach agreement with Last Patriot and its successors with respect to the appropriate application of the consent clause, and that continuing to distribute The Patriot would cause it to incur expenses that it could not recoup, impairing its distribution fee. It therefore ended the film's distribution in October 2005.

As of September 30, 2006, Defined Proceeds had reached $13,467,850, Buena Vista had earned distribution fees of $3,066,929, it had recouped $5,658,432 for its distribution costs, and it had distributed $4,742,489 to Last Patriot and its creditors.[8]

Ilshin filed suit against Buena Vista on February 23, 2006. As a creditor's suit pursuant to Code of Civil Procedure section 708.210, the suit alleged breaches of Buena Vista's obligations to Last Patriot under the Agreement, seeking damages for Buena Vista's unauthorized recoupment of costs in excess of the $900,000 expense limit, and for prematurely ending distribution of The Patriot before the June 2007 end of the Agreement's eight-year term. Ilshin's suit also included claims brought on its own behalf for conversion, punitive damages, and for equitable relief arising from the same facts.

Because it was undisputed that Ilshin's creditor's claim could not be heard by a jury, the trial court bifurcated "all aspects of this case except the conversion claim" for a bench trial upon the parties' stipulation, to be followed, if necessary, by a jury trial of the tort claim. By summary adjudication the trial court held that the contract language with respect to the Agreement's $900,000 limit on Buena Vista's recoupment of costs is

[8] As of that date Buena Vista reported that it had paid $567,638 in residuals owed by Last Patriot.

unambiguous, and that Buena Vista's misunderstanding or mistake as to its meaning (if any) was unilateral. It limited Last Patriot's proof of contract damages for Buena Vista's recoupment of excessive costs to recoupments reported after June 2001. And it struck Last Patriot's claim for punitive damages.

At the conclusion of the phase one trial, the court rejected Buena Vista's key contention that the parties had understood and intended that the Agreement's consent clause, with its $900,000 cost reimbursement limit, would apply only to certain marketing expenses, rather than to all costs that the Agreement elsewhere listed as recoupable distribution costs. For Buena Vista's breach in reimbursing itself for costs above the $900,000 expense limit, the trial court found that Ilshin was entitled to damages of $3,775,197, representing the amount in excess of $900,000 for which Buena Vista had reimbursed itself after the June 2001 cutoff, plus prejudgment interest on that amount.

The court ruled also that Buena Vista had breached its implied covenant of good faith and fair dealing by prematurely ending its distribution of The Patriot in October 2005, more than 18 months before the natural end of the Agreement's eight-year term. For that breach it awarded Ilshin lost-profit damages of $800,000.

After the phase one trial, the court denied Ilshin's motion for entry of a directed verdict on the conversion cause of action, holding that before judgment could be entered Buena Vista would be entitled to a jury trial of at least some issues. Ilshin then filed a voluntary dismissal of its conversion claim. The court awarded Ilshin costs of $53,440.63, and attorney fees of $1,439,203.08 under Code of Civil Procedure section 701.020, subdivision (c).

Judgment was entered April 23, 2008, and notice of its entry was filed and served May 1, 2008. Buena Vista timely appealed from the judgment on June 20, 2008. Buena Vista's appeal seeks reversal of the judgment with directions, contending that the damage award is unsupported, or if not, that it is excessive. In the alternative, it seeks reversal of the lost profits award, contending that it is unsupported by substantial evidence, and reversal of the attorney fee award on the grounds that Code of Civil Procedure section 701.020, subdivision (c), is inapplicable to this action and the award is in any event not supported by sufficient evidence.

On July 9, 2008, Ilshin filed its own timely appeal from the judgment. Ilshin's appeal asks that we order the judgment amended to add the $983,235 of additional cost reimbursements reported by Buena Vista before the two-year cutoff imposed by the trial court, plus interest on that amount, and that we affirm the judgment for contract damages and attorney fees, as amended. Ilshin's appeal asks also that we reinstate its claims for conversion and punitive damages against Buena Vista.

Because we conclude that certain of Buena Vista's affirmative contentions are well taken, we reverse the judgment in part, but otherwise affirm.

DISCUSSION

I. BUENA VISTA'S APPEAL

Summary of Conclusions

Buena Vista has not established that Last Patriot was not damaged as a result of its failure to obtain Last Patriot's consent under the Agreement's consent clause.

Buena Vista's appeal does not directly challenge the ruling that the consent clause imposed a $900,000 limit on the distribution costs Buena Vista could recoup without Last Patriot's consent, and that Buena Vista breached that provision by recouping costs in excess of that limit. Instead it argues that as a matter of law its failure to obtain Last Patriot's consent under the consent cause resulted in no damages to Last Patriot (and therefore to Ilshin), and it seeks reversal of the award of contract damages on that ground.

We reject Buena Vista's challenge on this issue, for it is contrary to the trial court's fully supported interpretation of the Agreement. We find, however, that the trial court erred in including within its damage award certain sums that cannot be found to be included within the consent clause's $900,000 limit on recoupable costs. Because that error will require redetermination of the date on which Buena Vista's recoupable costs reached the $900,000 threshold and the amount of the contract damages to which Last Patriot is entitled, the matter will be remanded to the trial court with directions to re-determine those facts and to appropriately adjust any other determinations that rely on them.

The record does not support the $800,000 award for lost profit damages.

In light of the trial court's fully supported ruling that Buena Vista was obligated to continue its distribution efforts until the natural end of the Agreement's term in June 2007, Ilshin was entitled to seek lost profits damages for the proceeds to which Last Patriot would have been entitled during the period after Buena Vista prematurely ended the film's distribution.

We find, however, that the evidence does not support the full amount of the court's award of lost profit damages. We therefore reduce the award to the maximum amount that the evidence could support, as adjusted to account for redetermination of the date on which Buena Vista's recoupable costs reached the $900,000 threshold, and affirm the award as modified.

Ilshin is not entitled to the attorney fee award.

Ilshin, a judgment creditor of Last Patriot, brought a creditor's suit against Buena Vista seeking contract damages for amounts Buena Vista allegedly owed to Last Patriot under the Agreement. Because there is no statutory authorization for an award of attorney fees to a prevailing creditor in an independent creditor's suit, the fee award to Ilshin cannot stand.

Ilshin is not entitled to a conversion verdict.

We find that Ilshin has failed to demonstrate prejudice resulting from the trial court's order striking its punitive damage claim at the outset of the phase-one trial, or from the court's refusal to direct a conversion verdict against Buena Vista at the close of the phase-one trial.

<u>Discussion</u>

A. Buena Vista's Appeal Fails To Demonstrate Error In The Trial Court's Determination That Ilshin Is Entitled To Contract Damages Resulting From Buena Vista's Breach Of Its Obligations To Last Patriot Under The Agreement.

In evaluating the parties' rights and liabilities under the Agreement, the trial court was required to give effect to the parties' objective intentions. (Civ. Code, § 1636.) It was required to determine those intentions by reference to the language of the Agreement, if possible. (Civ. Code, § 1639.) It was required to evaluate the Agreement's language as a whole (Civ. Code, § 1641), considering the custom and usage of the terms used (Rest. 2d, Contracts § 222(1), the circumstances of its making (Civ. Code, § 1647), and the subject to which it relates (*ibid.*), unless the court were to be persuaded that the language of the Agreement resulted from fraud, mistake, or accident that obscured the parties' intended meaning (Civ. Code, § 1640). Where no parol evidence raises a conflict as to the meaning of the Agreement, its meaning is a question of law, subject to independent review in this court. (*California National Bank v. Woodbridge Plaza LLC* (2008) 164 Cal.App.4th 137, 143.) However, where the evidence as to the Agreement's meaning is in conflict, the trial court's determination of its meaning is a factual issue that must be accepted if it is supported by substantial evidence. (*Dore v. Arnold Worldwide* (2006) 39 Cal.4th 384, 392-393 [evidence of contract's meaning, even if credited, does not support inference contrary to trial court interpretation]; see *Glendale Fed. Sav. & Loan Assn. v. Marina View Heights Dev. Co.* (1977) 66 Cal.App.3d 101, 134 [reviewing court is bound by trial court's construction of contract if it is reasonably susceptible to that interpretation].)

While substantial testimony (primarily that of participants in the Agreement's negotiation) was offered to explain the intended meaning of various provisions of the Agreement, much of the evidence merely explained what those individuals had intended or understood without raising any genuine conflict in the evidence as to the objective meanings of the disputed terms. (*Founding Members of the Newport Beach Country Club v. Newport Beach Country Club, Inc.* (2003) 109 Cal.App.4th 944, 956 [parties' undisclosed intent or understanding is irrelevant to contract interpretation].)

Because there is no contention in this appeal that any such evidence was improperly admitted or excluded, we examine it only when helpful to support the trial court's interpretation of the Agreement.

1. The trial court did not err in holding that Buena Vista's breach in failing to seek or obtain Last Patriot's consent caused damages to Last Patriot.

The Agreement's consent clause admonishes that Buena Vista is to incur no more than $900,000 of "recoupable" distribution costs without Last Patriot's consent. Buena Vista does not deny that it failed to seek or obtain Last Patriot's consent when its distribution costs reached the $900,000 threshold. It contends, however, that the judgment awarding contract damages to Ilshin must be reversed, because its breach—its failure to seek or obtain the required consent—resulted in no damage to Last Patriot or to Ilshin.

When properly interpreted, Buena Vista contends, the consent clause was designed to allay Last Patriot's concern that Buena Vista might incur and reimburse itself for costs that were unreasonably high when compared to disappointing sales. Such a scenario would provide Buena Vista with substantial fees, risk free, while leaving meager proceeds remaining for Last Patriot after deduction of the outsized costs and Buena Vista's fees. By affording Last Patriot the right to stop Buena Vista from incurring or reimbursing itself for additional costs, the consent clause would give substantial leverage to force Buena Vista either to end any abuses or see the demise of the profitable project.

As it turned out, however, sales were not at all disappointing. Because the distribution enterprise was successful, Buena Vista argued, Last Patriot's consent was a foregone conclusion if it had been sought. Last Patriot could not reasonably have withheld its consent to Buena Vista's continuing reimbursement for costs, for that would have required Buena Vista to end the profitable venture to the detriment of both parties. Buena Vista's failure to seek or obtain consent for continuing expense reimbursement therefore was of no consequence; in effect, no harm, no foul.[9]

Buena Vista's theory rests on the well-settled proposition that when a contract affords discretionary powers to a party, the implied covenant of good faith and fair dealing requires that party to exercise those powers in good faith and in a commercially reasonable manner, without injuring the other party's legitimate interests. (*Carma Developers (Cal.) Inc. v. Marathon Development California, Inc.* (1992) 2 Cal.4th 342, 371-372; *Kendall v. Ernest Pestana, Inc.* (1985) 40 Cal.3d 488, 496, 500.) As long as sales were booming, Buena Vista therefore argued, Last Patriot would not, and could not, have jeopardized the benefits to both parties by refusing to permit Buena Vista to continue incurring and recouping the expenses that were required to sustain sales, even after the $900,000 threshold was reached.[10]

The trial court interpreted the consent clause and its purpose differently, however. According to the court, the consent clause capped Buena Vista's recoupable expenses at $900,000 (a conclusion that Buena Vista does not challenge in this appeal). And the trial court also found that by ending its distribution of the film in 2005 in the face of Ilshin's challenges to its cost recoupment, Buena Vista had breached its obligations to continue

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[9] Ilshin contends this interpretation would render the consent clause superfluous, by making Last Patriot's consent a foregone conclusion. But under Buena Vista's theory the consent clause still would have provided Last Patriot with an opportunity to limit runaway costs if sales had been slow and the enterprise had turned out to be unreasonably expensive when compared to its returns.

[10] Ilshin sometimes seems to agree with this reasoning, at least in part. Ilshin's representative conceded at trial that in the face of high sales it would have been unreasonable to withhold consent under the consent clause. According to Ilshin, the consent clause required Last Patriot's consent in order "to determine what additional reimbursement Buena Vista might reasonably require in order to make sure that it was using the best approach to selling the film, and to decide the terms on which such additional reimbursement could be granted." The $900,000 cost threshold presented "an opportunity for the parties to consider the relationship" between Buena Vista's anticipated future reimbursable expenses, and "future income to the parties."

its distribution efforts until the end of the Agreement's term. It found that Buena Vista was obligated by its implied covenant of good faith and fair dealing to continue distributing The Patriot until the end of the Agreement's eight-year term, and apparently to expend whatever funds were required to do so, with or without reimbursement. That *implied* obligation, arising from the fact that the Agreement provided Last Patriot with no consideration other than its share of the distribution proceeds, was apparently unconditional and unaffected by any negative impact on the profitability of the enterprise to Buena Vista.

The trial court's interpretation of the parties' rights and obligations, if supported, scuttles Buena Vista's theory that Last Patriot would have been forced to permit Buena Vista to continue recouping costs above the $900,000 threshold if its consent to do so had been requested. Last Patriot would have had no reason to grant its consent (at least not without further concessions of some sort), because according to the court, it had bargained for the right not to do so; Buena Vista would be required to continue distributing the film without reimbursement for costs, at its own expense.

An extensive body of law governs the circumstances under which courts may—and may not—enforce implied contractual obligations, e.g., *Carma Developers (Cal.), Inc. v. Marathon Development California, Inc.*, *supra*, 2 Cal.4th 342; *Third Story Music, Inc. v. Waits* (1995) 41 Cal.App.4th 798; *Lippman v. Sears, Roebuck & Co.* (1955) 44 Cal.2d 136. Although Buena Vista challenges the court's failure to recognize an implied right of Buena Vista not to be forced to continue distributing the film with no way to recoup its costs, it offers nothing to impeach the trial court's factual determination that in negotiating the Agreement Last Patriot had bargained for the right to force Buena Vista to do exactly that.

Nor does it directly challenge the inference that, for the same reason, Buena Vista could not have ended distribution when the $900,000 limit was reached without Last Patriot's consent to continue recouping its costs. The court held that the cap on Buena Vista's reimbursement for expenses above the $900,000 threshold "was a critical piece of the deal" for which Last Patriot had bargained, and for which it had given consideration in the form of concessions with respect to audit rights. The implication is that the parties contemplated from the outset that Last Patriot would be in a position to bargain for concessions, with respect to audit or other rights, in exchange for its consent to further cost reimbursements.

Buena Vista's sole contention with respect to the implied obligation to continue distribution with or without consent is that its economic impact on Buena Vista would render Last Patriot's refusal to shoulder some or all of the distribution costs commercially unreasonable, and a decision by Buena Vista to halt distribution in that event would be objectively reasonable, as "'good economic sense'." But Buena Vista's contention is not consistent with the trial court's finding that Last Patriot had bargained for its right to receive all proceeds above the $900,000 threshold after payment of Buena Vista's percentage fees, and that it had given consideration for that right. Although it challenges the court's finding that it had no right to end distribution in 2005, Buena Vista does not directly contend that it could have ended distribution even earlier if it had sought Last Patriot's consent to further cost reimbursements and Last Patriot had withheld that consent. Buena Vista therefore offers no basis for a determination that it would have been entitled to neutralize Last Patriot's bargained-for right by walking away from the obligations it had undertaken.

The trial court's ruling that Last Patriot was damaged by Buena Vista's failure to seek and obtain its consent under the consent clause therefore is fully supported. Buena Vista cannot show that Last Patriot would have consented to continuing expense reimbursements if its consent had been requested, or that it would have been obligated to do so. That is because under the trial court's rulings the contract afforded Last Patriot with an unconditional right to withhold its consent if it wished; and also because without a request for consent to additional cost reimbursements, the court is not obligated to speculate about what concessions Last Patriot might have obtained in exchange for its consent.[11]

Under the trial court's ruling as to the parties' intended meaning, Buena Vista was afforded no right to end the film's distribution if no agreement were reached on terms under which expense reimbursements could continue above the $900,000 threshold. Because Last Patriot had not consented to any further reimbursements, it therefore was entitled to recover damages representing the amount by which Buena Vista had reimbursed itself (within the applicable period of limitations) for costs distributions after the $900,000 threshold was reached.[12]

2. The trial court did not err by ruling that rebates and price protections are within the consent clause's $900,000 limit on recoupable costs.

The Agreement provides that Last Patriot is entitled to "Contingent Compensation" constituting 100 percent of the Defined Receipts of distribution after deduction of Buena Vista's fees and reimbursable costs of distribution. In order to compute Last Patriot's Contingent Compensation, it requires that Buena Vista must account first for the Defined Receipts from the film's distribution, representing the film's gross receipts as adjusted to account for certain kinds of marketing factors. From the Defined Receipts, Buena Vista then deducts its distribution fees, computed as a percentage of the Defined Receipts. It next reimburses itself for the distribution costs

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[11] Because Buena Vista did not ask for Last Patriot's consent to continue expense reimbursements above the $900,000 threshold, and the evidence does not compel the conclusion that such a request would necessarily have been futile, we need not (and cannot) decide how a requirement of good faith might have shaped the terms under which consent might have been given or withheld. (*Thrifty Oil Co. v. Batarse* (1985) 174 Cal.App.3d 770, 775-776 [court cannot determine whether withholding consent to sublet would have been held arbitrary or unreasonable, where consent was not sought and record does not reflect that request for consent would have been futile act].)

[12] The period of limitations is discussed below.

that the Agreement identifies as recoupable. The balance constitutes the Contingent Compensation to which Last Patriot is entitled.

The Agreement specifically requires that rebates and sums paid by Buena Vista "in lieu of a reduction in the wholesale price" must be deducted from gross billings in order to determine Defined Receipts. Defined Receipts include "all sums actually received" from the film's distribution, specifically "less refunds, rebates and a reserve for returns . . . ." Specifically excluded from Defined Receipts are "[a]ny sums paid . . . as sales incentives . . . in lieu of a reduction in the wholesale price . . . or . . . as so-called 'free goods'." And Defined Receipts must be determined "after all refunds, credits, discounts, allowances and adjustments" to subdistributors and other purchasers. Buena Vista's accountings to Last Patriot did in fact account for rebates and price protections in determining the amount of Defined Receipts, effectively reducing Buena Vista's distribution fees, which are computed as a percentage of Defined Receipts.

But the Agreement also identifies rebates and price protections as recoupable costs of distribution, for which Buena Vista is entitled to reimbursement from the remaining proceeds before the balance is distributed to Last Patriot.[13] For that reason, the trial court interpreted the Agreement to require that amounts attributable to rebates and price protections must be included within the consent clause's $900,000 limit on recoupable expenses, notwithstanding their required deduction from gross billings and receipts in order to determine Defined Receipts.

Buena Vista argues that the parties did not intend the $900,000 cost threshold to encompass "contra-revenue" factors that affect the amount of revenue it receives from distributions, such as rebates and price protections, rather than costs that it pays to obtain distributions. It contends that despite the inclusion of rebates and price protections in the Agreement's list of recoupable costs, those amounts cannot properly be included within

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[13] The comprehensive list of recoupable distribution costs includes "[a]ll costs of rebates, contests, sales incentives, price protections and the like attributable to the Picture."

the $900,000 cap. That would be illogical, it suggests, for it would cause those amounts to be accounted for twice, both in determining Defined Receipts and as costs of distribution. We do not agree.

The trial court had discretion to find from the language of the Agreement and the conflicting evidence, as it did, that rebates and price protections were to be considered both in computing the Defined Receipts that determine the amount of Buena Vista's distribution fees, and also as costs of distribution that contribute to the $900,000 cost-reimbursement limit. The language of the consent clause is susceptible to that interpretation, for it specifically identifies rebates and price protections as recoupable distribution costs, and also includes all "Distribution Costs" as being subject to the $900,000 limit, without regard to whether they had been accounted for to determine Defined Receipts.

Under the trial court's interpretation, rebates and price protections need not be deducted twice from the distribution proceeds. Rebates and price protections are used first to identify the size of the Defined Receipts from which Buena Vista's fees are computed. And because they are accounted for at the outset as reductions to Defined Receipts, the cost of rebates and price protections are not (and were not) deducted again when other distribution costs are deducted and reimbursed to Buena Vista before the $900,000 limit has been reached. The reduction of Buena Vista's gross billings to reflect the costs of rebates and price protections effectively reimbursed Buena Vista for those costs.[14]

Under the Agreement's classification of rebates and price protections as costs that are within the $900,000 limit on cost reimbursements, once that threshold is reached the amounts attributable to rebates and price protections therefore must be paid by Buena Vista into the proceeds that constitute Last Patriot's compensation. That effectively

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[14] Buena Vista's accountings to Last Patriot did not deduct the costs of rebates and price protections from the proceeds remaining after the distribution fees were paid to Buena Vista, because "the Defined Receipts already have rebates deducted from them, so I wouldn't charge them twice again as a distribution cost."

undoes the reimbursement for those costs to Buena Vista in the Defined Receipts determination, and transfers the costs of rebates and price protections from Last Patriot to Buena Vista. We therefore do not disturb the trial court's determination, based on its reasonable interpretation of the contract language, that amounts attributable to rebates and price protections must be included in the computation of when the $900,000 threshold was reached, and the amount by which it was exceeded.

3. The trial court erred by including residuals paid by Buena Vista on Last Patriot's behalf in determining the contract damages.

Buena Vista also argues that the parties did not intend the $900,000 cost threshold to encompass residuals that were owed by Last Patriot under guild agreements, but were paid by Buena Vista when Last Patriot became unable to do so.[15] It appeals from the trial court's inclusion of these items in tallying costs under the $900,000 limit, which potentially affected both the determination when the $900,000 cost threshold was reached, and the amount by which it was exceeded.

The trial court held that because residuals paid by Buena Vista (like rebates and price protections) are included in the Agreement's list of recoupable distribution costs, the parties intended them to be included within the consent clause's $900,000 limit. We conclude, however, that the Agreement cannot reasonably be interpreted to provide that Buena Vista has no right to be reimbursed for its payments of residuals on Last Patriot's behalf above the $900,000 limit. That interpretation, while consistent with the Agreement's apparent classification of residuals as recoupable costs, squarely contradicts the unequivocal provisions identifying the payment of residuals as Last Patriot's obligation, and requiring Last Patriot to indemnify Buena Vista for any amounts paid by Buena Vista on Last Patriot's behalf.

[15] Residuals are royalty obligations owed to industry guild members on the basis of receipts, constituting "payments due pursuant to collective bargaining agreements which are triggered by . . . exploitation of distribution rights."

The Agreement provides that the payment of residuals to industry guild members who had worked on The Patriot is Last Patriot's obligation. But unless the residuals were paid, Buena Vista would be subject to suit and the film would be subject to seizure for the unpaid amounts, jeopardizing its continuing distribution. The Agreement therefore also expressly grants Buena Vista the option to make those payments on Last Patriot's behalf, and to recover those amounts from the proceeds otherwise due Last Patriot.

In giving Buena Vista the election to pay the residuals owed by Last Patriot, the parties anticipated that Last Patriot might become unable to meet its obligations, and provided Buena Vista with the right and ability to protect itself—as well as Last Patriot, its creditors, and the entire distribution enterprise—from the consequences if that event were to occur, as it did, when Last Patriot filed for bankruptcy in October 2001. As a result, Buena Vista paid very substantial residuals on Last Patriot's behalf, in order to prevent those who were owed the residuals from suing Buena Vista for the unpaid amounts, and from jeopardizing the film's continued distribution.[16]

The Agreement expressly permits Buena Vista to recoup any residuals it pays on Last Patriot's behalf as recoupable distribution costs. That gives rise to an inference, as the trial court found, that like other costs of distribution, residuals paid by Buena Vista are to be applied against the consent clause's $900,000 limit.[17] And the Agreement also provides as discussed above, that any residuals paid by Buena Vista "shall be deemed [recoupable] Distribution Costs" and that Buena Vista "shall incur no more than Nine Hundred Thousand Dollars ($900,000) of recoupable U.S. Distribution Costs without [Last Patriot's] prior consent."

But unlike other costs of distribution, the Agreement expressly makes payment of residuals an obligation of Last Patriot, not Buena Vista. It provides Last Patriot's express representation and warranty that Buena Vista "shall not be obligated to make payments to

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[16] There is no contention that the residuals paid by Buena Vista were not legitimate debts owed by Last Patriot.

[17] The list of costs recoupable by Buena Vista includes "[a]ll costs of music, talent clearances and residuals which [Buena Vista], in its sole discretion, elects to pay . . . ."

any third party" in connection with the film, and that "'any and all third parties due and owing money as a result of Videogram sales hereunder, including without limitation, music publishers, record companies, unions, guilds, performers and profit participants shall be paid by [Last Patriot]'." It expressly obligates Last Patriot to pay "all costs" necessary to secure any releases entitling Buena Vista to distribute the film, including "any music licenses and/or clearances required (on a buy-out basis) from any union, guild, music publisher and performer," and it includes Last Patriot's express representation and warranty that it will do so. And it expressly provides that Last Patriot "shall indemnify and hold [Buena Vista] harmless" for any payments by Buena Vista of money owed by Last Patriot to third parties as a result of the film's distribution. And the Agreement provides not just express indemnities for amounts paid to third parties by Buena Vista on Last Patriot's behalf,[18] but also an additional express indemnity by Last Patriot for any liabilities, losses, and expenses resulting from "a breach or failure of [Last Patriot's] covenants, agreements, representations or warranties"—apparently including Last Patriot's promise to meet all residual payment obligations, or if it did not, to indemnify Buena Vista for any payments made on its behalf.[19]

The trial court found that Buena Vista had "bargained they would pay for the residuals to the producers of the guilds, to the two guilds," "so they can't ask now to rewrite that." It held that the residuals paid by Buena Vista therefore necessarily must be included within the consent clause's $900,000 limit on recoupable expenses, and it

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[18] Specifically, the Agreement includes Last Patriot's express warranty that it will pay all costs in connection with licenses or clearances required from unions, guilds, music publishers and performers, and that it "shall indemnify and hold [Buena Vista] harmless" as to payments of money owed by Last Patriot to third parties as a result of the film's distribution.

[19] Last Patriot represented and warranted in the Agreement that it had secured or will secure all releases, clearances, agreements, waivers, etc., required for Buena Vista "to manufacture, distribute, advertise, promote, package, publicize, and commercially exploit the Picture" as contemplated by the Agreement, "including, without limitation, any music licenses and/or clearances required (on a buy-out basis) from any union, guild, music publisher and performer."

awarded Last Patriot damages of $274,625, plus interest, for the residuals that Buena Vista had paid on Last Patriot's behalf after costs, including residuals paid by Buena Vista, exceeding the $900,000 threshold.

However neither the language of the Agreement, nor the evidence relating to its negotiation, contains any indication at all that Buena Vista "bargained they would pay for the residuals," as the trial court found, for the Agreement expressly makes Buena Vista's payment of residuals completely voluntary "in its sole discretion. Nor does any evidence indicate that any party to the Agreement (or any representative of any party) believed or intended the Agreement would have any such result.[20] The only evidence that supports the trial court's interpretation with respect to residuals is the consent clause's identification of the costs to which it applies as the costs that are recoupable by Buena Vista—which in turn includes residuals paid by Buena Vista on Last Patriot's behalf.[21]

The trial court's interpretation with respect to residuals contradicts Last Patriot's express indemnity of Buena Vista for residual payments made on Last Patriot's behalf, and its express indemnity for any failure to fulfill its residual payment obligations. Those indemnities do not suggest that they are subordinate to the consent clause's limitation on costs.

By limiting the application of those express indemnities to residuals that are paid by Buena Vista before the $900,000 threshold is reached, the court's interpretation effectively nullifies the warranty and indemnity provision of the Agreement. Those provisions would have no purpose at all if they apply only to amounts that Buena Vista is

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[20] The sales agent who negotiated the Agreement on Last Patriot's behalf also testified that he did not include residuals among the expenses he wanted to be included within the consent clause's expense cap.

[21] The Agreement provides that any residuals paid by Buena Vista "shall be deemed Distribution Costs and shall be recoupable pursuant to the terms of subparagraphs IV.A.(ii), IV.B.(ii), and IV.C.(iii) (as applicable) above. Subparagraph IV.A.(ii) contains the list of recoupable distribution costs; a different subparagraph, subparagraph IV.A.(iv), has the provision limiting recoupable costs to $900,000. Subparagraphs IV.B.(ii) and lV.C.(ii) contain the cost-deduction provisions for the U.K. and France territories, not involved here. The reference to subparagraph IV.C (iii) is apparently an error.

elsewhere expressly permitted to recoup. The holding that residuals voluntarily paid by Buena Vista are limited by the consent clause's $900,000 expense limitation therefore is inconsistent with the Agreement's express indemnities, and with its plain meaning.

Even if it had been Last Patriot's intention when the Agreement was negotiated that Buena Vista would be liable to Last Patriot for the amount of any residuals Buena Vista might pay on Last Patriot's behalf after costs reached the $900,000 threshold (and there is no evidence of any such intention), that interpretation would make little sense. Buena Vista had no control over the extent to which Last Patriot would become unwilling or unable to meet its payment obligations and would breach its indemnities. Yet its ability to continue distributing the film, for the benefit of both parties, depended on *someone* meeting those obligations. Thus the trial court's interpretation of this provision would contradict the purpose for which the Agreement granted Buena Vista the right to elect to pay the residuals on Last Patriot's behalf.

Nor is the inclusion of residuals within the $900,000 limit on Buena Vista's recoupable costs consistent with the consent clause's purported purpose, the protection of Last Patriot against excessive cost expenditures by Buena Vista. If residuals are not included within the $900,000 cost limitation, Buena Vista's payment of residuals owed by Last Patriot (unlike its payment of other costs of distribution) would be no threat to Last Patriot's interests, for it would not diminish Last Patriot's entitlement to distribution proceeds; rather, it would merely preserve Last Patriot's ability to profit by enabling distribution to continue.

But the trial court's interpretation instead rewards Last Patriot for its default, and creates a strong incentive for Buena Vista *not* to enable distribution to continue by curing Last Patriot's default. The parties could not have intended that simply by breaching its obligation to pay residuals (or by going bankrupt and ending its ability to do so), Last Patriot could shift the obligation to pay residuals from itself to Buena Vista, while nevertheless remaining entitled to the resulting proceeds undiminished by the amounts paid to cover its breaches.

For these reasons we conclude that despite the ambiguity created by the Agreement's language, the trial court's interpretation of this provision cannot be squared with either the language of the Agreement or the purposes the parties intended the relevant provisions to serve. The inclusion of residual payments made by Buena Vista on the list of recoupable costs, and the consent clause's reference to the items on that list as coming within its terms, cannot be read to wholly nullify Last Patriot's express promises and indemnities with respect to the payment of residuals; to contradict the purpose for which the trial court found Last Patriot bargained for the inclusion of the consent clause in the Agreement; to create an incentive for Buena Vista *not* to enable distribution to continue if Last Patriot becomes unable to meet its obligations; and to penalize Buena Vista and reward Last Patriot for Last Patriot's breach of its contractual obligations. It cannot be read to require that Buena Vista would bear the cost of residuals Buena Vista paid on Last Patriot's behalf. The court therefore erred by including amounts attributable to residual payments made by Buena Vista in the determination of the amounts by which distribution costs recouped by Buena Vista exceeded the $900,000 threshold, and by including those amounts, and interest thereof, in determining the contract damages and lost profits to which Last Patriot is entitled.

B. The Record Does Not Support The Award Of $800,000 To Last Patriot For Lost Profits Damages.

Although distribution proceeds were strong through September 2003, by September 2005, they had dwindled. Buena Vista's financial expert, Andrew Safir, opined that if the film's distribution had continued after October 2005, Last Patriot's share of the proceeds after that date would have been only about $19,000. Ilshin's expert, Robert Wunderlich, testified that distributions in favor of Last Patriot in excess of the $900,000 cap would have been $452,163.[22]

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[22] Wunderlich estimated that Last Patriot's lost profits would total less if residual payments are not deducted from Buena Vista's cost reimbursements.

Buena Vista also presented expert testimony from Warren Lieberfarb, not to establish Last Patriot's lost profits from potential sales after October 2005, but only on the subject of distribution licensing—the kinds of contract terms that are (and are not) ordinarily found in videocassette and DVD distribution contracts.[23] During his cross-examination, however, Ilshin's counsel questioned Lieberfarb (over objection that the subject was beyond the scope of the direct examination) about a hypothetical situation that he had been questioned about at his deposition. During his deposition Lieberfarb had testified that if the film had been withdrawn from distribution in 2005 (as it was), and had later been reintroduced as part of a package with other Steven Seagal films in the fourth quarter of 2007, the resulting sales might have produced profits of from $500,000 to 1.2 million.[24]

The trial court awarded Ilshin $800,000 for the additional profits Last Patriot would have received before the Agreement's natural term would have ended, finding that Lieberfarb's deposition testimony "provides a reasonable estimate for the sales that would have occurred" if Buena Vista had not ended the film's distribution in October

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[23] On direct examination Lieberfarb testified as an expert that for a studio to obligate itself to continue distributing a film after the volume of sales had ebbed substantially could damage its reputation in the industry; that in reviewing hundreds of distribution contracts he had only very rarely seen a studio forego the right to end distribution for economic reasons; that he disagreed with testimony that when a distribution contract provides no minimum guarantee or advance to the producer, the studio is impliedly obligated to continue distributing the film without regard to economics; and that although he had seen distribution contracts that capped reimbursable *marketing* expenses, he had never seen one that capped all distribution expenses.

[24] At trial, Lieberfarb tried to qualify that opinion as having been conditioned on unproven assumptions, such as Buena Vista's ability to obtain the rights to other Steven Seagal films (that it did not own), and resolution of the industry battle over Blu-Ray technology. As Buena Vista's objection put it, "we brought [Lieberfarb] here as an . . . expert with general industry experience. They asked him about every possible issue in the case that we didn't proffer opinions then or now for, and this is way beyond the scope."

2005. Buena Vista's appeal challenges the award as being unsupported by substantial evidence. We agree.[25]

The object of damages for breach of contract is to compensate the injured party so that it will receive as nearly as possible the equivalent of the full benefits of the contract's performance. (Civ. Code, § 3300; 1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 869, p. 956; 5 Corbin, Contracts (2005) Damages, § 55.3, p. 7.) "The aim is to put the injured party in as good a position as he would have been had performance been rendered as promised." (*Brandon & Tibbs v. George Kevorkian Accountancy Corp.* (1990) 226 Cal.App.3d 442, 455-457.)[26]

Substantial evidence in this context amounts to evidence that is reasonable in nature, credible, and of a sort that a reasonable trier of fact might accept as supporting its award. (*Guntert v. City of Stockton* (1976) 55 Cal.App.3d 131, 142; *United Professional Planning, Inc. v. Superior Court* (1970) 9 Cal.App.3d 377, 393.) Although to be recoverable, profits must have been lost as a natural and direct consequence of the breach, they need not be established with certainty; it is enough to show a reasonable

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[25] Buena Vista's failure to challenge the lost profits award by motion for new trial does not disqualify it from challenging the sufficiency of its supporting evidence here. A claim of excessive or inadequate damages cannot be raised on appeal unless appellant first raised the error in a timely motion for new trial (Code Civ. Proc., § 657, subd. (5); *Jamison v. Jamison* (2008) 164 Cal.App.4th 714, 719-720), because the power to weigh the evidence and resolve issues of credibility is vested in the trial court, not the reviewing court. (*Schroeder v. Auto Driveaway Co.* (1974) 11 Cal.3d 908, 919.) However, the question whether the evidence in the record is legally sufficient to support the damages awarded raises no issue of credibility; it is a question of law. The failure to move for a new trial therefore does not preclude review of errors of law in the trial of damages, because "the error is cognizable by this court without encroaching upon the trial court's legitimate discretion over factual determinations." (*Glendale Fed. Sav. & Loan Assn. v. Marina View Heights Dev. Co.*, *supra*, 66 Cal.App.3d at p. 122.)

[26] Section 3300 of the Civil Code provides: "For the breach of an obligation arising from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, will be likely to result therefrom."

probability that the profits would have been earned except for the breach. (*Nelson v. Reisner* (1958) 51 Cal.2d 161, 171-172; *Guntert v. City of Stockton*, *supra*, 55 Cal.App.3d at p. 143.) Some uncertainty in the amount of lost profits damages is inevitable, and it is Buena Vista's burden to demonstrate error in the trial court's award. (*City of Salinas v. Souza & McCue Construction Co*. (1967) 66 Cal.2d 217, 225; *Guntert v. City of Stockton*, *supra*, 55 Cal.App.3d at p. 142.) "'[T]he wrongdoer cannot complain if his own condition creates a situation in which the court must estimate rather than compute.'" (*Sanchez-Corea v. Bank of America* (1985) 38 Cal.3d 892, 908.) At the same time, however, lost anticipated profits that depend on future events are allowed only "where their nature and occurrence can be shown by evidence of reasonable reliability." (*Grupe v. Glick* (1945) 26 Cal.2d 680, 693; *A & M Produce Co. v. FMC Corp.* (1982) 135 Cal.App.3d 473, 493-494.)

The trial court expressly rested its award of lost profits on testimony that Lieberfarb had given at his deposition, rejecting the opinions of both Last Patriot's and Buena Vista's financial experts that the lost profits would have been much lower (as well as Lieberfarb's own warning that no valid conclusion about anticipated profits could be based on his deposition testimony on a subject outside of that for which he was designated as an expert). The court rejected Lieberfarb's attempt to limit his deposition opinion, ruling that "any discrepancy [among these opinions] has to be pretty much held against [Buena Vista]" because Buena Vista had prevented the post termination sales from occurring. "Unfortunately I have to guess on this. I'll set about $800,000 total [lost profits] for the two years."

Lieberfarb's testimony does not support the trial court's $800,000 guess. Lieberfarb had a long career in entertainment financing; he was credited as a central figure in the development of consumer videocassette technology; and from the 1970's until 2002, he had held senior positions in theatrical and video marketing, distribution and sales organizations. But he had never testified as an expert on distribution finances (or any other subject); his qualifications (if any) to testify about the profits Last Patriot might have earned from 2005 to 2007 but for Buena Vista's breach of contract were not identified by either party and do not appear in the record; nor does the record show that he had examined or analyzed the facts upon which such an opinion might reasonably be based. Whether he might have qualified as an expert on that subject if his testimony had been offered and admitted on that basis, we therefore cannot tell from the record.

This much is clear, however: The record lacks any showing that Lieberfarb's examination of the factual circumstances would have been a sufficient basis for an opinion that is reasonable in nature, credible, and of a sort that a reasonable trier of fact might accept to establish the amount of profits that Last Patriot would have earned during the 2005 to 2007 period, were it not for Buena Vista's premature termination of the film's distribution. (See *Nelson v. Reisner*, *supra*, 51 Cal.2d at pp. 171-172; *Guntert v. City of Stockton, supra*, 55 Cal.App.3d at p. 143.) Lieberfarb did not purport to base his supposed lost profits opinion on facts supported by evidence in the record, such as the record of actual sales or proceeds from The Patriot during the Agreement's term.[27]

For all the record shows, Lieberfarb's only exposure to the circumstances of this case was little more than a 1998 Buena Vista draft estimate of projected returns for distribution of The Patriot. And while Last Patriot's counsel said that Lieberfarb had "looked at the sales" and that the opinion he gave was "based on the sales record," the record lacks any supporting evidence, much less evidence of what sales records he may have seen, what those records showed, and what information in them he might have relied on.

Lieberfarb had suggested that the film might have been able to accrue substantial additional sales, resulting in profits of from $500,000 to $1.2 million, *if* after a two-year moratorium in sales, The Patriot had been reintroduced to the market in late 2007, and then was remarketed together with other Steven Seagal films, as a complete set, in

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[27] As Buena Vista's counsel pointed out in objecting to the scope of Lieberfarb's cross-examination, Lieberfarb's direct testimony had been limited to issues concerning the terms of *other* distribution contracts; "we didn't ask for any opinions on this contract or this project."

conjunction with Steven Seagal's personal participation in sales promotions. Those factual assumptions were not just unproven, but were actually inconsistent with the court's ruling that Last Patriot would have earned distribution profits during the 2005 to 2007 period. They assumed that there would have been no sales, and Last Patriot would have received no profits at all, from 2005 to 2007, while the film would be withheld from distribution, notwithstanding the court's ruling that Buena Vista had no right to withhold the film from distribution. They assumed that Buena Vista could have reintroduced The Patriot for distribution in 2007, after the Agreement's eight-year term had lapsed. And they assumed that Buena Vista could have obtained rights to distribute Steven Seagal's other films, that Lieberfarb had testified would be part of any successful distribution package at that point.[28]

When an expert's opinion is based on assumptions that are not supported by evidence in the record, or upon factors that are speculative, remote or conjectural, the expert's conclusion has no evidentiary value. (*Pacific Gas & Electric Co. v. Zuckerman* (1987) 189 Cal.App.3d 1113, 1135.) "In those circumstances the expert's opinion cannot rise to the dignity of substantial evidence." (*Ibid*.) Lieberfarb's opinion does not address the subject of profits lost during the relevant 2005 to 2007 period; it is based on assumptions that are unsupported by any evidence in the record; and it contains not even a cursory identification of any factual basis.

The trial court's $800,000 lost profits award therefore is unsupported by any cognizable opinion (much less by any witness qualified to testify on the subject), and it exceeds by almost 100 percent the next highest estimate given by any witness at all—including Ilshin's own expert on the subject. It does not rise to the level of evidence of

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[28] Lieberfarb testified at trial that his proposed marketing plan was also "not realizable" because it rested on his own assumption at that time that the industry dispute between the Blu-Ray and HD DVD formats would have been resolved by late 2007—which it was not. The trial court apparently disregarded that caveat as an after-the-fact excuse, because Lieberfarb had not identified the industry dispute over video formats at his deposition; but the court did not address the other assumptions, unproven at trial, on which Lieberfarb's deposition opinion had been expressly based.

lost profits that is reasonable in nature, credible, or of a sort that a reasonable trier of fact might accept as supporting its award, nor does it constitute evidence showing a reasonable probability that the profits would have been earned except for Buena Vista's breach in prematurely discontinuing the film's distribution. (*Pacific Gas & Electric Co. v. Zuckerman*, *supra*, 189 Cal.App.3d at p. 1135; *Nelson v. Reisner*, *supra*, 51 Cal.2d at pp. 171-172; *Guntert v. City of Stockton*, *supra*, 55 Cal.App.3d at p. 143.)

The award must be reversed. However, the trial court's finding that Ilshin is entitled to a very substantial lost profit damage award is unaffected by our conclusion that the dollar amount awarded exceeds the greatest amount supported by the evidence. We therefore conclude that no retrial on the issue of lost profits damages is required. We instead will remand the matter to the trial court with directions to enter an amount for lost profits damages in favor of Ilshin in the amount of the highest amount of lost profits after October 2005 that is supported by the testimony of Ilshin's expert, Wunderlich, as adjusted to account for the residual payments attributable to those projected profits for which Buena Vista would be entitled to reimbursement, and appropriate prejudgment interest.

C. The Trial Court Lacked Discretion to Award Attorney Fees to Ilshin Under Code Of Civil Procedure Section 701.020.

Ilshin moved for an award of attorney fees, grounding its claim exclusively on section 701.020, subdivision (c), of the Code of Civil Procedure.[29] The judgment awards Ilshin $1,439,203.08 for its attorney fees.

Buena Vista appeals from the attorney fee award, on grounds that (1) section 701.020 does not provide for a recovery of attorney fees; (2) even if section 701.020 does permit an attorney fee award for a defendant's noncompliance with a creditor's levy without good cause, in this case Buena Vista acted with good cause in denying its

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[29] All further code citations in this part of the opinion (I.C) are to the Code of Civil Procedure unless otherwise specified.

liability to Ilshin as a debtor to Last Patriot; and (3) the evidentiary basis for the award's amount was insufficient.

The question whether section 701.020 affords the trial court discretion to award attorney fees in this case raises a question of law, subject to review de novo. (*Connerly v. State Personnel Bd.* (2006) 37 Cal.4th 1169, 1175-1176 [statutory interpretation raises question of law]; *Mejia v. City of Los Angeles* (2007) 156 Cal.App.4th 151, 159 [same].) We must "presume that the [trial] court properly applied the law and acted within its discretion unless the appellant affirmatively shows otherwise." (*Mejia v. City of Los Angeles*, *supra,* 156 Cal.App.4th at p. 158.)

We conclude that appellant has carried that burden. The trial court erred in determining that it had statutory authority to award attorney fees to Ilshin as judgment creditor in this case. For that reason (as well as due to the reversals to the judgment required with respect to other issues in this appeal) the fee award must be set aside.

1. Last Patriot brought its suit against Buena Vista as an independent creditor's claim.

Since the Legislature revised the law regarding enforcement of judgments in 1982, the provisions regarding creditor's suits appear in section 708.210 et seq. Section 708.210 provides that if a third person is indebted to the judgment debtor or possesses property in which the judgment debtor has an interest, "the judgment creditor may bring an action against the third person to have the interest or debt applied to the satisfaction of the money judgment."

Additional remedies supplement that right when certain circumstances are present. Specifically, section 708.120, regarding debtor's examinations, permits a judgment creditor to discover and specify property of the judgment debtor in the third person's possession, and to obtain an order, on motion, determining any claim of exemption asserted by the judgment debtor. (§ 708.120, subd. (d).) When the third person claims no interest in the property or debt, such a motion procedure may be all that is required in order for the judgment creditor to obtain satisfaction of its judgment in whole or in part.

Even when the third person claims an interest in the property that is claimed to be owed to the judgment debtor, the court in certain circumstances may still determine the judgment creditor's and the third person's respective interests without a separate creditor's suit—but only when no adjudication of competing claims is required. When the claims require a contested adjudication, the parties are entitled to have the issues determined in an independent creditor's action, rather than by the motion procedure under section 708.120, subdivision (d).

A creditor's suit, rather than the motion procedure, is required if the court finds that the third person's claim is made in good faith, and that at least one of the following three conditions exists: (1) that court is not a proper forum for adjudication of the claim; (2) another action is pending with respect to the claim; or (3) the court believes the claim should be tried as an independent creditor's suit. (§ 708.180; *Evans v. Paye* (1995) 32 Cal.App.4th 265, 277, fn. 9; Cal. Law Revision Com. com., Deering's Ann. Code Civ. Proc., preceding § 708.210, p. 578.)[30]

In this case Ilshin brought an independent creditor's suit against Buena Vista (either as a matter of choice or because section 708.180, subdivision (b), required an independent action rather than a summary motion procedure). Ilshin's suit sought funds held by Buena Vista that it claimed were owed to Last Patriot due to Buena Vista's breach of the Agreement's consent clause and $900,000 limit on cost reimbursements. Its breach of contract claims alleged that Ilshin was an unsatisfied judgment creditor of Last Patriot; that "Buena Vista has possession or control of property in which [Last Patriot], a judgment debtor, has an interest"; and that "Ilshin, as a judgment creditor, is

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[30] As the Law Revision Commission comment explains, while the "less expensive and less cumbersome enforcement procedures will be used in the normal case," independent creditor's suits "will be used. . . where the court does not determine disputed ownership of the property or the existence of the debt" under section 708.180, "or where for some other reason the judgment creditor believes that the third person will not cooperate. . . ." (Cal. Law Revision Com. com., Deering's Ann. Code Civ. Proc., preceding § 708.210, *supra*, p. 578.) The history of the modifications to these procedures during the last century is set forth and explained in *Evans v. Paye*, *supra*, 32 CalApp.4th at pp. 275-280.

entitled to bring suit against Buena Vista to have the property turned over to the judgment creditor and applied towards the reduction of the debt." Its claim that Buena Vista breached the Agreement by ending the film's distribution after October 2005, was also brought as an independent creditor's suit by Ilshin, "standing in the shoes" of Last Patriot.

These allegations bring Ilshin's claim within section 708.210's provision for a creditor's suit against a third person—in this case, Buena Vista. The law does not authorize an award of attorney fees for such a suit, as we explain below.

2. The law does not entitle Ilshin to an award of attorney fees for prevailing on its creditor's suit against Buena Vista.

"[T]he 'American Rule'" [is] that each party in a lawsuit ordinarily shall bear its own attorney's fees unless there is express statutory authorization to the contrary." (*Hensley* v. *Eckerhart* (1983) 461 U.S. 424, 429.) Attorney fees are not recoverable unless a fee award is expressly authorized by either statute or the parties' contract. (§ 1021; *Real Property Services Corp. v. City of Pasadena* (1994) 25 Cal. App.4th 375, 379.)

Ilshin points to section 701.020, subdivision (c), as the statutory authority for its fee award in this case. Subdivision (a) of section 701.020 provides that "[i]f a third person is required by this article to deliver property [pursuant to a judgment creditor's levy] and the third person fails or refuses without good cause to do so, the third person is liable to the judgment creditor for [the value of the property or the amount required to satisfy the judgment]." Subdivision (c) of section 701.020 gives discretion to "the court that determines the liability" to "require the third person to pay the costs and reasonable attorney fees incurred by the judgment creditor in establishing the liability."

In June 2003, Ilshin served Buena Vista with a writ of execution in case number BC214077, as a judgment creditor of Last Patriot and others in that case, and a notice of levy for almost $8 million. The levy sought "[a]ll accounts receivable for, or accounts payable to, or monies due to [Last Patriot], judgment debtors in the above-entitled action." Ilshin's counsel explained in a contemporaneous letter that it sought "any assets due to [Last Patriot]" in light of counsel's understanding that Last Patriot would be entitled to a distribution from Buena Vista "at the end of this month." Neither the levy nor the letter mentioned any claim against Buena Vista for distribution costs in excess of $900,000. In response to the levy, Buena Vista apparently turned over the distribution proceeds that were due to Last Patriot under its understanding of the Agreement, after satisfaction of claims interposed by Last Patriot's secured creditors. (§ 701.030, subd. (f)(1).)

Ilshin filed this suit in February 2006, as a judgment creditor of Last Patriot and others to whom Buena Vista allegedly owed funds as a result of its breach of obligations under the Agreement, as authorized by section 708.280, subdivision (b). (§ 708.210.) However, section 708.280 does not authorize an award of attorney fees to a successful claimant. Ilshin instead sought fees pursuant to section 701.020, subdivision (c), based on its success in obtaining judgment for distribution costs withheld by Buena Vista from its distributions to Last Patriot, and Buena Vista's failure to turn over those funds in response to the levy in case number BC214077. However, section 701.020, subdivision (c), applies to procedures for enforcement of judgments by writs of execution. By its own terms, it does not provide for an award of attorney fees to a prevailing creditor in an independent creditor's suit. It therefore does not support the trial court's attorney fee award in this case.

Section 701.020 is within Chapter 3 (entitled "Execution") of Title 9 ("Enforcement of Judgments") of the Code. Chapter 3 "governs enforcement of a money judgment by a writ of execution," unless otherwise specifically provided. (§ 699.010.) But Ilshin's suit resulting in the judgment against Buena Vista in this case did not seek the enforcement of a money judgment by a writ of execution—the subject of Chapter 3. Rather, it was an independent creditor's suit against Buena Vista, as a third person alleged to be holding funds to which Ilshin was entitled. The action was brought under section 708.210, not under section 701.020.

Section 708.210 is not within Chapter 3 of Title 9, the portion of the Code to which the attorney fee provision in section 701.020, subdivision (c) applies, nor does it deal with the subject of Chapter 3, writs of execution. Section 708.210 is within Chapter 6 (entitled "Miscellaneous Creditors' Remedies") of Title 9. And Chapter 6 contains no provision affording discretion to award attorney fees in creditor's suits. No statute provides that section 701.020, subdivision (c), applies to creditor's suit under section 708.210.

According to Ilshin, under subdivision (c) of section 701.020, a court may order Buena Vista to pay Ilshin's attorney fees when its liability is established on the judgment creditor's claim, even in an independent creditor's action. This interpretation of section 701.020's scope is supported, Ilshin argues, by leading commentators on debt collection and enforcement of judgments, citing a note by Ahart and Michaelson that costs and attorney fees "may be recovered from the third person under [section] 701.020 [, subdivision] (c)" under certain circumstances, even though costs incurred in prosecuting a creditor's suit cannot be charged against the judgment debtor as a cost of enforcing the judgment. (Ahart and Michaelson, Cal. Practice Guide: Enforcing Judgments & Debts (The Rutter Group 2009) ¶ 6:1406-1407, p. 6G-32.)

But Ilshin's reading of section 708.020's scope is not supported by the statutory language. Section 701.020 provides for a third person's liability to a judgment creditor if the third person "is required *by this article*" to deliver property to the levying officer, and refuses to do so without good cause. (§ 701.020, subd. (a), italics added.) Its reference in subdivision (c) to "the third person's liability" therefore does not encompass *any* possible liability for which the third party may later found to be responsible, such as liability for breach of contract in an action brought under section 708.210. It is a reference to the liability specified in subdivision (a): the third person's liability for its failure to deliver property to the levying officer as "required by this article"—Article 5 of Chapter 3, dealing with duties and liabilities after levy, not Article 3 of Chapter 6, dealing with independent creditor's suits.[31]

Last Patriot did not assert its claim that Buena Vista had breached its contractual obligations to Last Patriot in case number BC214077—the case in which the writ of execution was issued, and the proper forum for any claim that Buena Vista's response to the levy was insufficient. (See § 708.160 [examination of third person in "court in which money judgment is entered"]; § 708.180 [court that ordered third person's examination may determine parties' interests in property, unless third party disputes claim or debt in good faith].) And when it instead filed the suit involved here, it raised no issue as to Ilshin's rights under the levy, or under section 701.020. Its complaint did not allege that Ilshin had levied against Buena Vista, nor that Buena Vista's response to the levy was insufficient, or lacking in good cause. The judgment in this case established Ilshin's right to recover damages for Buena Vista's breach of its contract with Last Patriot, but it did not purport to determine whether Buena Vista's compliance with any levy in case number BC214077 was or was not satisfactory or done without good cause. Nothing in this action concerns the parties' rights or liabilities under section 701.020.[32]

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[31] We do not doubt that Ahart & Michaelson correctly notes that costs and attorney fees may be available under section 701.020, subdivision (c); but this case was not brought under section 701.020, subdivision (c), and Ahart & Michaelson's note does not purport to be as sweeping as the proposition for which Ilshin relies on it. Ahart & Michaelson does not purport to say that section 701.020, subdivision (c) authorizes an award for attorney fees incurred in an independent creditor's suit under section 708.210, merely because in a different lawsuit the plaintiff was earlier unsuccessful in enforcing the obligation by levy upon writ of execution.

[32] In the trial court Ilshin argued that subdivision (c) of section 701.020 means "that a party will not be liable for the underlying debt" if it had good cause for failing to pay "on the levy." But that is plainly not what the statute means. The failure of a levy on writ of execution to provide relief against a third party does not necessarily immunize the third party from liability for the claim. The third person may nevertheless be found to be liable for the underlying debt, even if its failure to honor the levy was fully justified—for example by independent creditor's suit when the third person asserts a claim to the property in good faith, or by motion in the same case when the court finds an absence of good faith along with one of the other specified circumstances. (§ 708.180.)

Section 701.020 does not apply to independent creditor's suits. The trial court therefore lacked authority to determine whether fees could or should be awarded pursuant to section 701.020, subdivision (c), and to award attorney fees incurred by Ilshin to prosecute the suit against Buena Vista in this case. The attorney fee award must be set aside.[33]

II. ILSHIN'S APPEAL

Summary Of Conclusions

A. The trial court did not err by imposing an agreed two-year limitation on Ilshin's recovery of excess costs recouped by Buena Vista.

B. Ilshin is not entitled to reinstatement of its claim for punitive damages, and the trial court's refusal to direct a verdict of conversion did not prejudice Ilshin's rights.

Discussion

A. The Trial Court Did Not Err By Imposing An Agreed Two-Year Limitation On Ilshin's Recovery Of Excess Costs Recouped By Buena Vista.

The Agreement provides that two years after each distribution statement is rendered by Buena Vista, the statements "shall be deemed accounts stated and not subject to audit . . . ." The trial court interpreted this provision as an agreed two-year statute of limitation on actions based on the contents of Buena Vista's distribution accountings. Ilshin's appeal challenges the trial court's interpretation of this provision.[34]

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[33] Our determination that the fee award is not authorized by law makes it unnecessary to address Buena Vista's other contentions with respect to the attorney fee award.

[34] The Agreement (with key language in italics) provides: "[Buena Vista] shall account to you within Ninety (90) days after the end of each calendar quarter. You shall have the right to audit [Buena Vista's] accounting statements no more than once annually . . . for the first two (2) years after the initial release of the Picture . . . . [S]tatements shall be given semiannually for the next two years, and then annually . . . . *All statements shall be deemed accounts stated and not subject to audit two (2) years after each such statement is rendered by [Buena Vista]. The inclusion of any item from a prior statement on a subsequent statement shall not render such prior-appearing item contestable or recommence the running of the applicable Twenty Four (24) month period with respect*

Contending that this provision imposes a two-year limitation on Last Patriot's (and therefore on Ilshin's) right to contest Buena Vista's accountings, Buena Vista argued in the trial court that the correctness of the amounts set forth in Buena Vista's accountings issued before February 23, 2004, two years before Ilshin filed its suit against Buena Vista, were immune from challenge.[35] The trial court found the argument "well taken," but also found that Buena Vista's suggested "dates are wrong." It granted Buena Vista's in limine motion to place a two-year limitation on Ilshin's proof of damages, but fixed the date from which the limitation must be computed as June 20, 2003, rather than February 23, 2006, as Buena Vista sought. That limited Ilshin's proof of damages to excessive cost reimbursements reflected on the statements issued by Buena Vista on and after June 23, 2001.

Ilshin does not contest the right of contracting parties to fix a reasonable period of time within which claims must be asserted. (See *Capehart v. Heady* (1962) 206 Cal.App.2d 386, 388.) Nor does it contend that the two-year limitation that the court found the parties adopted is necessarily unreasonable, unconscionable, or otherwise unenforceable, if that was what the parties intended by the Agreement. (See Civ. Code, § 1670.5.) Ilshin contends only that "the plain language of the paragraph as a whole and the clause at issue demonstrate that the trial court erred as a matter of law in construing the sentence as a statute of limitations." Ilshin therefore asks that we set aside this two-year limitation on damages, and that we amend the judgment to add $983,235, for the

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thereto. Notwithstanding the foregoing, you shall not have the right to audit Distribution Costs incurred by [Buena Vista] in the exploitation of the Rights Granted; provided, however, that upon your written request [Buena Vista] shall provide you with a statement from a financial officer of [Buena Vista] specifying [Buena Vista's] 'blended' costs (i.e., the total marketing, advertising, publicity, sales and manufacturing costs incurred by [Buena Vista] hereunder) with respect to the U.S. Territory . . . ."

[35] Ilshin argued in opposition that the applicable statute of limitation was four years before the February 23, 2006 filing of Ilshin's complaint. However, the parties' June 2004 tolling agreement would push that limit forward to June 2000; and Ilshin's June 26, 2003 levy would push the limit a year earlier, to June 1999. We have no occasion to consider whether Ilshin's theory could justify its conclusions.

costs exceeding $900,000 reported on Buena Vista's statements before June 2001, plus prejudgment interest thereon.

We conclude that the trial court did not err in interpreting the Agreement's language.

In the absence of extrinsic evidence as to the parties' mutually intended meaning, the interpretation of their written agreement presents an issue of law, subject to this court's independent review. (*Wolf v. Walt Disney Pictures & Television* (2008) 162 Cal.App.4th 1107, 1126-1127.) Even when a contract term may have more than one reasonable interpretation, the resolution of that ambiguity remains a question of law unless the interpretation turns on the credibility of extrinsic evidence. (*City of Hope National Medical Center v. Genentech, Inc.* (2008) 43 Cal.4th 375, 395; *Parsons v. Bristol Development Co*. (1965) 62 Cal.2d 861, 865–866; *New Haven Unified School Dist. v. Taco Bell Corp*. (1994) 24 Cal.App.4th 1473, 1483.) However, where there is substantial evidence in the record to support the trial court's finding that an account was stated between the parties, we may not substitute our own deductions for those of the trial court. (*Zinn v. Fred R. Bright Co*. (1969) 271 Cal.App.2d 597, 602.) With one exception, the parties have proffered no extrinsic evidence with respect to interpretation of the two-year limitation, and none that affects the interpretation of this provision.[36]

An "account stated" is an agreement that an account, and the items in it, are correct. It is a new contract that supersedes the underlying account, and into which the items in the underlying account are merged. (*Maggio, Inc. v. Neal* (1987) 196 Cal.App.3d 745, 752-753.) In an action on the account stated, "'[i]nquiry may not be had into [the original items of the account] at all'" except for fraud or mistake in the making

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[36] Ilshin cites testimony of a senior Buena Vista officer, Ms. Gazica, for the proposition that the cited provision of the Agreement does not apply to challenges to the $900,000 expense limit. But Gazica did not participate in negotiating the Agreement; moreover, her lay opinion was that the Agreement's two-year limit "would apply to the dispute over the cap on distribution costs"—the opposite of the proposition for which Ilshin relies on it. Therefore we do not consider whether her testimony was relevant, or whether her understanding was accurate.

of the account. (*Gleason v. Klamer* (1980) 103 Cal.App.3d 782, 786-787; see 1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 972, p. 1062.)

An account stated ordinarily comes into existence when an account is rendered, and its recipient either acknowledges that it is correct or fails to object to it within a reasonable time. From that, the law implies an agreement that the account is correct as rendered. (*Maggio, Inc. v. Neal*, *supra*, 196 Cal.App.3d at pp. 752-753; see also *Zinn v. Fred R. Bright Co*., *supra*, 271 Cal.App.2d at p. 600; *Levy v. Prinzmetal* (1955) 134 Cal.App.2d Supp. 919, 922 [creditor's acceptance of account and payment without objection constitutes account stated].) Where there has been a prompt objection to the account, however, no assent can be implied, and therefore no account stated arises. (*Hansen v. Fresno Jersey Farm Dairy Co.* (1934) 220 Cal. 402, 408.)

Ilshin does not dispute that once items in Buena Vista's distribution statements have been transformed into accounts stated, there can be no challenge to them. It argues instead that no account stated was formed as to any of Buena Vista's statements, because Last Patriot had questioned Buena Vista's accounts as early as July 2001, and in June 2002 one of Last Patriot's creditors had objected specifically to Buena Vista's recoupment for costs in excess of $900,000, as shown on its distribution accounts. On that basis it argues that the trial court erred in interpreting the Agreement's provision as a statute of limitations requiring suit, rather than "at most, a contractual clause requiring a statement of objection" by Last Patriot—which objection had been made.

The question facing the trial court was what the parties intended by their agreement that "[a]ll statements shall be deemed accounts stated and not subject to audit two (2) years after each such statement is rendered . . . ." That language unquestionably could be interpreted to mean a number of different things, and the trial court did not explain why it held that Ilshin would be permitted to challenge statements that Buena Vista issued only on or after June 23, 2001. However it was entitled to find that the parties intended that provision to provide certainty with respect to their rights. When an account stated arises from its recipient's silence or failure to object, the time that the implication of account stated arises may be a question of fact, leaving the parties uncertain as to their rights. "The law has never set any arbitrary time within which an irrefutable implication arises, save perhaps in the olden times when the law was solely of the law merchant. The length of time necessary to work out the change from a mere demand to an account stated necessarily varies with all of the circumstances." (*Hemenover v. Lynip* (1930) 107 Cal.App. 356, 364.)

Thus by providing that each statement would be deemed to be an account stated after the passage of two years, the parties might well have intended simply to establish a fixed period of time after which the contents of each statement issued by Buena Vista would become immune from inquiry or challenge, freeing them from the uncertainty of the general rule that would leave the determination of that temporal period to be implied from the circumstances as a matter of discretion. The trial court was entitled to find that to be the parties' intended meaning, and we find no error in that interpretation.[37] The trial court's ruling on this issue is affirmed.

B. Ilshin Is Not Entitled To Reinstatement Of Its Claims For Conversion Or Punitive Damages.

Buena Vista moved in limine to preclude Ilshin from introducing any evidence at trial with respect to its claim for punitive damages. Before the court ruled on that motion, however, the parties stipulated to bifurcate the case for a bench trial of the contract claims raised by Ilshin's creditor's suit, leaving its conversion claim for a phase-two jury trial if necessary. The trial court then struck Ilshin's punitive damage claim at the outset of the phase-one trial, rejecting Ilshin's plea to delay that ruling until the court "decide[s] what to do with this conversion claim."

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[37] Neither Buena Vista's nor Ilshin's appeals challenge the trial court's ruling that the two-year limitation ran from June 2001, two years before Ilshin served its Notice of Levy on Writ of Execution on Buena Vista in case number BC214077. That question therefore is not before us. (*Sunset Drive Corp. v. City of Redlands* (1999) 73 Cal.App.4th 215, 226 [court need not consider issues not raised in appellate briefs].)

At the close of the phase-one trial Ilshin asked the court to direct a verdict of conversion against Buena Vista, contending that the phase-one statement of decision, together with Ilshin's lienholder status, established that Buena Vista had retained $3,775,197 belonging to Last Patriot, "resolv[ing] all disputed issues relating to the conversion claim." The court denied the motion, expressly because punitive damages remained an issue in the case. Disregarding its earlier order striking the punitive damage claim, the court held that Buena Vista "is entitled to a jury trial on the intentional tort and then [to] have the same jury determine whether the evidence was clear and convincing as to the tort. Defendant then has the right to have the same jury determined [*sic*] whether exemplary damages are proper. . . ."

After failing to obtain a directed verdict of conversion, Ilshin abandoned its conversion claim. Explaining that the court's refusal to direct a conversion verdict made it "financially impractical to proceed to trial on the conversion claim," Ilshin asked the court to dismiss the conversion claim with prejudice. When the court refused, Ilshin filed its own voluntary dismissal, foregoing a phase-two trial.

In this appeal Ilshin contends that the trial court erred by striking its claim for punitive damages, and by refusing to direct a verdict in its favor on the conversion claim. However, its appeal challenges the order striking punitive damages only in connection with the refusal to direct a verdict for conversion: "Ilshin is not appealing the punitive damage ruling alone but rather the **combination** of the incorrect punitive damage ruling **and** the erroneous refusal to enter a directed verdict [for conversion]." From this admonition we conclude that the issues are wholly interdependent in the context of this appeal. Because the conversion claim could yield no additional compensatory damages to Ilshin, it could benefit Ilshin only as an intentional-tort basis for punitive damages. (*Brewer v. Premier Golf Properties* (2008) 168 Cal.App.4th 1243, 1255-1256 & fn. 11 [no punitive damages available for breach of obligation arising from contract].) Therefore the order striking punitive damages is of no consequence unless we were also to reverse the trial court's refusal to enter a conversion verdict, to reinstate the voluntarily dismissed conversion claim, and to direct the trial court to direct a conversion verdict against Buena Vista. And of course the converse is also true: Unless the order striking the punitive damage claim is reversed and the claim is reinstated, Ilshin is not prejudiced by its failure to obtain a conversion verdict.

We conclude that on the record in this case, Ilshin has failed to demonstrate prejudice resulting from any error in the trial court's rulings. Without a demonstration of prejudice, no reversal is justified. (Cal. Const., Art. 6, § 13; Code Civ. Proc., § 475.) We therefore affirm the challenged rulings. Before examining these issues, however, we first reject Buena Vista's contention that Ilshin necessarily waived its appeal by voluntarily dismissing its conversion claim.

1. Ilshin's dismissal of the conversion claim did not waive its right to challenge the trial court's ruling on its conversion claim.

The procedure Ilshin used to bring these issues before this court is recognized as an appropriate method of challenging a trial court ruling that renders an appellant's remaining case pointless, without the expense and delay of an unnecessary trial of remaining issues. (*Denny v. Lawrence* (1994) 22 Cal.App.4th 927, 930, fn. 1 [appeal will lie from adverse trial court ruling despite voluntary dismissal of claim when dismissal operates as request for entry of judgment so that prompt appeal can be taken from adverse ruling]); *Ashland Chemical Co. v. Provence* (1982) 129 Cal.App.3d 790, 793 [same].)

Ilshin reasoned in this case that because the court had already awarded it all the compensatory damages it could recover for conversion, "a jury trial on the conversion claim . . . would be financially impractical for Ilshin and an unnecessary use of judicial resources" unless it had a potential to recover punitive damages. Therefore the trial court's denial of the motion for a directed verdict, combined with its earlier striking of the punitive damage claim, "is essentially a death knell for Ilshin's conversion claim at this stage."

Faced with what it concluded would be an expensive and pointless phase-two trial of the conversion claim as a prerequisite to being able to obtain a final judgment in order to bring to this court the question whether the trial court erred in striking its claim for punitive damages, Ilshin chose instead to voluntarily dismiss its conversion claim with prejudice. We conclude that Ilshin is at least theoretically correct: Ilshin did not waive its appeal by dismissing its conversion claim expressly in order to obtain an appealable final judgment, so it could challenge the orders striking the punitive damage claim and refusing to direct a verdict on the conversion claim.

2. Ilshin is not entitled to reinstatement of its punitive damage claim.

Notwithstanding the viability of the procedure adopted by Ilshin to bring the issue to this court, its challenge lacks substantive merit. With or without a conversion verdict, the trial court would have been justified in refusing to reinstate the punitive damage claim as pleaded, or in refusing to permit it to go to trial.

A trial court is permitted "at any time in its discretion" to "strike out any part of a pleading not drawn . . . in conformity with the laws of this state . . . ." (Code Civ. Proc., § 436, subd. (b).) The court's decision to do so therefore is, by definition, reviewed for abuse of discretion. (*Quiroz v. Seventh Ave. Center* (2006) 140 Cal.App.4th 1256, 1282.) However where the order striking a claim for punitive damages is based on the inadequacy of the pleadings under the law, we review that issue de novo. (*Clauson v. Superior Court* (1998) 67 Cal.App.4th 1253, 1255.) "In passing on the correctness of a ruling on a motion to strike, judges read allegations of a pleading subject to a motion to strike as a whole, all parts in their context, and assume their truth." (*Ibid*.)

Ilshin's pleading states its claim for punitive damages in a single sentence: "Ilshin is informed and believes and on that basis alleges that Buena Vista committed all of the acts described above"—the acts constituting the claimed conversion—"maliciously, willfully, in bad faith, in conscious disregard for Ilshin's rights, and that the acts of

Comerica justify the imposition of exemplary and punitive damages."[38] These facts, even if they are assumed to be true, do not themselves support the punitive damage claim. A viable punitive damage pleading must allege not only an intentional tort committed under circumstances constituting oppression, fraud, or malice; it must also allege facts that, if found, would be sufficient to support a finding of those circumstances by clear and convincing evidence. (*Grieves v. Superior Court* (1984) 157 Cal.App.3d 159, 166; *G.D. Searle & Co. v. Superior Court* (1975) 49 Cal.App.3d 22, 29.)

Ilshin's pleading fails to do so. It alleges at most its conclusion, on information and belief, that Buena Vista acted intentionally with malice and in bad faith. And it provides no factual support at all for that conclusion—not even on information and belief, much less by clear and convincing evidence. (*Smith v. Superior Court* (1992) 10 Cal.App.4th 1033, 1041-1042 [pleading that merely alleges defendant's conduct was intentional, willful and fraudulent is patently insufficient to support claim for punitive damages].)

To prove its entitlement to punitive damages Ilshin's briefs have indicated that it would show that Buena Vista committed conversion "when it deliberately withheld those funds [in excess of the $900,000 limit] from Ilshin in the face of Ilshin's repeated requests for those funds." And at oral argument in this court about the grounds for its punitive damage claim, Ilshin's counsel suggested that its punitive damage claim would be supported by evidence that Buena Vista had for years denied Ilshin's rights as a creditor of Last Patriot in bad faith. Nowhere has Ilshin indicated, in the trial court or this court, that its claim for punitive damages rests on anything but what it considers to be Buena Vista's intentional denial of its known obligations to pay funds under its agreement with Last Patriot.

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[38] Although Ilshin's pleading nowhere identifies Buena Vista as the party whose conduct justifies punitive damages, we presume that its identification of "Comerica" rather than Buena Vista was an oversight, and we ignore it.

We do not reach the question whether such conduct—a willful failure to perform known and undisputed contractual obligations—even if proven, would support a punitive damage award in the context of this case.[39] In this case, that conduct was not pleaded; moreover, it is inconsistent with the record. The outcome of this appeal itself demonstrates that *neither party* has been wholly correct—or wholly wrong—in interpreting their rights and obligations, and that *both parties* have been reasonably justified in refusing to accede to all of one another's contentions and demands.

Parties are entitled to seek judicial resolution of their legitimate contractual disputes without risking punitive repercussions when they do not prevail. Access to the courts is a constitutional right founded upon the First Amendment to the United States Constitution. (*California Transport v. Trucking Unlimited* (1972) 404 U.S. 508, 510-511 [30 L.Ed.2d 642, 646, 92 S.Ct. 609].) Strong public policy favors open access to the courts for the resolution of legitimate conflicts. (*Grindle v. Lorber* (1987) 196 Cal.App.3d 1461, 1467; *Norton v. Hines* (1975) 49 Cal.App.3d 917, 922.) Litigants have the right to present issues that are arguably correct, even when it is unlikely they will prevail. (*In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 650; *Williams v. Coombs* (1986) 179 Cal.App.3d 626, 640; see *Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 863-874 [confirming policy-based limitations on recovery for malicious prosecution].) We need not (and do not) determine that Ilshin would *necessarily* have been wholly unable to frame or establish a viable claim for punitive damages in this case,

[39] See *Freeman & Mills, Inc. v. Belcher Oil Co*. (1995) 11 Cal.4th 85, 94-96, 117 [Mosk, J. conc.], and cases discussed therein; e.g., *Foley v. Interactive Data Corp*. (1988) 47 Cal. 3d 654, 683-693 [no tort remedies for bad faith breach of employment contract]; *Hunter v. Up-Right, Inc.* (1993) 6 Cal.4th 1174, 1180-1182 [remedies for breach of the implied covenant, except as to insurance contracts, "have almost always been limited to contract damages"; no tort damages for misrepresentations made to induce breach of contract;]; see *Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 515-516 ["the law generally does not distinguish between good and bad motives for breaching a contract"];*Casey v. Metropolitan Life Ins. Co.* (E.D.Cal. 2010) 688 F.Supp.2d 1086, 1102 [under California law, legitimate, genuine dispute with respect to contract obligations negates right to punitive damages].

had it attempted to do so; however these policy considerations underscore Ilshin's burden to demonstrate that it was prejudiced by its loss of the punitive damage claim.

Ilshin did not ask the trial court to reinstate its punitive damage claim, even when it appeared the court had done so sua sponte. At the close of the phase-one trial the trial court's ruling denied Ilshin a directed verdict on the conversion claim, explaining that it did so because Ilshin would necessarily be required to establish its entitlement to punitive damages in the phase-two trial. That reasoning clearly signaled either that the trial court had reinstated the stricken claim, or that it had at least indicated its willingness to reconsider the ruling if reconsideration were sought.

Yet Ilshin disregarded that signal. It did not seek reinstatement of the punitive damage claim, it did not ask to amend its pleading to state facts showing its entitlement to punitive damages, and it did not suggest to the court any factual basis on which it would be able to do so. It instead asked the trial court to dismiss the conversion claim—the sole basis on which it could even arguably seek punitive damages—which the court declined to do, again signaling its unwillingness to forever eliminate the punitive damage issue from the case. Ilshin then itself dismissed its conversion claim, suggesting it was pointless, without ever attempting to reassert its right to seek punitive damages.

The stricken pleading of the punitive damage claim is insufficient on its face to support the claim. In this court Ilshin has requested only that its claim be reinstated, based on the same insufficient conclusions of the stricken pleading, without suggesting that it could or would plead legally sufficient facts if it were given that opportunity. While the trial court did not purport to strike the punitive damage claim because the pleading was inadequate, or because Ilshin failed to present an adequate offer of proof, we review the propriety of the order, not the reasons articulated for it. (*Day v. Alta Bates Medical Center* (2002) 98 Cal.App.4th 243, 252, fn. 1; *J.B. Aguerre, Inc. v. American Guarantee & Liability Ins. Co.* (1997) 59 Cal.App.4th 6, 15-16; *Lee v. Bank of America* (1990) 218 Cal.App.3d 914, 919-921 [judgment of dismissal without leave to amend affirmed although trial court erroneously based ruling on statute of limitations, where on other grounds pleading failed as a matter of law to state cause of action].)

In light of these considerations we conclude that Ilshin is not entitled to reinstatement of the defective claim for punitive damages, or to require the trial court to revisit the issue at this stage of the proceedings. And because the order striking the punitive damage claim is affirmed, Ilshin is unable to show prejudice resulting from its failure to obtain a directed verdict of conversion against Buena Vista.

3. Even if the punitive damage claim were reinstated, Ilshin was not prejudiced by the trial court's refusal to direct a conversion verdict in its favor.

Our decision not to reinstate Ilshin's punitive damage claim is further bolstered by the fact that Ilshin was apparently mistaken when it concluded that without a directed verdict of conversion, a phase-two trial would be burdensome and expensive. Ilshin has not explained its basis for that conclusion, and the record does not support it.

The record indicates no prejudice to Ilshin from the trial court's refusal to direct a conversion verdict against Buena Vista before the phase-two trial—even if Ilshin is correct that all the elements of conversion are satisfied by the phase-one findings, and even if the punitive damage claim were reinstated. The relevant evidence, and Ilshin's burden, would have been virtually identical in a phase-two trial, with or without entry of a conversion verdict at its outset.

With or without a conversion verdict, in any phase-two trial the jury would necessarily be instructed as to the ultimate facts that the court had determined in the phase-one trial. (*Torres v. Automobile Club of So. California* (1997) 15 Cal.4th 771, 781 [jury that determines punitive damages will "be advised of the" result of phase-one trial].) With or without a conversion verdict, Ilshin would be required to present evidence sufficient to persuade a jury, by clear and convincing evidence, that Buena Vista's conduct in refusing to pay funds to Ilshin was fraudulent, oppressive, or malicious. (Civ. Code, § 3294, subd. (a); *Medo v. Superior Court* (1988) 205 Cal.App.3d 64, 68 ["In order for a jury to evaluate the oppression, fraud or malice in the conduct giving rise to liability in the case, it must consider the conduct giving rise to liability"].) Moreover, with or without a conversion verdict, Buena Vista would be equally entitled to show the jury that it had prevailed on many of its defenses to Ilshin's claims both in the trial court and in this court, thereby dispelling any implication that it had acted in bad faith or with malice in asserting those defenses.

Thus Ilshin has not explained any way in which its burden in a phase-two trial with a conversion verdict in hand would have differed from its burden if it had begun the phase-two trial without having first obtained such a verdict. The evidence, and the instructions to the jury, apparently would have been no different. On this record, we see additional burden, expense, or prejudice to Ilshin resulting from the trial court's refusal to direct a conversion verdict in its favor. For this reason, too, we affirm the trial court's rulings on the conversion and punitive damage claims.

Disposition

Damages for breach of contract

The award of damages for breach of contract is reversed. The trial court is directed to determine and enter an amount for damages for breach of contract in favor of Ilshin in the amount of $3,775,197, adjusted as required by this opinion to delete from it the residuals paid by Buena Vista on Last Patriot's behalf, and to reflect any change in the total costs withheld by Buena Vista in excess of the $900,000 cost threshold resulting from a change in the time the $900,000 threshold was reached, along with prejudgment interest on the total.

The award of lost profits damages is reversed. The trial court is directed to determine and enter an amount for lost profits damages in favor of Ilshin in the amount of $452,163, adjusted as required by this opinion to reflect any change in the time the $900,000 cost threshold was reached, along with prejudgment interest on the total.

Attorney fees

The award of attorney fees and costs is reversed.

Statute of Limitations

The trial court's ruling on the applicable statute of limitations is affirmed.

Conversion & Punitive damages

The orders striking the punitive damage claim, and refusing to enter judgment in Ilshin's favor on the conversion claim, are affirmed.

The parties are to bear their own costs on appeal.

CERTIFIED FOR PARTIAL PUBLICATION.

CHANEY, J.

I concur:

MALLANO, P. J.

ROTHSCHILD, J., Concurring and Dissenting.

I concur in the majority opinion except as to Parts I.A and I.B of the Discussion, from which I respectfully dissent. In my view, the implied covenant of good faith and fair dealing prohibited Last Patriot Productions, Inc. (Last Patriot) from unreasonably withholding consent to distribution costs in excess of $900,000, and there is no reason why a court cannot determine whether it would have been unreasonable for Last Patriot to withhold consent to Buena Vista's distribution costs if Buena Vista had asked. Moreover, on this record it is undisputed that withholding consent would have been unreasonable—Buena Vista introduced evidence that its distribution costs were reasonable, Ilshin introduced no evidence to the contrary, and all parties agree that the ongoing distribution of the film was profitable. I further conclude that the implied covenant of good faith and fair dealing prohibited Last Patriot from requiring Buena Vista to continue to distribute the film if Last Patriot refused to consent to additional distribution costs, so the lost profits award should be reversed as well.

ROTHSCHILD, J.