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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

PageMasters, Inc.,)
)
Plaintiff,)
)
vs.)
)
Autodesk, Inc.,)
)
Defendant.)
_____)

No. CV-08-00553-PHX-RCB

O R D E R

This lawsuit is the latest attempt by plaintiff PageMasters, Inc. to obtain "several million dollars" in royalty payments which it believes Océ-Technologies, B.V. ("Océ"), its former licensee and a non-party, owes it. See Co. (doc. 1) at 3, ¶ 10. That purported obligation is based upon a Software Distribution Agreement entered into more than a decade ago, in 1997, between PageMasters and Océ ("Océ Agreement"). Currently pending before the court is a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) by defendant, Autodesk, Inc. (doc. 10). The court is intimately familiar with the history of this litigation having presided over not one, but

1 two, prior closely related lawsuits.¹ See Océ-Technologies, B.V.
2 v. PageMasters, Inc., No. CIV 04-0557-PHX-RCB ("PageMasters I");
3 and PageMasters, Inc. v. Océ-Technologies, B.V., No. CIV 05-1519-
4 PHX RCB ("PageMasters II"). Given that familiarity, and the
5 straightforward issues which Autodesk's motion raises, oral
6 argument will not assist the court. Therefore, the court denies
7 the parties' requests for oral argument. See Mahon v. Credit
8 Bureau of Placer County, Inc., 171 F.3d 1197, 1200 (9th Cir. 1999).

9 Background

10 I. Scope of Record

11 Before outlining the facts, the court must decide which
12 documents it may properly consider on this motion to dismiss.
13 Ordinarily in ruling on a Rule 12(b)(6) motion, such as Autodesk's,
14 a court may not consider matters beyond the complaint. See Corrie
15 v. Caterpillar, Inc., 503 F.3d 974, 979-980 (9th Cir. 2007)
16 (internal quotation marks and citation omitted)("In general, the
17 focus of any Rule 12(b)(6) dismissal . . . is the complaint.") In
18 the present case, however, both parties are relying upon documents
19 other than the complaint. The court must therefore determine
20 whether it may properly consider any of those documents without
21 converting this motion into one for summary judgment. See Lee v.
22 City of Los Angeles, 250 F.3d 668, 688-89 (9th Cir. 2001) (internal
23 quotation marks and citation omitted) ("[A] court may consider
24 material which is properly submitted as part of the complaint on a
25 motion to dismiss without converting th[at] motion . . . into a

26
27 ¹ Indeed, this court's "familiarity with the transaction and the
28 arguments raised in [the] instant case," was the primary reason for transferring
the present action from the Honorable Neil V. Wake to this court. Order (doc. 21)
at 5:16-17.

1 motion for summary judgment.”)

2 **1. Incorporation by Reference**

3 Both parties heavily rely upon the Océ Agreement and the March
4 2000 Asset Purchase Agreement (“APA”) between PageMasters and
5 Buzzsaw.² Unquestionably those two agreements form the basis for
6 PageMasters’ claims herein, and although the complaint mentions
7 both, neither is attached thereto. Additionally, despite the fact
8 that Autodesk is requesting the court to take judicial notice of a
9 number of documents, that request does not include these two
10 agreements.³ Nonetheless, as the incorporation by reference
11 doctrine permits, the court will consider the Océ Agreement and the
12 APA on this motion to dismiss. See U.S. v. Ritchie, 342 F.3d 903,
13 908 (9th Cir. 2003) (citations omitted) (“Even if a document is not
14 attached to a complaint, it may be incorporated by reference into a
15 complaint if the plaintiff refers extensively to the document or
16 the document forms the basis of the plaintiff’s claim.”); see also
17 Knieval v. ESPN, 393 F.3d 1068, 1076 (9th Cir. 2005) (internal
18 quotation marks and citations omitted) (incorporation by reference
19 doctrine allows for consideration of “documents whose contents are
20 alleged in a complaint and whose authenticity no party questions,
21 but which are not physically attached to the [plaintiff’s]
22 pleading[.]”). Likewise, the court will “treat such a document[s]

23
24 ² After the closing of that APA, Buzzsaw “merged into Autodesk[.]” Co.
25 (doc. 1) at 2, ¶ 8. Thus, Autodesk is the successor-in-interest to Buzzsaw. To
simplify matters, both companies will be referred to throughout as Autodesk.

26 ³ Autodesk did attach those two agreements to its RJN as exhibit A and
27 B respectively, but specifically limited its request for judicial notice to
28 exhibits C-0 thereto. RJN (doc. 11), at 2:2-3. Autodesk correctly implies,
however, as discussed above, that the court may properly consider those two
agreements based upon the incorporation by reference doctrine. See Mot. (doc. 10)
at 3, n. 2.

1 as part of the complaint, and . . . assume that [their] contents
2 are true for purposes of [this] motion to dismiss under Rule
3 12(b)(6).” See Marder v. Lopez, 450 F.3d 445, 448 (9th Cir. 2006)
4 (internal quotation marks and citation omitted).

5 **2. Request for Judicial Notice**

6 Because the 13 filings from PageMasters’ related lawsuits and
7 arbitration are a matter of public record, Autodesk contends that
8 the court can properly take judicial notice of their “existence[.]”
9 Autodesk’s Request for Judicial Notice (“RJN”) (doc. 11) at 2-3.
10 The court may also take judicial notice of “certain arguments and
11 statements made” in those filings, according to Autodesk, because
12 they are “readily verifiable . . . and their existence cannot be
13 subject to any dispute because they were made by a party to the
14 current action in a prior related lawsuit.” Id. at 3:1-2; and
15 3:19-21. Tellingly, PageMasters did not respond to this RJN.
16 Perhaps because it, too, is relying upon some of those prior
17 filings.⁴

18 Pursuant to Fed. R. Evid. 201, a court may “take judicial
19 notice of matters of public record and consider them without
20 converting a Rule 12 motion into one for summary judgment.” U.S.
21 v. 14.02 Acres of Land, 530 F.3d 883, 894 (9th Cir. 2008) (internal
22 quotation marks and citation omitted). Pleadings and orders in
23 other actions are matters of public record, and hence properly the
24 subject of judicial notice. See, e.g., Reyn’s Pasta Bella, LLC v.
25 Visa USA, Inc., 442 F.3d 741, 746 n. 6 (9th Cir. 2006) (taking

27 ⁴ PageMasters goes so far as to “incorporate” into its Response this
28 court’s “Undisputed Facts” as set forth in PageMasters II, 2006 WL 753164 (RJN
(doc. 11), exh. K thereto). See Pl. Resp. (doc. 17) at 2.

1 judicial notice, as a matter of public record, "pleadings,
2 memoranda, expert reports, etc., from [earlier] litigation[,]"
3 which were thus "readily verifiable"); Kourtis v. Cameron, 419 F.3d
4 989, 994 n.2 (9th Cir. 2005) (citation omitted) ("court records
5 from related proceedings can be taken into account without
6 converting a motion to dismiss into a summary judgment motion[]"),
7 overruled on other grounds, Taylor v. Sturgell, ___ U.S. ___, 128
8 S.Ct. 2161, 171 L.Ed.2d 155 (2008).

9 By its silence, and the fact that it is also relying in part
10 upon those prior court filings, the court assumes that PageMasters
11 is not opposing Autodesk's RJN. Accordingly, the court grants
12 Autodesk's RJN as to exhibits C-0 attached thereto and will
13 consider those exhibits to the extent necessary to resolve this
14 motion, as well as the Océ Agreement and the APA. It is only
15 taking judicial notice of those prior filings to show, for example,
16 that a prior proceeding occurred or that a certain argument or
17 position was asserted therein. See, e.g., Faurie v. Berkeley
18 Unified School District, 2008 WL 820682, at *2 n. 3 (N.D.Cal. March
19 26, 2008) (taking judicial notice of pleadings to "see what
20 arguments Defendants advanced in" another court and what court
21 ruled); Mitchell v. Branham, 2008 WL 3200666, at *8 (S.D.Cal. Aug.
22 5, 2008) ("[d]ocuments that are part of the public record may be
23 judicially noticed to show . . . that a judicial proceeding
24 occurred or that a document was filed in another court case[]").
25 Autodesk is not requesting that the court take judicial notice of
26 factual findings made by other courts or the arbitrator, Mot. (Doc.
27 10) at 1, n.1; and indeed, the court could not do that. See
28 Mitchell, 2008 WL 3200666, at *8 (citations omitted) ("[A] court

1 may not take judicial notice of findings of facts from another
2 case.") The court may consider the prior court filings, the Océ
3 Agreement and the APA without converting this motion to one for
4 summary judgment. See Nunez v. Idaho Atty. Gen., 2009 WL 484431,
5 at *3 (D.Idaho Feb. 26, 2009) (citation omitted) ("A court may look
6 beyond the complaint to matters of public record, and doing so does
7 not convert a motion for . . . dismissal into a motion for summary
8 judgment.")

9 **3. PageMasters' Documents**

10 PageMasters also relies upon documents beyond the complaint;
11 but, it does not request that the court take judicial notice of any
12 of those documents. Perhaps most significantly, PageMasters is
13 relying upon a September 12, 2007, letter from PageMasters to
14 Autodesk to establish that in its view that is the accrual date of
15 its breach of contract claim against Autodesk. In that letter,
16 PageMasters informs Autodesk of this court's September 11, 2007,
17 decision denying the former's motion for post-judgment relief. See
18 Resp. (doc. 17), exh. B thereto. PageMasters then inquires as to
19 "whether Autodesk will demand an audit of Océ[.]" Id. PageMasters
20 also attaches to its Response the December 11, 2006, affidavit of
21 its attorney, which is exhibit M to Autodesk's RJN. Unlike the
22 RJN, however, PageMasters includes the five exhibits to that
23 affidavit, including communications between PageMasters and
24 Autodesk pertaining to the former's request that Autodesk demand an
25 audit of Océ.

26 Autodesk objects to what it views as this impermissible
27 expansion of the record. Autodesk accurately points out that the
28 complaint does not include allegations of these purported

1 communications between it and PageMasters as to an audit demand.
2 Autodesk further asserts, with no explanation, that these
3 communications are not proper matters for judicial notice, even if
4 PageMasters had made such a request.

5 The court is well aware that Fed. R. Evid. 201(c) allows it
6 "to take judicial notice whether requested or not." Not all facts
7 are subject to judicial notice, however. Only those which are
8 "either (1) generally known within the . . . jurisdiction of the
9 trial court or (2) capable of accurate and ready determination by
10 resort to sources whose accuracy cannot reasonably be questioned"
11 are properly subject to judicial notice. Fed. R. Evid. 201(b).
12 Except for the court filings which PageMasters attaches to its
13 response (including the McKee affidavit of which judicial notice
14 has already been taken), none of the other matters are the "kinds
15 of facts" which may be judicially noticed. See id. Thus, even if
16 the court were so inclined, it could not take judicial notice of
17 the correspondence between PageMasters and Autodesk pertaining to
18 the audit demand. Given the scant allegations in the complaint,
19 and in light of the foregoing, the facts set forth below are drawn
20 primarily from documents referenced in the complaint or prior court
21 filings of which the court has taken judicial notice.

22 **II. Factual & Procedural History**

23 Essentially this litigation began with PageMasters' 2003
24 demand upon Océ for an arbitration. Two lawsuits followed --
25 PageMasters I and PageMasters II. So, this is the third lawsuit
26 arising out of the Océ Agreement. Assuming familiarity with those
27 prior proceedings, there is no need to repeat the entire protracted
28 history of this litigation. Some aspects of that history bear

1 repeating, though, because they directly pertain to the narrow
2 issues which Autodesk's motion raises.

3 Basically the Océ Agreement granted Océ an exclusive right to
4 license PageMasters' software. RJN (doc. 11), exh. A thereto.
5 Under the terms of that Agreement, Océ agreed to pay PageMasters
6 royalties for copies of the software which Océ shipped. Id., exh.
7 A thereto at §§ 5.4 and 5.6. One provision of that Agreement has
8 been at the center of this dispute for years - the audit provision.
9 The Agreement required Océ to "maintain a complete, clear and
10 accurate record of the number of copies of the Software [which it]
11 shipped[.]" Id. at ¶ 5.6. Correspondingly, PageMasters had "the
12 right - upon 10 . . . days prior written notice - to have an
13 inspection and audit of all such records of Océ conducted by an
14 independent audit firm reasonably acceptable to both parties[.]"
15 Id.

16 Roughly three years later, in March 2000, PageMasters entered
17 into the APA with Autodesk. That APA mandated that "[a]ll accounts
18 receivables [sic] for sales that occurred prior to closing [*i.e.*,
19 March 21, 2000], . . . remain[ed] the property of [PageMasters]."
20 RJN (doc. 11), exh. B thereto at 14 (Schedule G). "All unbilled
21 receivables for sales that occurred prior to the closing, . . .
22 also remain[ed] the property of [PageMasters] including monies due
23 from Océ." Id. In assigning the rights of the Océ Agreement to
24 Autodesk, Autodesk "assume[d] all responsibilities under th[at]
25 . . . Agreement as of the Closing." Id., exh. B thereto at 20,
26 § 5.16.

27 As with the audit provision in the Océ Agreement, one
28 provision of the APA -- the so-called single audit provision -- has

1 been hotly disputed in the prior actions, and continues to be here.

2 That provision states in relevant part:

3 [Autodesk] will provide reasonable assistance to
4 [PageMasters] to assist [PageMasters] in conducting
5 a single audit of Océ's financial records (as
6 permitted under the Océ Agreement) to verify amounts
due and paid by Océ to [PageMasters] prior to the
Closing, and will pay [PageMasters] the Net Revenues
actually recovered pursuant to such audit.

7 Id.

8 **A. PageMasters I**

9 In approximately "October 2000, PageMasters notified Océ that
10 it was exercising its right to conduct an audit of its books and
11 records." RJN (doc. 11), exh. J thereto at 3, ¶ 16; see also RJN
12 (doc. 11), exh. I thereto at 7, ¶ 26. A dispute arose as to the
13 scope of that audit and eventually, in 2003, PageMasters commenced
14 an arbitration proceeding against Océ. Id., exh. I thereto at 7-
15 10, ¶¶ 27-39. In response to Océ's motion to dismiss that
16 arbitration, on November 26, 2003, *inter alia*, PageMasters filed a
17 cross-motion seeking "leave to . . . join Autodesk . . . as an
18 indispensable party." Id., exh. O thereto at 10. PageMasters
19 argued that "to the extent [that] the Arbitrator finds that the
20 provisions of the [APA], required . . . Autodesk . . . to
21 affirmatively pursue PageMasters' claims (the right to perform an
22 audit and receive payment of accounts receivable existing prior to
23 the [APA])," it should be granted "leave to join Autodesk as an
24 indispensable party to the arbitration." Id., exh. O thereto at
25 10-11. The arbitrator denied Océ's motion to dismiss. Id., exh. D
26 thereto at 5, ¶ 19. The record is silent as to the outcome of that
27 cross-motion.

28 Océ then commenced an action in this court seeking to enjoin

1 PageMasters from pursuing the arbitration. During PageMasters I,
2 PageMasters took the position that under the APA it "did not
3 transfer and assign to [Autodesk] its right to conduct an audit of
4 Océ's books and records" under the Océ Agreement. See RJN (doc.
5 11), exh. D thereto at 2, ¶ 3. Similarly, Pagemasters' indicated
6 its "understanding that, under [the single-audit provision] of the
7 [APA] . . . , it remained entitled to demand an audit of Océ under
8 the [Océ] Agreement." Id., exh. D thereto at 7, ¶ 28 (citation
9 omitted). PageMasters based its "understanding" on the declaration
10 of Jayson Jones, one of its "shareholder[s]" and "officer[s][.]"
11 Id., exh. E thereto at 1, ¶ 1.

12 Based upon his "personal knowledge" acquired through "active[]
13 participat[ion]" in negotiati[ng]" both the Océ Agreement and the
14 APA, Mr. Jones declared that "[b]ased on the language in [the
15 single-audit provision] of the [APA], [he] understood that
16 PageMasters continued to have the right to demand an audit of Océ's
17 books and records under the [Océ] Agreement." Id., exh. E thereto
18 at 1, ¶¶ 1-3; and 5. Mr. Jones further declared that he
19 "understood and intended that, if Océ failed or refused to allow
20 PageMasters to properly audit its books and records, PageMasters
21 was permitted to pursue its rights and remedies under the [Océ]
22 Agreement with [Autodesk]." Id., exh. E thereto at 2, ¶ 7. At
23 that time Mr. Jones frankly declared that "[o]n behalf of
24 PageMasters, [he] did not intend that . . . Autodesk, would be
25 burdened with pursuing Océ to recover on any of PageMasters' rights
26 and claims that existed at the time of the [APA]." Id., exh. E
27 thereto at 2, ¶ 8. With further candor, Mr. Jones stated that he
28 "did not want . . . Autodesk to pursue PageMasters' rights,

1 because" it did not have "the business information and financial
2 motivation to vigorously pursue claims solely for PageMasters'
3 benefit." Id. In essence, PageMasters' response to Océ' summary
4 judgment motion in PageMasters I incorporated this view. See id.,
5 exh. C thereto at 12 ("It would be illogical for the parties to
6 contemplate that [Autodesk] would be burdened with pursuing
7 PageMasters' right that existed under the Océ Agreement prior to
8 the closing of the [APA].")

9 Furthermore, in PageMasters I, PageMasters reiterated its
10 position that PageMasters was an "indispensable party to the
11 Arbitration[.]" Id., exh. C thereto at 16 and 17. Finding that the
12 APA did "not state that PageMasters retained a right to pursue
13 arbitration against Océ[.]" on October 25, 2004, this court granted
14 Océ's summary judgment motion. Id., exh. F thereto at 7:23-25; and
15 at 13:23-24. The court also denied PageMasters leave to join
16 Autodesk in the arbitration. Id., exh. F thereto at 13:2-3.
17 Likewise, although PageMasters discussed the issue of its audit
18 right in PageMasters I, the court explicitly declined to rule on
19 that issue because it was "not currently before th[e] Court." Id.,
20 exh. F thereto at 5: n 4.

21 **B. Pagemasters II**

22 Trying a new tactic, a week after the entry of that order, on
23 November 1, 2004, PageMasters filed suit against Océ in Maricopa
24 County Superior Court, State of Arizona. Id., exh. G thereto.
25 PageMasters sought to compel an audit pursuant to the terms of the
26 Océ Agreement. PageMasters did not name Autodesk as a party to
27 that action.

28 After removal to this court, on cross-motions for summary

1 judgment, PageMasters again took the position that under the APA it
2 "did not transfer and assign to [Autodesk]. . . its right to
3 conduct an audit of Océ's books and records[.]" Id., exh. I thereto
4 at 4, ¶ 12. PageMasters continued to adhere to its view that under
5 the APA, it had "negotiated for a continuing right to audit Océ's
6 books and records." Id., exh. I thereto at 7, ¶ 22 (citation
7 omitted).

8 On March 23, 2006, this court granted Océ's motion for summary
9 judgment. The court found that the APA did "not state that
10 PageMasters retained the right to independently pursue . . . an
11 audit[]" under the single-audit provision. Id., exh. K thereto at
12 9:1-2. "Instead," the court found that the APA "language
13 specifically declares that [Autodesk] will provide *reasonable*
14 *assistance* to PageMasters to *assist* PageMasters in conducting the
15 audit[.]" Id., exh. K thereto at 9:2-5 (emphasis added). Further,
16 according to the court, "the plain language of the [APA] indicates
17 that the parties intended to transfer to [Autodesk] all rights and
18 responsibilities pertaining to the [Océ] Agreement, including the
19 right to conduct the 'single' audit to collect any remaining
20 royalty payments due to PageMasters." Id., exh. K thereto at 9:6-
21 10. In so holding, the court explained that "[t]he 'single' audit
22 clause contained within section 5.16 is merely an agreement between
23 PageMasters and [Autodesk] that *requires* [Autodesk] *to allow and*
24 *assist* such an audit, and deliver to PageMasters any royalties it
25 discovers through such an audit." Id., exh. K thereto at 9:10-14
26 (emphasis added). Finding "that the parties contemplated that only
27 [Autodesk] would have the right to conduct the audit of Océ[,]" the
28 court concluded that "[a]n independent right to audit Océ was not

1 expressly retained for PageMasters within the contract." Id., exh.
2 K thereto at 9:21-24. Finally, the court denied PageMasters'
3 request for leave to join [Autodesk][.]" Id., exh. K thereto at
4 11:15-17.

5 Nine months later, PageMasters moved for relief from judgment
6 of that March 23, 2006 order. Id., exh. L thereto. The basis for
7 that motion was Océ's supposed "fail[ure] to disclose the fact that
8 it had entered into an agreement with Autodesk . . . , to acquire
9 the right and interests under" the Océ Agreement. Id., exh. L
10 thereto at 1. On September 11, 2007, the court denied that motion,
11 finding, *inter alia*, that in the exercise of due diligence,
12 PageMasters could have discovered the Autodesk-Océ Agreement. Id.,
13 exh. O thereto at 7-9.

14 **C. Pagemasters III**

15 On March 20, 2008, PageMasters filed the present action. In a
16 sparse complaint, with no mention of the preceding four years of
17 litigation in this court, PageMasters alleges that it "has demanded
18 that Autodesk perform its responsibilities under the [APA] . . . to
19 demand an audit of Océ's financial records[,]" and to pay
20 PageMasters what it believes is "several million dollars" owed to
21 it by Océ. Co. (doc. 1) at 3, ¶¶ 9 and 10. Conspicuously lacking
22 from the complaint are any allegations as to the time frame of that
23 demand. Again with no mention of time frame, PageMasters baldly
24 alleges that "Autodesk has refused to perform its responsibilities
25 under, and therefore . . . is in breach of, the [APA]." Id. at 3,
26 ¶ 11. PageMasters is seeking a declaration that Autodesk is
27 "required . . . to demand and perform an audit of Océ's financial
28 records and turn over to PageMasters the net revenues from accounts

1 receivable due and owing by Oce to PageMasters[.]” Id. at 3, ¶ (A).
2 PageMasters also seeks an award of “appropriate damages[.]” Id. at
3 3, ¶ (B).

4 Discussion

5 Autodesk filed the present pre-answer motion asserting three
6 independent grounds for dismissal. First, plaintiffs’ claims are
7 barred by the statute of limitations. Second, the equitable
8 doctrine of laches bars those claims. Third, even if neither of
9 those defenses are availing, Autodesk maintains that it is entitled
10 to dismissal for failure to state a claim because it has no
11 obligation under the APA to “demand and perform” an audit. Its
12 obligation thereunder is limited to providing reasonable assistance
13 with the audit.

14 The court will address the statute of limitations argument
15 first because if Autodesk prevails on that argument, it renders
16 moot the other two dismissal arguments.

17 I. Statute of Limitations

18 “If the expiration of the applicable statute of limitations
19 is apparent from the face of the complaint,” it is well settled
20 that “the defendant may raise [that] defense in a Rule 12(b)(6)
21 motion to dismiss.” See In re Juniper Networks, Inc. Sec. Litig.,
22 542 F.Supp.2d 1037, 1050 (N.D.Cal. 2008) (citing Jablon v. Dean
23 Witter & Co., 614 F.2d 677, 682 (9th Cir. 1980)). In the present
24 case, however, the complaint does not include any allegations
25 whatsoever as to time. It is, therefore, impossible to ascertain
26 from the face thereof the timeliness of this action. Thus,
27 Autodesk properly resorted to the judicially noticed matters
28 previously discussed, in an effort to show its entitlement to

1 dismissal on statute of limitations grounds. See Yeager v. Bowlin,
2 2008 WL 3289481 at *3 (E.D.Cal. Aug. 6, 2008) (internal quotation
3 marks and citation omitted) (taking judicial notice "of the fact
4 and content" of documents filed in other cases as they "directly
5 relat[ed]" to whether and when plaintiff had notice of his
6 potential claims such that they would not be barred by the
7 applicable statutes of limitations[]); see also Ritchey v. Upjohn
8 Drug Co., 139 F.3d 1313, 1319-20 (9th Cir. 1998) ("[W]hen the
9 stroke of judicial notice is played upon [plaintiff's] pleading, it
10 appears perfectly clear that the statute of limitations is a
11 defense[.]")

12 The parties agree that California's four year statute of
13 limitations for breach of contract actions, Cal Code Civ. Proc. §
14 337(1),⁵ applies to this declaratory judgment action premised upon
15 breach of the APA. See Booth v. Quantum3d, Inc., 2005 WL 1512138,
16 at *9 (N.D.Cal. June 15, 2005) (applying California's four year
17 statute of limitations in declaratory judgment action based upon
18 breach of contract) (citing, *inter alia*, 118 East 60th Owners, Inc.
19 v. Bonner Properties, Inc., 677 F.2d 200, 2002 (2d Cir. 1982)
20 ("When the declaratory judgment sought by a plaintiff would declare
21 his entitlement to some affirmative relief, his suit is time-barred
22 if the applicable limitations period has run on a direct claim to
23 obtain such relief.)) They disagree, however, as to the accrual

24 ⁵ California law applies because that is the "governing law" of the APA.
25 RJN (doc. 11), exh. B thereto at 11, § 8.16. This choice of law provision includes
26 limitations periods. See In re Western United Nurseries, Inc., 2000 WL 34446155,
27 at *8 (D.Ariz. July 3, 2000) (footnote omitted) ("Arizona's conflict-of-law
28 principles no longer treat limitations periods as procedural matters to be
determined by the law of the forum. Instead, section 187 of the Restatement
requires that a valid, general choice-of-law clause be deemed to include the
statutes of limitations of the chosen state."), amended in part, vacated in part
on rehearing on other grounds, 2000 WL 3448963 (D.Ariz. Sept. 29, 2000).

1 date for that statute of limitations.

2 Autodesk maintains that PageMasters' cause of action accrued
3 in October, 2000, prior to the Autodesk/Buzzsaw merger, when
4 PageMasters began to conduct an audit pursuant to the Océ
5 Agreement. Autodesk asserts that "PageMasters could have enforced
6 the [reasonable] assistance clause at that time[,] " but it did not.
7 Mot. (doc. 10) at 11:2-3 (citation omitted). Instead, PageMasters
8 waited until seven years later, March, 2008, when it commenced this
9 lawsuit to attempt to enforce that clause against Autodesk. Thus,
10 Autodesk argues that this action is time-barred.

11 Alternatively, Autodesk contends that PageMasters was on
12 notice of its claim against Autodesk at least by November 26, 2003,
13 when it filed a motion to join Autodesk as an "indispensable party"
14 in the arbitration. See RJN (doc. 11), exh. D thereto at 5, ¶ 17
15 (citation omitted); and exh. N thereto. Therefore, Autodesk
16 contends that this action is not timely because it accrued at the
17 time of that notice, on November 26, 2003, more than four years
18 prior to the commencement of this action.

19 PageMasters did not dispute or otherwise respond to Autodesk's
20 arguments that the accrual date is either October 2000, or November
21 23, 2006. Instead, noting the absence of any "deadline" in the
22 agreements as to performance of an audit by Autodesk, PageMasters
23 declares that the statute of limitations "did not accrue until it
24 sent [a] written demand to Autodesk on September 12, 2007, and
25 Autodesk notified PageMasters that it was refusing to perform the
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1 duties demanded of it by PageMasters.⁶” Resp. (doc. 17) at 4
2 (emphasis added). Thus, PageMasters argues that this action, which
3 was filed less than a year later, on March 20, 2008, is timely.

4 Autodesk challenges PageMasters’s reliance upon “‘discussions’
5 and correspondence” not alleged in the complaint as a basis for
6 establishing a September 2007 accrual date. Even taking those
7 matters into account, it is Autodesk’s position that it should
8 still prevail on its statute of limitations defense because,
9 basically, PageMasters sat on its rights by not making a demand for
10 performance earlier. Finally, Autodesk distinguishes PageMasters’
11 authority because those cases did not involve “the situation in
12 which the plaintiff’s right to demand performance has accrued but
13 nonetheless the plaintiff fails to exercise that right within the
14 limitations period.” Reply (doc. 20) at 6:7-9 (footnote omitted).

15 “Under California law, an action must be commenced within the
16 prescribed limitations period ‘after the cause of action shall have
17 accrued.’” Diorio v. Coca-Cola Company, 2009 WL 483190, at *2
18 (S.D.Cal. Feb. 24, 2009) (quoting CAL. CODE CIV. PROC. § 312). In
19 California, “[a] cause of action accrues when the wrongful act is
20 done and the consequent liability arises.” Id. (citation omitted).
21 “[I]n ordinary . . . contract actions, the statute of limitations .
22 . . begins to run upon the occurrence of the last element essential
23 to the cause of action.” El Pollo Loco, Inc. v. Hashim, 316 F.3d
24 1032, 1039 (9th Cir. 2003) (internal quotation marks and citation

25
26 ⁶ As discussed earlier, the court is not considering this September 12,
27 2007 letter. Nonetheless, the court observes that there is nothing in that letter
28 or elsewhere which indicates when Autodesk purportedly refused to perform. Hence,
it is impossible to ascertain both when PageMasters demanded that Autodesk fulfill
its responsibilities under the APA, and, in turn, when Autodesk supposedly refused.

1 omitted). In a case such as this, however, where the contract does
2 not specify a time for "performance of an act required to be
3 performed," then, "a reasonable time is allowed." Cal. Civ. Code §
4 1657.

5 By contending that the accrual date is September 12, 2007,
6 Autodesk retorts that PageMasters "ignore[s]" the "well-settled
7 principle" that where a contract "provides that a party can demand
8 action by another party, that party cannot unilaterally toll the
9 statute of limitations indefinitely by refusing to make a demand."
10 Reply (doc. 20) at 4:25-26 (citation omitted). It is not
11 PageMaster's disregard for that principle which undermines its
12 argument that the accrual date is September 12, 2007. Rather, as
13 Autodesk alludes to, and explained below, it is PageMasters'
14 failure to make a demand within the statute of limitations which
15 defeats its suggestion of a September 12, 2007 accrual date.

16 "Where a demand is an integral part of a cause of action, the
17 statute of limitations does not run until demand is made." Phillis
18 v. City of Santa Barbara, 229 Cal.App.2d 45, 55, 40 Cal.Rptr. 27,
19 31 (1964) (internal quotation marks and citation omitted).
20 Generally, "where demand is necessary to perfect a right of action
21 and no time therefore is specified in the contract, the demand must
22 be made within a reasonable time after it can lawfully be made."
23 Id. (internal quotation marks and citations omitted). "What is a
24 reasonable time depends upon the circumstances of each case; but in
25 the absence of peculiar circumstances, a time coincident with the
26 running of the statute will be deemed reasonable, and if a demand
27 is not made within that period, the action will be barred." Id.
28 (internal quotation marks and citation omitted).

1 Applying these well-settled rules to the present case, clearly
2 this action is time-barred. The APA does not specify a time frame
3 in which PageMasters was required to demand that Autodesk provide
4 "reasonable assistance" with the Océ audit. And, there has been no
5 suggestion of "peculiar circumstances." That means that for
6 PageMasters' action to be timely, it should have demanded that
7 Autodesk provide reasonable assistance with the Océ audit within
8 four years of the time it first initiated the audit. In other
9 words, it should have demanded reasonable assistance by October
10 2004 at the latest. It is undisputed that PageMasters did not make
11 a demand within that four year time frame. Accordingly, the court
12 grants Autodesk's motion to dismiss based upon the statute of
13 limitations. See Guerrero-Melchor v. Arulaid, 2008 WL 539054, at
14 *2 (W.D.Wash. Feb. 22, 2008) (citation omitted).⁷

15 **II. Failure to State a Claim**

16 Although the court has found that this action is time barred,
17 it will, nonetheless, address Autodesk's argument on the merits.
18 Even if timely, Autodesk maintains that dismissal is proper because

19 ⁷ Having resolved Autodesk's statute of limitations argument on the
20 grounds of failure to timely make a demand, there is no need to consider its
21 alternative argument that PageMasters had notice inquiry of its claim on November
22 26, 2003, when it first filed a motion to join Autodesk as an indispensable party.
The court does have two observations about Autodesk's attempt to invoke what is
commonly referred to as the discovery rule.

23 First, "[t]here is generally little need" to rely upon that rule "in breach
24 of contract cases[,]" such as this. See Leonard v. The College Network, Inc., 2004
25 WL 2944050, at *4 (N.D.Cal. Dec. 17, 2004). The discovery rule may be applied in
"unique breach of contract cases[,]" essentially "involving fraud or
misrepresentation[,]" El Pollo Loco, 316 F.3d at 1039 and 1040 (internal quotation
marks and citations omitted); but, PageMasters' complaint does not include any such
allegations.

26 Second, and more importantly, typically plaintiffs - not defendants - invoke
27 the discovery rule, which "permits delayed accrual until a plaintiff knew or should
28 have known of the wrongful conduct at issue." Id. at 1039 (internal quotation marks
and citation omitted). In light of the foregoing, the court has serious
reservations whether the discovery rule can be applied defensively. Resolution of
that issue can be left to another day however.

1 this action is based on the "unfounded assertion" that it had an
2 obligation under the APA to "demand and perform" an audit of Océ's
3 financial records. Mot. (Doc. 10) at 17:3-4. Autodesk's
4 obligation under the APA was much more limited, it asserts,
5 requiring only that it provide "'reasonable assistance'" to
6 PageMasters in conjunction with the Océ audit. Id. at 16:10
7 (quoting, *inter alia*, RJN (doc. 12), exh. B thereto at 20, § 5.16))

8 Remarkably, PageMasters did not respond at all to this
9 argument. The court construes PageMasters' silence as conceding
10 the validity of Autodesk's argument on the merits. See Tatum v.
11 Schwartz, 2007 WL 419463, at *3 (E.D.Cal. Feb. 5, 2007) (granting
12 defendants' motion to dismiss where plaintiff "tacitly concede[d]
13 . . . claim by failing to address defendants' argument in her
14 opposition[>"). Even without that implicit concession, Autodesk
15 would prevail for the reasons set forth below.

16 A cause of action for breach of contract in California
17 "requires proof of the following elements: (1) existence of the
18 contract; (2) plaintiff's performance or excuse for nonperformance;
19 (3) defendant's breach; and (4) damages to plaintiff as a result of
20 the breach." Nava v. VirtualBank, 2008 WL 2873406, at *10
21 (E.D.Cal. July 16, 2008) (quoting CDF Firefighters v. Maldonado,
22 158 Cal.App.4th 1226, 1239, 70 Cal.Rptr.3d 667 (2008)).
23 "Resolution of contractual claims on a motion to dismiss is proper
24 if the terms of the contract are unambiguous." Monaco v. Bear
25 Stearns Residential Mortgage Corp., 554 F.Supp.2d 1034, 1040
26 (C.D.Cal. 2008) (internal quotation marks and citations omitted).
27 The court must decide in the first instance "whether the contract
28 language is clear or ambiguous[.]" Navarro v. Mukasey, 518 F.3d

1 729, 734 (9th Cir. 2008) (citing Bank of the West v. Superior
2 Court, 2 Cal.4th 1254, 10 Cal.Rptr.2d 538, 545, 833 P.2d 545
3 (1992)).

4 Under California law, “[a] contract provision will be
5 considered ambiguous when it is capable of two or more reasonable
6 interpretations.” Monaco, 544 F.Supp.2d at 1040 (citation
7 omitted). In construing a contract, “[l]anguage . . . must be
8 interpreted as a whole and in the circumstances of the case.” Id.
9 (citation omitted). “Where the language leaves doubt as to the
10 parties’ intent, . . . the motion to dismiss must be denied.” Id.
11 (internal quotation marks and citations omitted). By the same
12 token though, “[i]f the contract language is clear, [the court]
13 give[s] effect to its plain meaning.” Navarro, 518 F.3d at 734
14 (citation omitted); see also Arbor Acres Farm, Inc. v. GRE Ins.
15 Group, 2002 WL 32107944, at *2 (E.D.Cal. Jan. 23, 2002) (internal
16 quotation marks and citation omitted) (“Interpretation of written
17 instrument is solely a judicial function unless the determination
18 turns upon the credibility of extrinsic evidence.”)

19 Here, the parties have differing interpretations of the APA’s
20 single audit provision. As recited earlier, that provision states:

21 [Autodesk] will provide *reasonable assistance* to
22 [PageMasters] *to assist* [PageMasters] in conducting
23 a single audit of Océ’s financial records (as
24 permitted under the Océ Agreement) to verify amounts
due and paid by Océ to [PageMasters] prior to the
Closing, and will pay [PageMasters] the Net Revenues
actually recovered pursuant to such audit.

25 RJN (doc. 11), exh. B thereto at 20, § 5.16 (emphasis added).

26 Quoting directly from section 5.16, Autodesk reads that section as
27 requiring that it provide “reasonable assistance” to PageMasters
28 “to assist” PageMasters in conducting the audit. Apparently, in

1 Autodesk's view, "reasonable assistance" does not encompass
2 demanding the audit of Océ in the first place.

3 Based upon the allegations in the complaint, however,
4 evidently PageMasters is construing section 5.16 as requiring
5 Autodesk to demand an audit of Océ. PageMasters expressly alleges
6 that Autodesk breached "its responsibilities under . . . the
7 [APA][,]" by not "*demand[ing] an audit* of Océ's financial
8 records[.]" Co. (doc. 1) at 3, ¶¶ 9 and 11 (emphasis added). The
9 relief which PageMasters seeks is even broader in scope. As a
10 result of that alleged breach, PageMasters seeks a declaration that
11 "Autodesk is not only required to "*demand . . . an audit* of Océ's
12 financial records[,]" but also to "*perform*" that audit. See
13 id. at 3, ¶ (A) (emphasis added).

14 Applying the familiar rules of contract interpretation
15 construction outlined above, the court finds that section 5.16 of
16 the APA is clear and unambiguous. It is not capable of two or more
17 reasonable interpretations. That section requires, as Autodesk
18 maintains, only that Autodesk give "reasonable assistance" to
19 PageMasters in conducting the audit. Making the initial demand for
20 the audit does not come within the plain and ordinary meaning of
21 "assist." "The American Heritage Dictionary of the English
22 Language defines 'to assist' as '[t]o give help or support to,
23 especially as a subordinate or supplement; aid.'" U.S. v.
24 Approximately 64,695 Pounds of Shark Fins, 520 F.3d 976, 980 (9th
25 Cir. 2008) (quoting *American Heritage Dictionary of the English*
26 *Language* (4th ed.2000)) (emphasis added). Nor under any reasonable
27 interpretation of "assistance" can performance of the audit, as
28 PageMasters seeks in its prayer for relief, constitute mere

1 "assistance." Under the circumstances, the assistance language in
2 the APA, which necessarily includes an element of subordination,
3 cannot reasonably be read to require Autodesk to demand an audit of
4 Océ in the first instance. Moreover, the court cannot ignore the
5 fact that nowhere in the APA is Autodesk under any obligation to
6 "demand and perform" an audit of Océ - the precise relief to which
7 PageMasters claims it is entitled. See Co. (doc. 1) at 3, ¶ (A).
8 Therefore, the court finds that Autodesk is entitled to dismissal
9 of the complaint as against it because it is "clear from the
10 unambiguous terms of the [APA] that the alleged conduct by
11 [Autodesk] does not constitute breach of contract." See Mieuli v.
12 Debartolo, 2001 WL 777447, *5 (N.D.Cal. Jan. 16, 2001) (citations
13 omitted).

14 The court would be remiss if it did not address PageMasters'
15 suggestion that its summary judgment order in PageMasters II
16 somehow governs the scope of the parties' obligations here.
17 PageMasters' reliance upon that order is misplaced because Autodesk
18 was not a party to that action. Therefore, any findings therein
19 cannot be given preclusive effect against Autodesk, based upon the
20 doctrine of collateral estoppel. See Kendall v. Visa U.S.A., Inc.,
21 518 F.3d 1042, 1050 (9th Cir. 2008) (internal quotation marks and
22 citation omitted) ("Issue preclusion prevents a party from
23 relitigating an issue decided in a prior action if four
24 requirements are met[,] including "the person against whom
25 collateral estoppel is asserted in the present action was a party
26 or in privity with a party in the previous action.") Not only that,
27 if PageMasters is attempting to rely upon collateral estoppel, it
28 has failed to meet its burden because it has not proven that each

1 of the four elements of issue preclusion are met here. See id. at
2 1050-1051. Finally, the court notes that consistent with its
3 reading herein of section 5.16 of the APA, in PageMasters II, it
4 read that same section as "merely an agreement between PageMasters
5 and [Autodesk] that *requires* [Autodesk] to allow and *assist* such an
6 audit[.]" RJN (doc. 11), exh. K thereto at 9:11-13 (emphasis
7 added). For all of these reasons, the court finds that PageMasters
8 has failed to state a claim for which relief may be granted against
9 Autodesk.

10 **Conclusion**

11 Having found that this action is barred by California's four
12 year statute of limitations for breach of contract, and that,
13 alternatively, plaintiff has failed to state a cause of action for
14 breach of contract under California law,⁸ IT IS ORDERED that:

15 (1) "Defendant Autodesk, Inc.'s Motion to Dismiss PageMasters'
16 Complaint" (doc. 10) is GRANTED; and the complaint is dismissed
17 with prejudice; and

18 (2) the Clerk of the Court is directed to enter JUDGMENT in
19 favor of defendant Autodesk, Inc. and to terminate the case.

20 DATED this 30th day of March, 2009.

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26 Copies to counsel of record

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28

⁸ Given these alternative bases for dismissal, there is no need to consider Autodesk's laches argument.