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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CENTURY OF PROGRESS PRODUCTIONS; CHRISTOPHER GUEST; ROB REINER PRODUCTIONS; UNITED HEATHEN; and SPINAL TAP PRODUCTIONS,

Plaintiffs,

v.

VIVENDI S.A.; STUDIOCANAL; RON HALPERN, an individual; and DOES 1 through 10, inclusive,

Defendants.

Case No. 2:16-cv-07733-DMG (AS)

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Hearing:	May 5, 2017
Time:	9:30 a.m.
Place:	Courtroom 8C
	350 West 1st Street
Before:	Honorable Dolly M. Gee

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Plaintiffs Spinal Tap Productions ("STP"), Harry Shearer's loan-out company Century of Progress Productions ("CPP"), Rob Reiner's loan-out company Rob Reiner Productions ("RRP"), Michael McKean's United Heathen ("UH") and Christopher Guest ("Guest") hereby oppose Vivendi's and the remaining Defendants' ("Vivendi" or "Defendants") Motion to Dismiss (Doc. 24.)

I. PRELIMINARY STATEMENT

Though titled as a motion to dismiss all but the trademark claim in Plaintiffs' case, Vivendi's Motion in fact admits that Spinal Tap Productions – an entity created by Harry Shearer, Rob Reiner, Christopher Guest and Michael McKean – has claims for breach of contract, breach of the covenant of good faith and fair dealing, accounting and declaratory relief regarding trademark rights, for which Vivendi is not seeking dismissal.

Vivendi instead focuses on the "Non-STP Plaintiffs" – Christopher Guest and the loan-out companies for Harry Shearer, Rob Reiner, and Michael McKean. For reasons disguised in Vivendi's Motion, Vivendi does not dispute that Vivendi must answer to STP for Vivendi's accounting. Rather, Vivendi asserts that it should not be required to answer to the artists who formed STP and for whose sole benefit STP was created.

Vivendi also uses its Motion to issue a grossly inappropriate litigation threat against Harry Shearer. The threat – to file a lawsuit and seek recovery of its lawyers' presumably extravagant attorneys' fees – is purportedly to challenge Shearer's right to issue a copyright termination notice reclaiming copyrights to the musical compositions, sound recordings and characters that appeared in *This Is Spinal Tap*. The threat is legally irrelevant to the current proceedings, in which the copyright termination notice is not a part of the complaint. Yet Vivendi brings the threat, and notably brings it only against Harry Shearer, although similar copyright termination notices were also issued by Rob Reiner, Christopher Guest and Michael McKean more than two months prior to Defendants' filing of their Motion.

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This attempted intimidation is consistent with Vivendi's pattern and practice: Vivendi has failed to enforce trademarks or pay the creators for revenues from unauthorized users of *Spinal Tap* music, merchandise and characters that regularly appear in commerce; yet Vivendi periodically singles out the artist-creators themselves as the target for threatened legal action over Vivendi's purported "intellectual property."

Spinal Tap songs and characters were created for television in 1978, several years before STP entered into any agreement with Vivendi's predecessors. The characters performed live for audiences and the songs were included in a short film also created prior to any contract for the production of *This Is Spinal Tap*. Copyrights to these works belonged, unencumbered, to the creators. Yet Vivendi asserts in its Motion, for no legitimate reason, that all of the co-creators' work constituted "works for hire" to which the artists have no rights.

Vivendi admits that its subsidiary Studiocanal "is now responsible for accounting to STP" and does not dispute the Plaintiffs' allegations concerning the paltry sums it has dispensed. Vivendi's argument that only the four co-creators' production company, but not the co-creators themselves, has standing to prosecute this case fails because the co-creators are clearly intended third-party beneficiaries of the Agreement. However futile, this argument is not properly presented in a motion to dismiss. *See, e.g., Prouty v. Gores Tech. Group,* 121 Cal. App. 4th 1225, 1233 (2004) ("Generally, it is a question of fact whether a particular third person is an intended beneficiary of a contract."); *Bozzio v. EMI Group Ltd.*, 811 F.3d 1144, 1153 (9th Cir. 2016) ("whether [plaintiff] forfeited the ability to sue as a third-party beneficiary is a fact-bound inquiry ill-suited to resolution at the motion to dismiss stage.")

Vivendi's challenges to Plaintiffs' fraud claims as "lacking specificity" are equally specious. The first amended complaint is replete with specific, factual allegations outlining Vivendi's hidden, fraudulent accounting practices and

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Ron Halpern's and his staff's repeated, knowingly false statements that they were providing "accurate and reliable accountings to Plaintiffs." These allegations are more than sufficient to state a claim for fraud, particularly where more expansive evidence of the fraud is in Vivendi's possession and control and can only be obtained through legally compelled discovery.

II. PERTINENT FACTUAL ALLEGATIONS

Shearer, Guest and McKean first performed together live as "Spinal Tap" in a television show in the 1970s. They later performed live as a band in the Los Angeles area. Then, with Reiner, they developed the characters in the "Spinal Tap" band and made a short film with improvised scenes and containing seven songs. In the process of attempting to turn that short film into a feature-length movie, they formed a production company in 1982, "Spinal Tap Productions" or "STP," through which they would provide essential services in regards to the creation of the full-length motion picture *This Is Spinal Tap*. (FAC ¶¶ 25-26, 32.)[1]

On May 7, 1982, Guest and the personal loan-out companies of Shearer, McKean and Reiner (CPP, UH and RRP) as co-owners of STP signed an agreement with Embassy for production, financing, and distribution of the motion picture *This Is Spinal Tap*. The 1982 Agreement was drafted in several sections, including an eleven-page letter agreement; letters of inducement signed by the individual co-creators and their loan-out companies; a one-page Instrument of Transfer attached as Exhibit A; and Embassy's form "Standard Terms and Conditions" attached as Exhibit B. (FAC ¶¶ 30-31, *see also* Exhibit A to Defendants' Motion to Dismiss, hereinafter "Ex. A."))

[1] Loan-out companies are common practice in the entertainment industry. "A loan-out corporation is a legal fiction employed for the financial benefit of successful artists and entertainers. It is a duly organized corporation, typically wholly owned by an artist, the sole function of which is to 'loan out' the services of the artist-owner to producers and other potential employers. The form offers "limited personal liability and beneficial tax treatment." *Bozzio*, 811 F.3d at 1147 (9th Cir. 2016) (citations omitted.)

As confirmed by Embassy's transmittal letter for the Agreement: "The eleven page letter agreement dated May 7, 1982 preceding the inducement letters and the exhibits, ***contains the essence of the deal.***" (Ex. A p. 1 (emphasis added)). That letter agreement clearly shows that the individual co-creators and their personal loan-out companies (the "Co-Creators") were intended third-party beneficiaries of the Agreement. It expressly identifies the Co-Creators as providing essential creative services for the film as "Screenplay Writers," "Composers/Songwriters," "Actors" and, in the case of Reiner, as "Director/Actor." (FAC ¶ 32; Ex. A pp. 5-6.) It also identifies the Co-Creators as the intended beneficiaries of payments resulting from the performance of their services in the form of fixed, deferred and contingent compensation. (FAC ¶¶ 33, 55; Ex. A pp. 5-8, ¶¶ 4-6.) It further states that music royalties are to be paid directly to the individual co-creators. (FAC ¶ 33, Ex. A p. 8 ¶ 6.) The letter agreement provides that "Embassy shall endeavor to add [STP and the Co-Creators] as additional named insureds in its errors and omissions insurance policy." (FAC ¶ 31, Ex. A p. 12 ¶13.) It also makes clear that "[t]o the extent of any inconsistency between this letter and [the] standard terms and conditions [attached as Exhibit B], this letter shall prevail." (Ex. A p. 12 ¶ 13.)

In the years after the film was released, the catalogue of Embassy, including unsuccessful films "bundled" with *This Is Spinal Tap*, was subsequently transferred in a succession of transactions, with Vivendi's subsidiaries ultimately acquiring Embassy's pertinent rights and obligations under the Agreement. (FAC ¶¶ 35-36; Mot. at 1.) As a result, Vivendi subsidiaries began sending some profit participation statements to STP c/o Creative Artists Agency, Reiner's agent. (FAC ¶ 36.) At the same time, Vivendi's agents including Studiocanal executive Ron Halpern, "repeatedly assured Plaintiffs' manager at the time, Harriet Steinberg, that he and his staff were fully complying with the underlying Agreement, were providing accurate and reliable accountings to Plaintiffs, and were using all available means to promote Spinal Tap assets and enforce Spinal Tap intellectual property to maximize revenue

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for the Spinal Tap creators." (FAC ¶ 41; 64.) Plaintiffs reasonably relied on these statements and neither knew, nor could they have known, that these statements were knowingly false when made. (*Id.*)

It was not until in or about November 2013, when Plaintiff CPP learned the results of study that it had commissioned regarding the accounting statements and revenue streams associated with *This Is Spinal Tap*, that CPP first discovered that the statements by Vivendi and its agents were false, and "that Vivendi had engaged in a pattern of anti-competitive and unfair business practices, had abandoned enforcement of valuable [*This Is Spinal Tap*] rights, and had willfully concealed and manipulated years of accountings to retain monies due and owing to Plaintiffs" under the Agreement. (FAC ¶¶ 39, 41.) Plaintiffs Guest, RRP and UH did not become aware of the bases for their claims until after the initial complaint in this lawsuit was filed on October 17, 2016. (*Id.*)

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III. <u>ARGUMENT</u>

A. The Co-Creators Have Standing to Sue on Their Breach of Contract, Implied Covenant and Accounting Claims.

Vivendi admits that Studiocanal is "the successor to Embassy's rights and obligations under the 1982 Agreement" and does not dispute that Plaintiff STP has the right to sue Defendants for breach of contract, breach of the implied covenant of good faith and fair dealing, and an accounting. (Mot. 1, 4.) Vivendi's argument is that Plaintiffs CPP, Guest, RRP and UH (the "Co-Creators") lack standing to sue as non-third party beneficiaries. This argument fails because the Co-Creators are plainly intended third-party beneficiaries of the Agreement.[2]

[2] Although not expressly raised in the Motion, there is no question that the Co-Creators have Article III standing to bring their claims. The Co-Creators allege that they have suffered actual injury as a direct result of Defendants' fraudulent accounting, contractual breaches, and non-payment of royalties "all of which would be paid to them if Defendants had honored their accounting and other obligations under the Agreement." (FAC ¶¶ 55-58.) This is clearly sufficient to establish standing under Article III. *See, e.g., Clinton v. Universal Music Group, Inc.*, No. 07-cv-672-PSG (JWJx), 2007 U.S. Dist. LEXIS 102806,

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1. *<u>The Co-Creators Have Standing to Sue as Third-Party Beneficiaries of the Agreement</u>*

Under California law, "[a] contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it." Cal. Civ. Code § 1559. The term "expressly," however, "has been held not to mean 'exclusively,' 'solely,' or 'primarily' for the benefit of a third person," nor has it been construed "to require that performance be rendered 'directly' to the beneficiary, or that the beneficiary be specifically named or identified in the contract." *Northstar Fin. Advisors Inc. v. Schwab Invs.*, 779 F.3d 1036, 1062 (9th Cir. 2015) (internal citations omitted). Rather, "[t]he effect of the section is to exclude enforcement by persons who are *only incidentally or remotely benefited*.'" *Id.* (emphasis added) (quoting *Lucas v. Hamm*, 56 Cal.2d 583 (1961)).

"[T]he critical issue is '[w]hether the third party is an intended beneficiary.'" *Id.* (citations omitted). "The resolution of this issue, in turn, 'involves construction of the intention of the parties, gathered from reading the contract as a whole in light of the circumstances under which it was entered.'" *Id*. (citations omitted). As a result, whether a third person is an intended third party beneficiary is generally a question of fact which cannot be resolved on a motion to dismiss. *See, e.g., Prouty*, 121 Cal. App. 4th at 1232-33 ("Generally, it is a question of fact whether a particular third person is an intended beneficiary of a contract."); *Bozzio*, 811 F.3d at 1153 ("We agree with [plaintiff] that whether she forfeited the ability to sue as a third-party beneficiary is a fact-bound inquiry ill-suited to resolution at the motion

at *9 (C.D. Cal. July 30, 2007) (denying defendants' motion to dismiss, finding *inter alia* that plaintiff artist had Article III standing where he alleged "that he suffered an actual injury due to Defendants' underpayment and nonpayment of artist royalties" which "would have been paid to him, whether directly or indirectly through [his loan-out company], if Defendants had honored their obligations in the Agreement"), 2008 U.S. Dist. LEXIS 120353 at *11 (C.D. Cal. June 19, 2008) (denying motion for summary judgment based on standing on the same grounds), *affirmed* 376 Fed. App'x. 780, 781 (9th Cir. 2010) ("[Plaintiff] alleges that [defendant] failed to pay him adequate royalties. This allegation is clearly sufficient to establish standing under Article III.")

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to dismiss stage."); *Solid Host, NL v. Namecheap, Inc.*, 652 F. Supp. 2d 1092, 1119 (C.D. Cal. 2009) ("Because they involve factual questions of intent, third party beneficiary claims are often not appropriate for resolution via motion to dismiss.")

Here, the plain language of the Agreement shows that the Co-Creators were intended third-party beneficiaries. The Co-Creators are expressly identified as providing services essential to the creation of the film as "Screenplay Writers," "Composers/Songwriters," "Actors" and, in the case of Reiner, as "Director/Actor." (FAC ¶¶ 31-32; Ex. A pp. 5-6). They are also identified as the beneficiaries of payments resulting from the performance of those services in the form of fixed, deferred and contingent compensation. (FAC ¶¶ 31-33; 55; Ex. A pp. 5-8 ¶¶ 4-6.) With regard to fixed compensation, Paragraph 4(a) of the letter agreement lists the specific fees owed to Reiner, Shearer, Guest and McKean. (Ex. A at pp. 5-6, ¶ 4(a)). With regard to contingent compensation, Paragraph 4(b) states that "12.5% of [STP's] Share of Net Receipts … *shall vest in the Screenplay Writers*" (defined on page 5 as "Rob Reiner, Harry Shearer, Christopher Guest and Michael McKean") (Ex. A pp. 6-7, ¶ 4(b) (emphasis added)). The letter agreement further requires that music royalties be paid directly to the individual co-creators: Paragraph 6 states "fifty percent (50%) of the gross receipts from said music … shall be paid collectively to the *Screenplay Writers*" (defined above) and that if the film's "*Actors*" (defined as "Harry Shearer, Christopher Guest and Michael McKean") perform on a soundtrack album, "they shall receive collectively a royalty of six percent (6%) of the retail price of the album" and that if they produce the album "they shall receive collectively a royalty of three percent (3%) of the retail price of the album." (FAC ¶ 33; Ex. A pp. 6, 8 ¶ 6.)

Federal courts in California have consistently held, in cases with similar facts, that individual artists have standing to sue to recover unpaid royalties as third-party beneficiaries of a contract signed by their loan-out companies. *See, e.g., Bozzio*, 811 F.3d at 1152-53 (9th Cir. 2016) (plaintiff had alleged standing to sue for unpaid

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royalties where the agreement signed by her loan-out company reflected that she "would incur obligations and receive benefits" under the agreement and "contemplate[d] royalty payments to individual artists"); *see also Clinton v. Universal Music Group, Inc.*, Case No. 07-cv-672-PSG, 2007 U.S. Dist. LEXIS 102806 at *9 (C.D. Cal. July 30, 2007) (denying motion to dismiss on grounds that plaintiff had standing to sue where "the Agreement indicated that Plaintiff was an 'Artist' and 'Producer'"; the plaintiff's "services as an artist are recognized as 'the essence' of the Agreement"; and the plaintiff alleged that he would ultimately receive the royalties due under the agreement whether directly or through his loan-out company), 2008 U.S. Dist. LEXIS 120353 at *11(C.D. Cal. June 19, 2008) (denying summary judgment on same grounds), *affirmed*, 376 Fed.Appx. at 781 (9th Cir. 2010) ("Taken in the light most favorable to [plaintiff], the facts suffice to make [him] either a third party beneficiary or a real party in interest."); *see also Northstar Fin. Advisors*, 779 F.3d 1036, 1063-64 (9th Cir. 2015) (investors were intended third-party beneficiaries of the underlying investment agreement where it reflected that they had "more than a 'remote' relationship to the contract.")

2. The "Standard Terms and Conditions" Do Not Abrogate the Co-Creators' Rights as Third-Party Beneficiaries

Defendants improperly rely on language in the form "Standard Terms and Conditions" attached as Exhibit B to the eleven-page letter agreement to argue that the Co-Creators were not intended third-party beneficiaries. (Mot. at 6:6-20). There are two problems with this.

First, the parties expressly agreed in Paragraph 13 of the letter agreement that "[t]o the extent of any inconsistency between this letter and such standard terms and conditions, ***this letter shall prevail***." (Ex. A p. 12 (emphasis added)). Because the letter agreement clearly reflects that the Co-Creators are intended third-party beneficiaries, any language to the contrary in the boilerplate standard terms and conditions must be disregarded.

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Second, even if it applied as written, the language cited by Defendants does not support their argument that the Co-Creators are not third-party beneficiaries. The "no third-party beneficiary" clause states that "[t]his Agreement is not for the benefit of any third party … whether referred to herein or not, *except if and to the extent specifically set forth in Article 1* to the contrary." (Ex. A p. 68 (emphasis added)). Article 1.01 of the standard terms and conditions contains sections that would specifically identify by name the film's "Screenplay Writers," "Director," and "Principal Artist." (*See* Ex. A p. 21.) Although these sections were left blank, they unquestionably refer to the Co-Creators, who are specifically identified by these terms in the letter agreement. (*See* Ex. A pp. 5-6.) Furthermore, when read in the context of the entire agreement, the no-third party beneficiaries clause was plainly intended to refer to incidental third parties who were not expressly named in the Agreement: for example, unnamed employees of the *Spinal Tap* production team who would be entitled to receive payment for their services in connection with production of the film. Such payments were contemplated in the letter agreement, which provides that "at least eight percent (8%) … of the Net Receipts going to [STP] … shall be payable ***to third parties other than*** Reiner, Shearer, Guest and McKean." (Ex. A p. 7 ¶ 4(b)) It is these incidental third parties – not the *Spinal Tap* Co-Creators – that could not bring claims against Embassy.

Nor does the language in Exhibit 1 to the Standard Terms and Conditions support Defendants' position. The cited language states that "Producer [STP] shall be solely responsible out of any Net Receipts payable to Producer for the payment of any sums computed or based upon Net Receipts or Gross Receipts payable to third parties." (Mot. at 6:13-16; Ex. A p. 81) This is similar to language in the Inducement Letters attached to the letter agreement which state that the Co-Creators would "look solely to [STP] for the payment of any and all compensation or other payments which are required to be made to it or on its behalf as a result of the rendition by it of services pursuant to the foregoing Agreement." (Mot. at 7:14-25;

Ex. A pp. 13-20.) Contrary to Defendants' arguments, neither of those provisions reflect an intent to prohibit the Co-Creators from suing Embassy directly to recover unpaid royalties or for other breaches of its contractual obligations. That language only prohibits the Co-Creators from suing Embassy if there was an internal dispute among the individual artists over the internal allocation and distribution of royalties that had been properly accounted for and paid by Embassy to STP. *See, e.g.*, *Bozzio*, 811 F.3d at 1153 (finding this was a viable reading of similar contractual language which prevented dismissal on a motion to dismiss). To the extent that Defendants dispute this point, that dispute raises factual questions regarding the original contracting parties' intent (i.e. Embassy and the Co-Creators) that cannot be resolved on a motion to dismiss.

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3. <u>The Co-Creators Did Not Waive Their Right to Sue As Third-Party Beneficiaries</u>

Defendants also wrongly argue that the Co-Creators waived their right to sue as third-party beneficiaries by signing "Inducement Letters" which state that the Co-Creators will "look solely to [STP] for the payment of any and all compensation or other payments which are required to be made to it." (Mot. at 9.)

This argument was recently rejected by the Ninth Circuit in *Bozzio v. EMI Group Limited*, 811 F.3d 1144 (9th Cir. 2016). The plaintiff in that case -- the front woman of the band "Missing Persons" -- sued to recover unpaid royalties as a third-party beneficiary of a recording contract signed by the band's loan-out company, "Missing Persons, Inc." *Id.* at 1146-47. As part of the agreement, the band members each signed an artist declaration which stated that they would "agree to look solely to [Missing Persons, Inc.] for the payment of my fees and/or royalties … ***and will not assert any claims in this regard against Capitol.***" *Id.* at 1147 (emphasis added). The defendants argued that by signing this artist declaration, the plaintiff had waived any right to sue as a third-party beneficiary. *Id.* at 1152. The Ninth Circuit disagreed, finding that other language in the agreement was

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"in tension" with that conclusion, including provisions showing that the plaintiff and her bandmates would incur obligations and receive benefits under the agreement if the loan-out company ceased to exist, as well as language that "contemplates royalty payments to the individual artists." *Id.* at 1152-53. The Ninth Circuit also found that the language in the artist declaration was susceptible to different interpretations and held that "whether [plaintiff] forfeited the ability to sue as a third-party beneficiary is a fact-bound inquiry ill-suited to resolution at the motion to dismiss stage." *Id.* at 1153. *See also Celador Intern. Ltd. v. Walt Disney Co.*, 347 F. Supp. 2d 846, 858 (C.D. Cal. 2004) (individual plaintiff did not waive standing to sue for breach of contract where he agreed to "look solely" to the company that signed the agreement for "any and all compensation to which [he] may be entitled.")

Defendants' waiver argument fails for the same reasons. Just like in *Bozzio*, the Agreement here provides that the Co-Creators would provide essential services to Embassy for which they would receive benefits, including payment of royalties, and would also incur obligations to Embassy. For example, the Inducement Letters each provide that the Co-Creators could be directly sued by Embassy for any breach of the Agreement by STP, and that if STP ceased to exist, then each of the Co-Creators would be obligated to "comply with all of the terms and provisions of the foregoing Agreement and shall perform all of the personal services required of it thereunder." (*See* Ex. A pp. 13-19, subd. (b), (d)).

Furthermore, in contrast to *Bozzio* where the artist declaration clearly stated that the plaintiff "***will not assert any claims … against Capitol***," the Inducement Letters here merely state that the Co-Creators will "look solely to [STP] for the payment of any and all compensation or other payments which are required to made to it or on its behalf…." (Ex. A pp. 13-19, subd. (c)). As the Ninth Circuit found in *Bozzio*, this language does not unequivocally mean that the Co-Creators waived their right to sue Embassy to recover unpaid royalties. Rather, it reflects the parties' intent that the Co-Creators were only prohibited from bringing claims against

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Embassy involving internal disputes as to the allocation and distribution of royalties that had already been properly accounted for and paid by Embassy. *See id.* at 1153.

To the extent there is any dispute or ambiguity, it cannot be resolved on the pleadings. *Bozzio*, 811 F.3d at 1153; *Florence W. Med. Clinic v. Bonta*, 77 Cal. App. 4th 493, 504 (2000) ("Waiver always rests upon intent. Waiver is the intentional relinquishment of a *known right after knowledge of the facts*. The burden, moreover, is on the party claiming a waiver of a right to prove it by clear and convincing evidence that does not leave the matter to speculation, and 'doubtful cases will be decided against a waiver.'") (internal citations omitted).

B. Plaintiffs Have Stated a Claim for Fraud.

1. The Co-Creators Have Standing to Sue for Fraud

Defendants' argument that the Co-Creators lack standing to sue for fraud fails for the reasons set forth above: as third-party beneficiaries of the Agreement the Co-Creators have standing to sue for injuries caused by Defendants' knowingly false representations that they were fully complying with the Agreement and were providing accurate and reliable accountings to Plaintiffs. *See, e.g., Shafer v. Berger Kahn, Shafton, Moss, Figler, Simon & Gladstone*, 107 Cal. App. 4th 54, 80 (2005) ("Just as an insurer may be held liable for defrauding its insured, so an insurer should not be allowed to deceive a third party beneficiary of the insurance policy.") (citations omitted); *NovelPoster v. Javitch Canfield Group.*, No. 13-cv-05186-WHO, 2014 WL 5687344 at *6 (N.D. Cal. Nov. 4, 2014) ("claims for fraud … do not require a contractual relationship between the plaintiff and the defendant"); *Diamond Woodworks, Inc. v. Argonaut Ins. Co.*, 109 Cal. App. 4th 1020, 1043 (2003) (an insurer's bad faith in respect to its obligations made for the third party's benefit "creates a proper basis for tort recovery by the third party beneficiary.")

The cases cited by Defendants are inapposite. In *Ambers v. Wells Fargo Bank, N.A.* No. 13-cv-03940 NC, 2014 WL 883752, at *4 (N.D. Cal. March 3, 2014) the plaintiff did "not allege or even argue in her opposition [to the motion to

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dismiss] that she was a party, or a third-party beneficiary of the agreements … or that she has some other basis to assert standing to bring the claims in [the] action." In *Hatchwell v. Blue Shield of California*, 198 Cal. App. 3d 1027, 1034 (1988) the court held that the plaintiff did not have standing to sue under her husband's health insurance policy for wrongful denial of benefits *to her insured husband*, not a denial of benefits to her under the policy. In *Mega Life Health Ins. Co. v. Superior Court*, 172 Cal. App. 4th 1522, 1531 (2009) the court held that the plaintiff could not assert a "separate and individual tort claim" based on alleged misrepresentations that the defendant insurance company made to his wife because the policy was issued solely to her and did not identify the plaintiff anywhere, making him "a stranger to the insurance contract." Similarly, in *Schauer v. Mandarin Gems of California Inc.*, 125 Cal. App. 4th 949, 952 (2005) the court held that the plaintiff could not sue a jeweler for fraud based on alleged misrepresentations made to her former husband regarding the value of an engagement ring absent an assignment of her husband's rights because she was not a party to the sales contract and could not allege that she had entered into the contract to her detriment in reliance on the jeweler's misrepresentations. *Id.* at 960. In *NovelPoster*, 2014 WL 5687344, the plaintiffs did not argue that they had standing to sue as third-party beneficiaries, and the court's holding was based solely on the fact that they failed to allege that they had any rights under the contract. *Id.* at *5-7. The court recognized that "claims for fraud … do not require a contractual relationship between the plaintiff and defendant," but found that plaintiffs lacked standing to assert fraud claims because the alleged injuries all arose directly from the underlying contract. *Id.* at *6.

By contrast, the Co-Creators here are expressly identified in the Agreement as the intended third-party beneficiaries of Embassy's obligations to truthfully account and pay all royalties and other monies due under the Agreement. Defendants went beyond mere contractual breaches of those obligations by making knowingly false statements to the Co-Creators that Defendants "were fully

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complying with the underlying Agreement, were providing accurate and reliable accounting to Plaintiffs, and were using all available means to promote *Spinal Tap* assets and enforce *Spinal Tap* intellectual property to maximum revenues for the Spinal Tap creators." (FAC ¶ 41.) Because the Co-Creators relied, to their detriment, on these false representations, the Co-Creators have standing to sue Defendants for fraud. (FAC ¶¶ 41, 64-68.)

2. Defendants' Fraudulent Conduct is Separately Actionable

Plaintiffs' fraud claim is not "functionally identical to the contract claim." (Mot. at 11.) The fraud claim is based on tortious conduct that is separate and distinct from Defendants' contractual breaches.

The breach of contract and accounting claims are based on Defendants' failure to perform their contractual obligations, including to properly account for and remit to Plaintiffs all royalties and other monies owed them under the Agreement. (*See* FAC ¶¶ 54-57; 60-62; 70-73.) These claims only require evidence that the contractual obligations were not met, and are cognizable regardless of whether Defendants had any intent to defraud Plaintiffs. By contrast, the fraud claim is based on Defendants' malicious, tortious conduct designed to defraud plaintiffs. Specifically, Defendants' knowingly false representations, both through affirmative misrepresentations that they were providing accurate and reliable accountings to Plaintiffs in full compliance with the agreement, and through fraudulent concealment in each of the profit participation statements of Vivendi's anti-competitive and unfair business practices in its cross-collateralization of revenues from different Vivendi subsidiaries, including the improper and disproportionate allocation of costs and bundling and cross-collateralization of unsuccessful films in the Embassy catalogue. (*See* FAC ¶¶ 36-37; 40-42, 64.)

California courts have consistently held that fraud claims are permissible where the defendant had an obligation to pay royalties, but knowingly concealed and/or misrepresented the amount of those royalties to the recipient's detriment.

For example, in *Roddenberry v. Roddenberry*, 44 Cal. App. 4th 634, 665 (1996), the California Court of Appeals affirmed the jury's finding of liability on a claim for fraud when the defendant represented that it was paying plaintiff one half (1/2) of all royalties when it was actually paying only one third (1/3) of royalties and concealed this fact:

> [Defendant] was under a duty to disclose because it was handling money belonging to [plaintiff]. Even if a fiduciary relationship is not involved, a nondisclosure claim arises when the defendant makes representations but fails to disclose additional facts which materially qualify the facts disclosed, or which render the disclosure likely to mislead. The evidence amply supported the finding that [defendant] concealed the true facts in the hope that [plaintiff] would accept [defendant's] payments and never discover that she was receiving only a third.

Similarly, in *H.B. Filmes, LTDA v. CBS, Inc.*, 98 F.App'x 596 (9th Cir. 2004) the Ninth Circuit reversed the district court's grant of summary judgment on plaintiff's fraud claim, finding that the plaintiff had offered sufficient evidence to support "its allegation that the figures appearing in [defendant's] monthly participation statements did not accurately represent the revenues attributable to [the film at issue]." *Id.* at 599. The Ninth Circuit also rejected the defendant's argument that the fraud claim was not actionable under California law because it "concerns an alleged fraud in the performance of a contract." *Id.*[3]

3. <u>The Fraud Claim is Pled with Specificity</u>

To satisfy Rule 9(b), the complaint "must state with particularity the circumstances constituting fraud." Fed. R. Civ. P. 9(b). "The purpose of this rule is to ensure that defendants accused of the conduct specified have adequate notice of

[3] *See also Davis v. Capitol Records, LLC*, No. 12-cv-1602 YGR, 2013 WL 1701746, at **5-6 (N.D. Cal. Apr. 18, 2013) (claims related to failure to pay royalty payments are cognizable under the UCL's fraudulent prong); *Dead Kennedys v. Biafra*, No. A094272, 2003 WL 21399983, at *9 (Cal. Ct. App. June 18, 2003) (fraud verdict upheld where plaintiffs relied to their detriment on defendant's continual, false representations that its payment of royalties to respondents was accurate.)

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what they are alleged to have done, so that they may defend against the accusations." *Concha v. London*, 62 F.3d 1493, 1502 (9th Cir. 1995).

Plaintiffs' complaint clearly meets this standard. In addition to alleging extensive background about Defendants' ongoing fraudulent accounting scheme, the First Amended Complaint specifically alleges that:

> Vivendi is responsible for accounting under the Agreement …. Those profit participation statements, Plaintiffs have recently discovered, reflect anti-competitive and unfair business practices in their cross-collateralization of revenues between different Vivendi subsidiaries; unfairly bundle and cross-collateralized unsuccessful films in the Embassy catalogue with TIST; were not delivered to other creators; and fraudulently underreported the revenues owed to Plaintiffs. (FAC ¶ 36.)

> Ron Halpern, during his management of the exploitation of TIST, repeatedly assured Plaintiffs' manager at the time, Harriet Steinberg, that he and his staff were fully complying with the underlying Agreement, were providing accurate and reliable accountings to Plaintiffs, and were using all available means to promote Spinal Tap assets and enforce Spinal Tap intellectual property to maximize revenue for the Spinal Tap creators. These assurance by Mr. Halpern and Vivendi have continued to the present day. Plaintiffs have reasonably relied on these representations. But the statements by Ron Halpern and Vivendi were knowingly false when made …. (FAC ¶ 41.)

> Defendants, by and through their agent Ron Halpern, repeatedly made statements to Plaintiffs' agents that Mr. Halpern and his staff were fully complying with the underlying Agreement, were providing accurate and reliable accountings to Plaintiffs, and were using all available means to enforce Spinal Tap trademarks and copyrights and to maximize revenue for the Spinal Tap creators. These statements were knowingly false when made and were made with the intent that Plaintiffs rely on them. Plaintiffs reasonably relied on these statements. (FAC ¶ 64.)

While these allegations are sufficiently specific to state a claim for fraud, Plaintiffs undoubtedly will uncover further evidence of the fraud through discovery in this lawsuit. Given that such evidence is in Defendants' possession and control, dismissal at this early stage is particularly unwarranted. *See Neubronner v. Milken*,

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6 F.3d 666, 672 (9th Cir. 1993) (with respect to fraud claims, the requirements of "Rule 9(b) may be relaxed with respect to matters within the opposing party's knowledge" because "[i]n such situations, plaintiffs cannot be expected to have personal knowledge of the relevant facts.")

4. *The Fraud Claim is Not Time-Barred*

Defendants' argument that the fraud claim is time-barred because it is based on false statements that Halpern made in 2000 is a red herring. (Mot. at 13-14.) While those statements were undoubtedly false, and reflect Halpern's mendacity, they are not the misrepresentations upon which the fraud claim is based.[4]

The fraud claim is based on different false statements which "have continued to the present day." (FAC ¶ 41.) Specifically, (i) Defendants' repeated, knowingly false representations by Mr. Halpern and his staff that they "were fully complying with the underlying Agreement, were providing accurate and reliable accountings to Plaintiffs, and were using all available means to promote Spinal Tap assets and enforce Spinal Tap intellectual property to maximize revenue for the Spinal Tap creators"; and (ii) Defendants' ongoing submission of cumulative profit participation statements which willfully concealed Defendants' illegal accounting practices and fraudulently underreported royalties owed to Plaintiffs. (FAC ¶¶ 39-41; 64-68.) These falsehoods continue even today, as shown by Defendants' representation in their motion to dismiss that they have "accounted and paid STP's participation in accordance with the Agreement." (Mot. at 2.)

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[4] Halpern's statements to Harry Shearer in 2000 that the re-release rights for *Spinal Tap* were being assigned to a small "boutique" distributor -- while provably false -- did not put Shearer on notice concerning Defendants' fraudulent accounting. As alleged in the first amended complaint, although "Mr. Shearer knew then that Ron Halpern was mendacious" he "never imagined, until his review of a report in or about November 2013, that Halpern was capable of the level of deception and willingness to subvert contractual obligations that characterized Halpern's mistreatment of the Spinal Tap creators." (FAC ¶ 42.)

IV. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court deny the motion to dismiss in its entirety or, alternatively, grant them leave to amend to cure any perceived deficiency with the First Amended Complaint.

Dated: March 29, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 29, 2017, I electronically filed a true and correct copy of the foregoing **PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS** through the Court's CM/ECF system, which will send a notice of electronic filing to all interested parties in the action through their counsel of record as follows:

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