2d Civil No. B 077509

IN THE COURT OF APPEAL OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FIVE

MAIN LINE PICTURES, INC., a Delaware corporation,

Plaintiff and Respondent,

vs.

KIM BASINGER, an individual; MIGHTY WIND PRODUCTIONS, INC., a California corporation; INTERNATIONAL CREATIVE MANAGEMENT, INC., a Delaware corporation, et al.,

Defendants and Appellants.

Appeal from the Los Angeles County Superior Court
Honorable Judith C. Chirlin, Judge, Case No. BC 031180

OPENING BRIEF OF APPELLANTS KIM BASINGER AND MIGHTY WIND PRODUCTIONS, INC.

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INTRODUCTION

Main Line Pictures, Inc. ("Main Line") obtained an $8.1 million judgment against Kim Basinger ("Basinger") "and/or" Mighty Wind Productions, Inc. ("Mighty Wind") for assertedly breaching an oral and an unsigned written contract for Basinger to appear in Main Line's proposed film, "Boxing Helena," the story of a man who amputates a woman's arms and legs and keeps her in a box in order to win her love. The case has received widespread publicity as a "test" of how the entertainment industry does business. In fact, it is nothing of the sort. While Hollywood may have its oddities (not the least of which is Boxing Helena), it is not exempt from the established law of contracts nor from any of the other accepted legal principles which routinely govern California's trial courts and citizenry.

This case is riddled with prejudicial errors of the most elementary nature, undermining such settled legal concepts as the requirement that special verdicts must resolve the issues presented to the jury, the presumption that a corporation and its shareholders are separate, the requirement that preliminary negotiations cannot result in a binding contract unless there is agreement to all material terms, and the rule that damage awards which include lost profits must be for net, rather than gross, lost profits.

A quick glance at the judgment will give this court its first insight into the sort of profound mistakes that were made below. Specifically, the judgment was entered against Basinger "and/or" Mighty Wind. By statute, that was the only judgment the court could enter, once it acquiesced to Main Line's insistence that the special verdict form be couched in "and/or" terms. But controlling decisional law establishes that a verdict or judgment against one party "and/or" another is incomprehensible as a matter of law; it gives no clue as against whom liability is supposed to be imposed. This error alone requires reversal of the judgment; moreover, because Main Line insisted that the erroneous verdict form be utilized and stated it was willing to take the risk, the reversal must be with directions to enter judgment in defendants' favor, as this court recently held under closely analogous circumstances. Resolution of this issue in defendants' favor disposes of the entire case.

If, however, the court opts to look further, it will quickly discover there was never any contract, oral or written. This error, too, requires reversal with directions. The Screen Actors Guild ("SAG") collective bargaining agreement, which applies to this case, requires an artist's prior written consent to perform in the nude. Since Boxing Helena required nudity and since Basinger

never gave written consent to act in the nude, there was never any enforceable oral or written contract. Moreover, the "written contract" upon which Main Line sued was simply the latest in a series of contract drafts, which no one ever signed. The draft was unenforceable because uncontroverted objective evidence--the type which governs issues of contract formation--unequivocally established the parties did not intend to be bound until they signed; moreover, two of the draft's provisions (as well as the presence of the signature lines themselves) expressly required that the agreement be executed. There was also no written contract because the draft did not address nudity with the specificity SAG requires; it left that key issue to future agreement of the parties. Further, Main Line sent the draft to defendants to be signed at a time when it admittedly knew that agreement on another key term (script approval) had not yet been reached.

Even though there could not legally be any oral or written contract, the jury found the existence of both. This finding would be puzzling but for the jury instructions that were given. In them, the court repeatedly misinstructed the jury concerning the central issue in this case--how a contract can be created: (1) The court misinstructed the jury that preliminary negotiations can lead to formation of a binding contract when all the essential terms are merely understood, undermining the most elementary of contract principles, the requirement that there can be no contract without both understanding and agreement as to all material terms. (2) The court erroneously instructed that industry custom and practice can be considered in determining whether a contract is created, thus improperly permitting the jury to find that a binding contract was formed based on testimony that the entertainment industry customarily considers brief memoranda and unsigned contracts to be binding; this contravened the elementary principle that the law, not an industry (not even Hollywood), decides when a contract is binding. (3) The court misinstructed the jury on estoppel, erroneously permitting the jury to find the ultimate fact that Basinger had agreed to act in Boxing Helena and, therefore, had entered into a binding contract, if it found that Main Line relied on any representation made by Basinger on any issue, even though the representation had nothing whatever to do with whether she agreed to act in the film; this instruction, of course, violated the rule that estoppel to deny a fact applies only to the fact represented, not to other facts. Unquestionably, it was these errors--alone and in combination--that led the jury to believe there was a contract when, in fact, one could not possibly have existed.

The court committed further egregious instructional error when it refused to give the standard BAJI instruction (BAJI 15.02) that each defendant is entitled to separate consideration. The court

failed to comprehend (or disagreed with) the elementary principle that corporations and individuals are separate entities unless proven otherwise. This error, too, caused enormous prejudice because there was substantial evidence, including testimony by Main Line's president and language appearing in the very document Main Line drafted and claimed was the parties' written contract, that the only contract ever contemplated by the parties was between Main Line and Mighty Wind, not Basinger.

Even if the incomprehensible "and/or" liability "finding" and the multiple instructional errors could somehow withstand scrutiny, the $7.4 million compensatory damage award cannot. Uncontroverted evidence established that the jury improperly awarded gross lost profits, rather than net lost profits as required by the instructions and by law. There is not a shred of substantial evidence which would support a lost profit award greater than the net number, $877,143.

Even the pro forma act of awarding attorney's fees and costs was botched. The trial court awarded Main Line more than $400,000 in attorney's fees because of an indemnity clause in the draft contract, even though a recent decision of this court expressly prohibits attorney's fees based on an indemnity clause. The court then added additional costs of almost $200,000, even though the governing cost statute expressly prohibits the costs that were awarded.

Finally, the jury engaged in misconduct, not only by awarding gross (rather than net) profits, but also by discussing experiences outside the evidence as a basis for its verdict. Although the trial court refused to permit the jury to see any of Basinger's prior movies, several jurors informed the others that they had seen one, that it contained nudity and that, therefore, Basinger should not have been concerned about the nudity required in Boxing Helena. This conduct, too, requires reversal.

Time after time, on issue after issue, defendants were the victims of the most glaring errors. It is small wonder, then, that the jury strayed so far from factual and legal reality. As we demonstrate in our first two arguments, the judgment should be reversed with directions to enter judgment in favor of defendants because: (1) Main Line induced the court--over strenuous defense objections--to use the improper and meaningless "and/or" special verdict form and stated it was willing to take the risk of reversal on that ground; and (2) there is no substantial evidence of either an oral or a written contract. Alternatively, because of the multiple prejudicially erroneous jury instructions, the lack of evidentiary support for the damage award and the prejudicial jury misconduct, the judgment must be reversed and remanded for a new trial. In any event, the judgment may not--under any circumstances--exceed the net profit figure of $877,143.

STATEMENT OF RELEVANT FACTS

A. The Parties.

Plaintiff Main Line is a film company whose president, Carl Mazzocone, was producing Boxing Helena as his first movie. (RT 724-725, 735.) Associated with Main Line were Larry Sugar, Boxing Helena's executive producer (RT 266), and Jennifer Lynch, an independent contractor who wrote the screenplay and was to direct Boxing Helena, her first film. (RT 179-180, 201-202, 432.)

Defendant Kim Basinger is an actress who has appeared in many movies including Batman, The Marrying Man, 9 1/2 Weeks and Cool World. (RT 1173, 1176-1178.) Defendant Mighty Wind is a California corporation which acts as a "loanout" company contracting for Basinger's services. (CT 2-3; RT 780, 1111-1112.)

B. Initial Discussions.

On December 28, 1990, Mazzocone wrote Basinger through J.J. Harris, an agent at Basinger's talent agency, offering her $500,000 plus additional deferred compensation to star in Boxing Helena. (Ex. 3.) The offer was contingent on a meeting between Basinger and Lynch. (Ex. 3; RT 746-747.) After Basinger reviewed the screenplay, she met with Lynch at Mighty Wind's offices on January 11, 1991. (Ex. 3; RT 196-197.) Basinger told Lynch the subject matter was "magical," the screenplay well-written (RT 198); Basinger said she felt a kinship with the project (RT 200). Lynch reported to Mazzocone that Basinger loved the screenplay. (RT 748.) After the meeting, Lynch learned from Mazzocone that Basinger was concerned about the nudity the film required and how the nude scenes were to be shot. (RT 202, 204.)

Lynch and Basinger met again on January 18 to address Basinger's concerns; at that meeting, they discussed how the nude scenes might be shot. (RT 203-207.) After Lynch reassured her, Lynch believed there was agreement on how the nudity would be filmed. (RT 206-207, 396.) Lynch knew, however, there would be continuing negotiations to "get a document everybody agreed to and signed." (RT 414-415.)

C. The Preliminary Negotiations.

In late January, Robert Wyman, Main Line's attorney, became involved in the negotiation process. (RT 495-498.) Robin Russell, an attorney with Basinger's talent agency, and Julie Philips, Basinger's attorney, began negotiations with Wyman. (RT 503-511.) After two telephone conversations on February 27, Wyman sent Philips a memorandum referred to as the "deal memorandum," dated February 27, 1991. (RT 513-514, Ex. 22.)

D. The "Deal Memorandum."

Among other things, the February 27 "deal memorandum" recited that Basinger would receive specified compensation,[1/] gave Basinger "[s]cript approval provided that Artist pre-approve the script which has been currently submitted to her," and addressed other issues. (Ex. 22; RT 516-522.) The "deal memorandum" did not mention or otherwise address nudity, although nudity concededly was a "deal point." (Ex. 22, RT 631.) Wyman thought the parties had reached an agreement on February 27 (RT 514-515); Philips, however, did not (RT 1694).

E. Basinger Immediately Responds to the "Deal Memorandum" with Changes.

Philips responded to the "deal memorandum" the next day (February 28, 1991) by adding to and revising its terms. (Ex. 24.) The revisions included altering the proposed start date of the film, the number of days Basinger would work for free during post-production, and the definitions governing some of the deferred compensation clauses. (Ex. 24.)

Philips' February 28 revisions also added to the script approval clause the statement: "Any changes are subject to Artist's approval." (Ex. 24.) Further, Philips raised six points that had not been mentioned in the "deal memorandum." (Ex. 24.) One of Philips' points provided: "Nudity--none & no body doubles" (Ex. 24; RT 1638); another declared: "Loan out Company is Mighty Wind Productions." (Ex. 24; RT 780.) According to Mazzocone, this last statement was to inform him: "That's who the contract should be made with and that's where the payment [should] be paid--

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1/ The "deal memorandum" provided for "guaranteed compensation" of $600,000; "gross deferrable" compensation payable out of "first receipts of producer of $400,000"; "adjusted gross receipts . . . of $1,000,000 payable out of 35% of "producer's receipts"; and "adjusted gross receipts deferment of $1,000,000 payable out of 25% of "producer's receipts." (Ex. 22.)

to Mighty Wind" (RT 780); according to Wyman, the payments for Basinger's services would be made to Mighty Wind and Mighty Wind would then pay Basinger. (RT 538-539.)

F. The First "Long Form Agreement" Draft.

On March 7, 1991, after telephone conversations between Wyman and Philips, Wyman prepared the first "long form" draft of the agreement. (EX 30; RT 527-539.) He sent it to Philips with a cover letter describing it as "a proposed Agreement between Main Line Pictures, Inc. and Mighty Wind Productions, Inc. f/s/o Kim Basinger."[2/] (Ex. 30.) Wyman's letter asked Philips to review the draft and stated: "[S]hould it meet with your approval, I will immediately prepare execution copies." (Ex. 30.) The letter cautioned, however, that Wyman "reserve[d] the right to make any changes" his client might request. (Ex. 30.)

The initial long-form draft defined Main Line as "Producer," Mighty Wind as "Lender," and Basinger as "Artist"; it provided, among other things, that "Lender and Artist shall be deemed pay or play for Lender's fixed compensation upon the securing of a production loan for the Picture." (Ex. 30, p. 1.) "Pay or play" is a clause which guarantees an artist compensation even if the film is not made. (RT 499-500, 1643-1671.)

G. Exchange of Multiple Drafts of Long Form Agreement.

Philips responded to Wyman's initial long-form draft with extensive revisions. (Ex. 32.) For example, she changed the pay or play clause to read: "Lender and Artist are deemed pay or play for Lender's fixed compensation" (Ex. 32, p. 1); she asked for escrow or "some security" of the guaranteed compensation of $600,000 (Ex. 32, p. 2); and she made changes to clauses governing compensation, nudity and script approval. (Ex. 32.) In her cover letter to Wyman, Philips, too, reserved the right to "suggest additional comments." (Ex. 32.)

In response to Philips' changes, Wyman further revised the long-form agreement; his new draft changed the pay or play clause to state: "Lender and Artist shall be deemed pay or play for Lender's fixed compensation upon the execution of this Agreement." (Ex. 34, p. 1.) He also added an escrow provision requiring "Artist's cash compensation" to be deposited into escrow four weeks before photography begins. (Ex. 34, p. 2.) He substantially redefined the terms governing how

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2/ The letters "f/s/o" mean "for services of." (RT 1667.)

deferred compensation would be computed, so as to allow Main Line to recoup its costs before paying any deferred compensation. (Ex. 34, pp. 3-4.)

Negotiations continued. In her next draft, Philips suggested substantial further revisions, including that $100,000 be placed in escrow "on signature." (Ex. 42, p. 3.) Philips also circled the entire nudity clause and noted: "[Basinger] and [Lynch] still must discuss." (Ex. 42, p. 8.) Four more drafts were exchanged, with both parties making further extensive revisions. (Ex. 49, 57, 66, 72.) Both parties accompanied each draft with a transmittal letter expressly reserving the right to make further changes. (Ex. 34, 42, 49, 57, 66, 72.) Each draft contained signature lines for Main Line "by" Mazzocone and Mighty Wind "by" Basinger. (Ibid.)

While the revision process continued, Main Line began preproduction in April, 1991. (RT 826.)

H. The Dispute Regarding Script Approval.

Basinger changed agents during April; Guy McElwaine of International Creative Management, Inc. ("ICM"), began representing her. (RT 2175-2176.) On May 6, Lynch learned Basinger had reservations about the script. (RT 390-391, 466, 832.) On May 8, Philips sent Mazzocone a letter apprising that photography would not start until Basinger approved the expected script revisions. (RT 837.)

Lynch began rewriting the script and sent her revisions to Basinger on May 23. (RT 236.) Even though Mazzocone and Wyman knew that script approval discussions were still in progress, Mazzocone instructed Wyman to send out "execution copies" of the long form agreement. (RT 1023-1024, 1867-1868.)

I. The Execution Draft of the Long Form Agreement.

In accordance with Mazzocone's instruction, Wyman sent an "execution" draft of the long form agreement to Philips on May 29. (RT 609.) The letter accompanying the draft stated: "Enclosed . . . you will find four execution copies of the agreement between Main Line Pictures, Inc. and Mighty Wind Productions, Inc. f/s/o Kim Basinger." (Ex. 76.)

The execution draft had two signature lines, one for "Main Line Pictures, Inc. by Carl Mazzocone" and one for "Mighty Wind Productions, Inc. by Kim Basinger." (Ex. 76, p. 12;

CT 24.) Attached was an eight page "loanout agreement" which provided that Mighty Wind, referred to therein as "Employer," agreed to loan the services of Basinger to Main Line to make the movie. (Ex. 76, pp. 13-22; CT 25-34.)

Among other things, the terms of the execution draft provided: (1) "Lender (Mighty Wind) and Artist (Basinger) shall be deemed pay or play for Lender's fixed compensation upon the execution of this agreement by Lender and Artist" (Ex. 76, p. 1; CT 13; emphasis added); (2) $100,000 of the cash compensation would be deposited into escrow "upon the execution of this Agreement" (Ex. 76, p. 3; CT 15; emphasis added); (3) "[t]he Director of the Picture shall consult with the Artist with respect to the nude scenes and it is agreed that said scenes shall be photographed in an artistic, not prurient, manner" on a closed set (Ex. 76, p. 9; CT 21); and (4) "[u]nless and until superseded by a more formal signed agreement," the execution draft superseded all other agreements and understandings. (Ex. 76, p. 11; CT 23.)

J. Philips Objects and the Parties Continue to Discuss Script Revisions.

On May 30, 1991, Philips responded to Wyman's execution draft with a letter stating it was her understanding that script approval was still pending and that the long form agreement required modification to state the initial payment would not be due until Basinger approved the script. (Ex. 78; RT 610.) Wyman responded by letter conceding that script changes had been made and "sent to [Basinger] for her review." (Ex. 79.)

K. The Negotiations End and Litigation Commences.

In early June 1991, Basinger and Lynch met and continued to discuss ways in which the script could be revised; they were unable to agree on proposed changes. (RT 240-241, 246-247, 1555-1556.) On June 10, Philips wrote Main Line confirming that the parties were unable to reach agreement. (RT 851-852; CT 35-36.) The execution draft was never signed. (Ex. 76.) Eleven days later, Main Line filed this lawsuit. (Ex. 76; CT 1.)

Main Line eventually produced Boxing Helena starring Sherilyn Fenn. (RT 217, 806.)

L. The Damages.

At trial, Sugar testified that on February 28, 1991, he began preselling the film in foreign markets, with Basinger's name attached.[3/] (RT 351-353.) Ultimately, foreign presales of the film marketed as starring Basinger totaled $6.8 million; however, all the foreign-presale money was to be spent making the film. (RT 296, 805, 859.) Domestic rights to Boxing Helena with Basinger starring were never sold; however, Jeff Rose, a former employee of Miramax, testified that, based on a Miramax proposal that Main Line never accepted, the value of such rights would have been "in the range of" $3 million. (RT 1578-1582.) Main Line claimed "preproduction" costs associated with producing Boxing Helena of $258,694 (Ex. 91); the claimed expenses began on March 8, 1991, and continued at least through August, 1992 (Ex. 91).

Foreign presales of the Fenn film were $2.8 million. (RT 305.) As of the date of trial, Main Line claimed it had not sold domestic rights to the Fenn film. (RT 2378.) The budget for the Fenn film was $4.8 million. (RT 2082.)

At trial, Louis Wilde, Main Line's expert, testified that, based on a theory which he devised, there was a "profit differential" of $5.1 to $9.7 million between the Basinger and Fenn projects. (RT 2078.) Wilde admitted, however, his "profit differential" analysis was just a "theory" which had nothing to do with lost profits (RT 2083, 2101-2102) and which was not based on accepted accounting principles (RT 2133-2135).

Further facts will be discussed as they relate to particular issues.

3/ Presales are licensing rights to distribute a film in a particular country before it is actually produced. (RT 269-270.)

STATEMENT OF THE CASE

A. The Complaint.

On June 21, 1991, Main Line sued Basinger, Mighty Wind and ICM for breach of contract, bad faith denial of the existence of a contract, and inducing breach of contract. (CT 1-36.) Attached to the complaint as the asserted written contract was a copy of the May 29, 1991, execution draft. (CT 13-34.) The complaint did not include any allegation that Mighty Wind and Basinger were alter egos. (CT 1-11.)

B. The Trial and Verdict.

Trial was by jury.[4/] The special verdict form posited inquiries on four theories: the existence of a binding oral contract, the existence of a binding written contract, estoppel, and wrongful denial of the existence of contract. (CT 1501-1504.) Over vehement defense objections, the court utilized a special verdict form which was couched in terms of whether Basinger "and/or" Mighty Wind entered into an oral contract; whether Basinger "and/or" Mighty Wind entered into a written contract; whether Basinger "and/or" Mighty Wind breached "a" contract; and whether breach of "a" contract caused Main Line damages. (CT 1501-1504.)

The jury unanimously found that Basinger "and/or" Mighty Wind entered into an oral contract (CT 1501-1506; RT 2093-2099); by vote of 9 to 3, it found Basinger "and/or" Mighty Wind entered into a written contract (ibid.); and it unanimously found that Basinger "and/or" Mighty Wind breached "a" contract (CT 1503) and that the breach was the legal cause of Main Line's harm (CT 1504).[5/] By 9 to 3 vote, the jury assessed damages for breach of contract at $7,421,694.00. (CT 1505.)

4/ At the conclusion of the evidence, the trial court granted nonsuit in favor of ICM. (CT 1595.) Since Main Line has not appealed, issues concerning ICM and McElwaine will not be discussed.

5/ The jury also found that Basinger, "on or after February 27, 1991, ma[d]e representations . . . that [she] had contracted to perform in the film 'Boxing Helena,'" but that Basinger should not reasonably have expected Main Line to change its position as a result of those representations. (CT 1501-1502.)

The jury further determined that Basinger "and/or" Mighty Wind denied in bad faith the existence of a contract, and it awarded an additional $1.5 million as damages for such conduct (CT 1505); however, the jury declined to award punitive damages (RT 2951; CT 2193-2195).

C. The Judgment, Post-Trial Motions and Rulings, and the Appeal.

Defendants moved for new trial, advancing multiple arguments, including excessive damages and jury misconduct. (CT 1783, 1825; see discussion, infra, at pp. 35-43, 48-50.) Defendants also moved for judgment notwithstanding the verdict, arguing, among other things, that the damages awarded for bad faith denial of the existence of contract duplicated those awarded for breach of contract and that defendants were entitled to entry of judgment in their favor because there was no substantial evidence of an oral or written contract. (CT 1830.)

Main Line filed a memorandum of costs which requested $456,702.46 in attorney's fees and $198,206.34 for various costs, including costs of experts that were not appointed by the court, research expenses, postage, telephone, fax, photocopying, and court transcripts. (CT 1834.) Defendants moved to tax costs, contending that the attorney's fees were impermissible and that the costs were precluded by statute. (CT 1886-1893.)

At the hearing on the post-trial motions, the trial court denied the motion for new trial, granted the motion for judgment notwithstanding the verdict as to the claim for bad faith denial of the existence of a contract (thus, eliminating as duplicative the $1.5 million awarded on that claim), and denied defendants' motion to tax costs. (CT 2199-2200.)

Judgment against Basinger "and/or" Mighty Wind was entered for $8,135,216.05, consisting of $7,421,694.00 for breach of contract and $713,522.05 for costs and attorney's fees. (CT 2190.) Basinger and Mighty Wind timely appealed from the judgment, from the order denying their motion for judgment notwithstanding the verdict, and from the order denying their motion to tax costs. (CT 2209-2210.)

STATEMENT OF APPEALABILITY

The final judgment is appealable pursuant to Code of Civil Procedure section 904.1, subdivision (a)(1); the order denying defendants' motion for judgment notwithstanding the verdict is appealable pursuant to Code of Civil Procedure section 904.1, subdivision (a)(4); and the order denying the motion to tax costs is appealable pursuant to Code of Civil Procedure section 904.1, subdivision (a)(2).

LEGAL DISCUSSION

I. THE JUDGMENT AGAINST BASINGER "AND/OR" MIGHTY WIND IS UNINTELLIGIBLE AS A MATTER OF LAW. SINCE IT IS BASED ON EQUALLY UNINTELLIGIBLE "AND/OR" SPECIAL VERDICT FINDINGS WHICH MAIN LINE IMPROPERLY INSISTED THE COURT UTILIZE, THE JUDGMENT MUST BE REVERSED WITH DIRECTIONS TO ENTER JUDGMENT IN FAVOR OF DEFENDANTS.

Our first issue is dispositive of the case in its entirety, compelling reversal with directions to enter judgment in defendants' favor. It is based on the court's erroneous submission--over defendants' objection and at Main Line's insistence--of an incomprehensible "and/or" special verdict form that failed to obtain jury resolution of key issues in the case, including such fundamental issues as identifying the defendant or defendants against whom the jury intended to impose liability.

The purpose of a special verdict is to obtain jury resolution of all the controverted factual issues. (Code Civ. Proc., § 624.) In this case, the jury was required to determine which defendant or defendants, if any, entered into a contract with Main Line. At trial, Mighty Wind (a corporation) and Basinger (an individual) contended they were separate and entitled to separate consideration. (RT 2652-2660.) Extensive evidence addressed this issue, including Mazzocone's testimony that he knew he was dealing with a loanout company and "that's who the contract should be made with and that's where the payment [should] be paid--to Mighty Wind" (RT 780); Wyman's March 7, 1991, letter proposing a long form agreement "between Main Line Pictures, Inc. and Mighty Wind Productions, Inc. f/s/o Kim Basinger" (Ex 30); the fact that all the drafts of the long form agreement, including the execution draft, only contained signature lines for Main Line and Mighty Wind (Ex. 30, 32, 34, 42, 76); and the fact the execution draft included an eight page loanout agreement by which Mighty Wind would loan Basinger's services to Main Line for the movie (Ex. 76, pp. 13-22).

Notwithstanding this and other evidence on the issue, the trial court informed the parties that it would use the expression Basinger "and/or" Mighty Wind in the special verdict form. (RT 2652-2660.) Defendants objected, arguing that each was entitled to separate consideration. (RT 2658-

2659; 2862-2863.) Main Line, however, insisted that "and/or" be used in the special verdict form. (RT 1440, 2658-2659.) The trial court agreed with Main Line but, because defendants so strongly objected, the court asked Main Line's counsel:

> "I take it you are willing to risk whatever risk there is in [defendants'] concern [with] a due process issue . . . ? I take it that you're willing to take that risk as opposed to asking for a separate finding with respect to each?" (RT 2659.)

Main Line responded:

> "Yes. Because I think the confusion would be so great to distinguish between the two that it's unfair to the jury." (Ibid.)

The trial court then submitted to the jury a special verdict form asking whether "Basinger and/or Mighty Wind enter[ed] into an oral contract"; whether "Basinger and/or Mighty Wind enter[ed] into a written contract"; whether "Basinger and/or Mighty Wind breach[ed] a contract"; and whether "the breach of contract by Ms. Basinger and/or Mighty Wind [was] the legal cause of damage or harm to Main Line?" (CT 1501-1504; emphasis omitted.) After the jury answered these questions affirmatively, the court entered judgment against "defendants Kim Basinger and/or Mighty Wind Productions, Inc." (CT 2196; emphasis added.)

The special verdict form wholly failed to resolve the central issues in this case. It gives no clue whether the jury found that both Mighty Wind and Basinger--or only one of them--entered into and breached a contract with Main Line. This was egregious error because, under the law, a corporation and an individual are presumed to be separate legal entities and, in the absence of proof establishing the two are alter egos, each must be treated as such. (United California Bank v. Maltzman (1974) 44 Cal.App.3d 41, 53 ["In cases in which the question is raised as to whether or not a corporate entity is actually the alter ego of an individual, there is a presumption of separate entity . . ."]; see further discussion in Section III, infra.) Here, there was neither assertion nor proof of an alter ego theory; indeed, Main Line expressly disavowed reliance on that theory. (CT 1; RT 1440 ["This is not an alter ego claim"].) Accordingly, Basinger and Mighty Wind were separate as a matter of law and each was entitled to have the jury determine which, if either, of them entered into a contract and who was liable for its breach.

As we now demonstrate, the "and/or" special verdict form precluded resolution of these vital issues. This error alone requires that the judgment be reversed and, because Main Line improperly insisted that the "and/or" formulation be employed and was willing to take the risk if that formulation proved erroneous, the reversal should be with directions to enter judgment in defendants' favor.

A. Where, As Here, Jury Findings Are Incomprehensibly Couched In Terms Of One Fact Or Party "And/Or" Another, A Judgment Based On Such Findings Is Unintelligible As A Matter Of Law And Must Be Reversed.

For more than fifty years, the courts of this state have uniformly condemned the use of "and/or" in a wide range of contexts because of the term's inherent ambiguity. In In re Bell (1942) 19 Cal.2d 488, Justice Traynor spoke for our Supreme Court in resoundingly rejecting "and/or" judgments. Addressing a criminal conviction based on a complaint charging the defendant with violating one "and/or" another provision of an ordinance, the court declared:

> "The expression 'and/or', which made possible a conviction couched in such general terms, has met with widespread condemnation. . . . It lends itself . . . as much to ambiguity as to brevity. Thus it cannot intelligibly be used to fix the occurrence of past events. A purported conclusion that either one or both of two events occurred is a mere restatement of the problem, not a decision as to which event actually occurred. . . . [T]he ambiguity of the judgment in the present case would thus clearly warrant a reversal of the conviction on appeal or other direct attack." (At pp. 499-500; citations omitted; emphasis added.)

An identical conclusion was reached in California Shipbuilding Corp. v. Industrial Accident Com. (1948) 85 Cal.App.2d 435. There, the Industrial Accident Commission found an employee's injury "was proximately caused by the serious and wilful misconduct of the employer and/or his managing representative." (At p. 436; emphasis added.) Concluding that the "and/or" finding was fatally uncertain, the Court of Appeal annulled the award, squarely holding:

"The only finding upon the issue . . . says that the employee's injury was caused by the serious and wilful misconduct of the employer 'and/or' his managing representative. Such a finding . . . is indefinite, uncertain and unintelligible. From the finding there is not any way of determining whether the injury was caused by the serious and wilful misconduct (1) of the employer, (2) of the managing representative, or (3) of the employer and the managing representative . . . [¶] . . . [¶] The award is annulled." (Id. at pp. 436-437.)[6/]

In this case, exactly as in California Shipbuilding, the jury--by returning "and/or" findings--did not resolve any of the controlling issues before it. To paraphrase the court in California Shipbuilding, "there is not any way of determining whether the injury was caused by the breach (1) of Mighty Wind, (2) of Basinger, or (3) of Mighty Wind and Basinger." Presently, either Mighty Wind (a corporation), or Basinger (an individual), or both, face liability of more than $8 million, but it is impossible to know which of them the jury intended to hold liable. Here, exactly as in California Shipbuilding, reversal is compelled.

6/ The principles articulated in In re Bell and California Shipbuilding are uniformly recognized by courts of this and other states. (E.g., Powers Farms v. Consolidated Irr. Dist. (1941) 19 Cal.2d 123, 128 [the term "and/or" is commonly defined to mean either "and" or "or"]; California Trout, Inc. v. State Water Resources Control Bd. (1989) 207 Cal.App.3d 585, 603 ["and/or" does not mean "and"]; Dinkins v. American National Ins. Co. (1979) 92 Cal.App.3d 222, 232 ["the use of 'and/or' gives rise to multiple meanings; specifically, it can mean either or it can mean both"]; Parker v. Keyser (Tex. Civ. App. 1976) 540 S.W.2d 827, 830 [jury verdict asking whether one "and/or" another defendant converted plaintiff's property; held, reversed: "Neither the trial court nor this Court is permitted to speculate as to what the jury intended by the ambiguous answer which, because of its ambiguity, cannot constitute a proper basis for a judgment. To use both the 'and' and the 'or' leads to uncertainty . . ."]; Putnam v. Industrial Commission (Utah 1932) 14 P.2d 973, 982 [by using "and/or" in a finding and judgment, both were rendered uncertain]; Russell v. Empire Storage & Ice Co. (Mo. 1933) 59 S.W.2d 1061, 1069 ["(T)he words 'and/or' tend only to uncertainty of meaning. This freakish symbol has been condemned as unintelligible"].)

B. Since Main Line Improperly Insisted On The Erroneous "And/Or" Formulation And Expressly Took The Risk If Use Of That Formulation Was Incorrect, The Judgment Should Be Reversed With Directions To Enter Judgment In Defendants' Favor.

Recently, this court acknowledged the ambiguity which disjunctive phrasing creates. In Myers Building Industries, Ltd. v. Interface Technology, Inc. (1993) 13 Cal.App.4th 949, 961, the plaintiff attempted to support a punitive damage award by asserting it could have been based on fraud because the jury found the defendant acted with "oppression, fraud or malice." This court flatly rejected the argument because: "[T]he special verdict on 'oppression, fraud or malice' was presented in the disjunctive, and the jury could have found only oppression or malice. Thus, the finding does not constitute a factual finding on a fraud cause of action." (Ibid.)

After so holding, this court explored the consequences of plaintiff's urging use of a special verdict form (as Main Line did here) that fails to obtain appropriate findings on controverted issues. Significantly, this court refused to remand for a new trial, even though the jury arguably might have found there was fraud. It so held because the plaintiff had failed to request a jury finding on the fraud issue and had opposed the defendant's efforts to obtain a proper verdict:

> "Under the doctrine of invited error, the jury's failure to arrive at a verdict on the fraud cause of action was accomplished at [plaintiff's] behest. . . . Accordingly, [plaintiff] is bound by the erroneous special verdict." (Myers, supra, 13 Cal.App.4th at p. 960, fn. 8; parallel citations omitted.)

Just as the defendant in Myers was entitled to know whether fraud was the basis for the jury's punitive damage award, each defendant here was entitled to a jury verdict revealing whether the jury found that defendant liable. (See Myers, supra, 13 Cal.App.4th at pp. 959-960 [the very purpose of a special verdict is to have "'"the jury resolve . . . all of the ultimate facts presented to it"'"] quoting Falls v. Superior Court (1987) 194 Cal.App.3d 851, 854-855 and Code Civ. Proc., § 624.) Main Line strenuously opposed a special verdict form that would have treated the defendants separately and, thus, would have disclosed the existence (if any) and basis (if any) of each defendant's liability. Main Line's intransigence in expressly announcing it was prepared to "take

the risk" regarding the absence of separate findings resulted in an incomprehensible verdict and judgment giving no clue as to the identity of the judgment debtor.

The hotly-contested trial in this case lasted five weeks, producing a reporter's transcript of 3,003 pages. By reason of Main Line's stubborn insistence, the trial was a complete waste of precious court and litigant time, resulting in a meaningless verdict and judgment that resolved none of the controverted issues presented. Under In re Bell and California Shipbuilding, the judgment must be reversed; under Myers, it must be reversed with directions to enter judgment in defendants' favor.

II. THE JUDGMENT SHOULD ALSO BE REVERSED WITH DIRECTIONS TO ENTER JUDGMENT IN FAVOR OF DEFENDANTS BECAUSE, AS A MATTER OF FACT AND LAW, THERE WAS NO ORAL OR WRITTEN CONTRACT.

Main Line proffered two different premises as a basis for imposing liability--an oral contract and a written contract consisting of the execution draft sent on May 29, which no one ever signed.[7/] Neither premise is supported by fact or law.

There was no enforceable oral or written contract because any agreement for Basinger to appear nude in Boxing Helena had to be accompanied by her written consent containing sufficient detail as to "the extent of the nudity and the type of physical contact required" to satisfy the mandatory requirements of the governing SAG collective bargaining agreement. That never happened. Written consent from Basinger was never obtained, the "deal memorandum" was silent on nudity, and the execution draft of the long form agreement (which was never signed by anyone and purported only to be between Main Line and Mighty Wind) never contained the requisite detailed description of nudity sufficient to meet SAG requirements and, in fact, left that issue to future negotiation.

7/ Main Line conceded that neither the February 28 "deal memo" nor any of the long-form drafts exchanged between March 7 and May 29 constituted the written contract upon which it based its claim, declaring: "[T]he jury rendered a special verdict expressly finding a written contract to exist. That written contract is the long-form written agreement entered on May 29, 1991, which constitutes the parties' final agreement on all the terms of defendants' engagement by Main Line." (CT 2091.)

There was also no contract because two of the key material terms were expressly contingent upon execution of the contract, yet execution never occurred. Moreover, the parties' entire course of negotiations--the very fact that they exchanged eight long-form drafts, each calling for Main Line's and Mighty Wind's signatures--objectively establishes the parties did not intend to be bound unless and until the long form agreement was executed. The parties also failed to reach agreement on two key issues, nudity and script approval, again defeating the existence of a binding contract.

Finally, even if there were somehow an enforceable contract, the terms of the execution draft and the parties' uncontroverted objective understanding conclusively establish the contract could only have been between Main Line and Mighty Wind, not Basinger.

We now separately address each of these points.

A. There Was No Enforceable Oral Or Written Contract Because, Under The SAG Collective Bargaining Agreement Which Governed The Parties' Relationship, The Appearance Of A Performer In The Nude Is Conditioned On Written Consent Describing The Extent Of The Contemplated Nudity And Type Of Physical Contact Required; No Such Written Consent Was Ever Obtained.

1. Under controlling SAG requirements, the parties could not orally agree that Basinger would perform in the nude.

It was undisputed that Basinger was a member of the Screen Actors Guild (RT 535-536, 995), that Main Line was a "signatory" to the SAG agreement (RT 535-536, 995), that nudity was a central theme of Boxing Helena (Ex. 15), and that Basinger's agreement to perform nude was a "deal point" (RT 631).

Under the provisions of the governing SAG collective bargaining agreement, Basinger's consent to perform in the nude had to be by writing which "include[d] a general description as to the extent of the nudity and the type of physical contact required in the scene." (Ex. 1036, § 41.)[8/]

8/ The pertinent SAG text fully provides: "The appearance of a performer in the nude or sex scene . . . shall be conditioned upon his or her prior written consent. Such consent may be obtained by letter or other writing prior to a commitment or written contract being made or executed. Such (continued...)

Even Mazzocone admitted the SAG agreement required that he "had to have something" in writing by Basinger before she could appear in the movie's nude scenes. (RT 997.) He never obtained such a writing.

The SAG provisions controlled because individual contracts may not be enforced contrary to the terms of a collective bargaining agreement. (Bale v. General Telephone Co. (9th Cir. 1986) 795 F.2d 775, 779 [individual contracts are enforceable only insofar as they are consistent with the collective bargaining agreement]; That Way Productions, Co. v. Directors Guild of America (1979) 96 Cal.App.3d 960, 967 [enforcing terms of collecting bargaining agreement of Directors Guild over terms of individual contract]; cf. Mattei v. Hopper (1958) 51 Cal.2d 119, 122 [in contract where consideration consists of mutual promises, and the promise of one party is not enforceable, contract fails for want of consideration]; O'Banion v. Paradiso (1964) 61 Cal.2d 559, 563-564 [oral agreement in violation of statute of frauds unenforceable].)

Here, SAG requirements regarding nudity were never satisfied. Thus, even assuming Basinger orally agreed to perform in the nude in Boxing Helena, such an agreement could never have resulted in an enforceable contract.

2. There was also no enforceable contract because the terms of the execution draft concerning nudity were never accompanied by Basinger's written consent, did not comport with SAG requirements and, in fact, expressly left the details concerning that vital term to future agreement between the parties.

In addition to lacking Basinger's written consent, the terms of the written nudity clause in the execution draft also failed to satisfy SAG requirements in another respect. The clause merely provided that Basinger consented to perform in the nude "subject to the following terms and conditions": "i. The director . . . shall consult with Artist with respect to the nude scenes and it is agreed that said scenes shall be photographed in an artistic, not prurient, manner; ii. Artist will not be required to perform in nude scenes that are materially changed or photographed in a manner

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8/(...continued)
executed. Such consent must include a general description as to the extent of the nudity and the type of physical contact required in the scene."

different from what has been agreed to between the director and Artist. . . ." (Ex. 76; CT 21, emphasis added.)[9/] Mazzocone acknowledged that nudity issues were going to be dealt with on the set while the film was being shot. (RT 915.)

This clause fell woefully short of what is necessary to satisfy the SAG requirements, namely, "a general description as to the extent of the nudity and the type of physical contact required in the scene." (Ex. 1036, § 41, emphasis supplied.) Rather than describing the extent of the nudity and the type of physical contact required, the execution draft merely abdicated those issues to future agreement. Where, as here, a material term of a contract--a "deal point," to borrow Wyman's words--is left for future agreement, there can be no binding contract. (E.g., Autry v. Republic Pictures, Inc. (1947) 30 Cal.2d 144, 151 ["agreement to agree" cannot create contract]; Beck v. American Health Group International, Inc. (1989) 211 Cal.App.3d 1555, 1563 [same].) Moreover, the failure to comply with governing SAG criteria concerning the specifics of the required nudity rendered any contract unenforceable. (See authorities discussed, supra, at p. 20.)

Because nude performance by Basinger was a "deal point"--central to Boxing Helena--and was a material term of the contemplated agreement, it was essential that Basinger give her consent in a writing that complied with SAG criteria. That never happened. The purported oral agreement could not, by definition, comply with the requirement of a writing, and the execution draft left the details of the nudity issue unresolved. There being no compliance with SAG criteria and there being nothing more than an agreement to agree in the future on nudity, there was never a binding contract.

9/ The remainder of the provision concerned doubling, closed sets and the use of still pictures from filming. (Ex. 76.)

B. As A Matter Of Law, There Was No Enforceable Written Contract For Other Compelling Reasons As Well.

1. Two of the most important and hotly negotiated contractual provisions--the "pay or play" provision and the escrow provision--were expressly contingent upon execution of the contract. Since the contract was never executed, these unsatisfied conditions precluded formation of a binding contract.

Where parties to a contract manifest an intent not to be bound until their agreement is reduced to writing and executed, there can be no binding contract until this is done. (Smissart v. Chiodo (1958) 163 Cal.App.2d 827, 830-831; Duran v. Duran (1983) 150 Cal.App.3d 176 [when parties contemplate a signed written agreement, acceptance to the terms must be by signing].) In determining contractual intent, "courts are not interested in the subjective intent of the parties, but only in their objective intent--that is[,] what would a reasonable man believe from the outward manifestation of consent." (Leo F. Piazza Paving Co. v. Bebek & Brkich (1956) 141 Cal.App.2d 226, 230; Citizens Utilities Co. v. Wheeler (1957) 156 Cal.App.2d 423, 432 [outward manifestation of assent is controlling].)

Here, the objective evidence conclusively establishes the parties never intended to be bound unless the execution draft was signed because, in the execution draft, two key provisions--pay or play and escrow of the first $100,000 of the guaranteed compensation--were expressly made contingent on execution of the contract. (Ex. 76, pp. 1, 3.) Even Wyman, Main Line's attorney, agreed that signatures were necessary, testifying it was his understanding that, if Main Line had chosen not to make the movie, it would not have been required to pay Basinger unless she had signed. (RT 680-681.)

Under virtually identical circumstances, the Court of Appeals recently held in Roth v. Garcia Marquez (9th Cir. 1991) 942 F.2d 617 that, under California law, there was no binding contract absent signature. There, a movie producer and an author negotiated, through the author's agent, for an option to a novel's film rights. (At p. 619.) The negotiations culminated in a letter from the producer outlining the terms of the agreement; the letter included a clause that the producer's option would commence upon signing a formal agreement. (Ibid.) The author's agent countersigned the

letter and returned it, stating she was "happy that this deal is finally concluded"; the author, however, never signed a formal agreement. (Ibid.) The producer sued for breach of contract based on the countersigned letter; the trial court dismissed the complaint for failure to state a claim. (At p. 620.)

On appeal, the producer urged that the author's signature was required only for the narrow purpose of triggering effectiveness of the option clause, which was specifically conditioned on signature, and that the rest of the contract was binding without signature. (At p. 626-627.) The Court of Appeals flatly rejected this argument as "simply too flimsy to stand." (At p. 626.) The court held there was no binding contract because the agreement clearly established the author's signature was required; according to the court, signature was a condition precedent to enforceability of the contract. (Ibid.)

So, too, here. Both the pay or play clause and the escrow provision were given extraordinary attention by both sides during negotiations and, exactly as in Roth, these provisions were expressly contingent on signature. Here, as in Roth, there could be no binding agreement until the agreement was signed; here, as in Roth, that never happened. Here, as in Roth, there was no contract.

2. The course of negotiations objectively established the parties did not intend to be bound until they signed.

The entire course of the parties' negotiations confirmed that the parties did not intend to be bound until a contract was signed. Numerous drafts were exchanged between the parties' attorneys; each draft carried signature lines; each draft continued to be revised; each draft was accompanied by a letter reserving the right to make further changes; further changes continued to be made. Moreover, at the outset, Wyman advised that, if the terms of the long form agreement were acceptable, he would prepare a copy for execution (Ex. 30) and, eventually, an execution draft--so-called by Main Line's own counsel--was prepared (Ex. 76). There was never any signature, however.

The only objectively reasonable interpretation is that the parties were engaged in continuing negotiations and did not intend to be bound until the execution draft was signed. (Carlson, Collins, Gordon & Bold v. Banducci (1967) 257 Cal.App.2d 212, 223 [holding letter from attorneys

proposing certain fee agreement not binding contract when parties continued to bargain]; Stephan v. Maloof (1969) 274 Cal.App.2d 843, 847 ["There is no meeting of the minds of the parties while they are merely negotiating as to the terms of the agreement to be entered into"; internal quotation marks omitted].) Since that never occurred, there was never a binding contract.

3. There was also no written contract because the parties never reached agreement on another key issue--script approval.

Without agreement on all material terms, there can be no contract. (Chakmak v. H. J. Lucas Masonry, Inc. (1976) 55 Cal.App.3d 124, 129; Russell v. Union Oil Co. (1970) 7 Cal.App.3d 110, 114; Civ. Code § 1550.) Here, both Mazzocone and Wyman admitted that, even when they sent the execution draft to Philips, they knew the parties had not reached an agreement on the script, one of the points that Wyman listed as a "principal term" in his "deal memorandum." (RT 702-703, 837, 1022-1024, Ex. 22.) This uncontroverted testimony from Main Line's own witnesses established that, just as with nudity, there was never any meeting of the minds as to a key element. This, too, precluded formation of a contract.

Main Line was, of course, free to discontinue negotiations if it did not want to compromise concerning the script, but it could not unilaterally create a binding contract simply by sending out an execution draft in the midst of continuing script negotiations.

Mutual assent to all the material terms is required for a binding contract. (Russell v. Union Oil Co., supra, 7 Cal.App.3d at p. 114.) Here, there was never any mutual assent to all the material terms and, therefore, there was never any contract.

C. Even If A Binding Written Contract Were Somehow Created (It Was Not), The Contract Could Only Have Been Between Main Line And Mighty Wind, Thus Precluding Any Possibility Of A Judgment Against Basinger.

If a binding written contract somehow did exist, it could only have been with Mighty Wind, not with Basinger. This conclusion is confirmed in multiple ways.

First, Mazzocone, Main Line's president, testified he understood the deal would be with Mighty Wind, Basinger's loanout company, and that that was Basinger's "production company and that's who the contract should be made with and that's where the payment [is to] be paid--to Mighty Wind." (RT 780; Ex. 24.) Wyman confirmed this understanding in his letter accompanying the execution drafts, stating: "Enclosed . . . you will find four execution copies of the agreement between Main Line and Mighty Wind. . . ." (Ex. 76.) Wyman also testified that payments for Basinger's services would be made to Mighty Wind and Mighty Wind would then pay Basinger. (RT 538-539.)

Second, the execution draft incorporated this mutual understanding. It provided that "Lender"--Mighty Wind--would cause Basinger to report for the movie (Ex. 76, p. 1; CT 13) and that Main Line would pay Mighty Wind for Basinger's services (Ex. 76, p. 2; CT 14). It also incorporated an eight page "loanout" agreement through which Mighty Wind loaned Basinger's services to Main Line. (Ex. 76, pp. 13-20; CT 25-34.) The loanout agreement would have been superfluous if Main Line were contracting directly with Basinger for her services.

Third, the execution draft contained only two signature lines--one for Main Line "by" Mazzocone and the other for Mighty Wind "by" Basinger. The signature line, preceded with the word "by," established as a matter of law that Mighty Wind, not Basinger, was the contracting party. (Barrett v. Hammer Builders, Inc. (1961) 195 Cal.App.2d 305 [contract signed "by" individual disclosed that corporation, not individual, was the contracting party]; see United States Liability Ins. Co. v. Haidinger-Hayes, Inc. (1970) 1 Cal.3d 586, 595 [officers of a corporation are not bound on documents signed by them unless they purport to bind themselves individually]; Carlesimo v. Schwebel (1948) 87 Cal.App.2d 482, 487 [appending "by" to signature shows signer is an agent of corporation, not individually liable].)

For these reasons, if a binding contract was ever created, the only parties were Main Line and Mighty Wind. Under any analysis, Basinger is entitled to entry of judgment in her favor.

D. Since The Evidence Conclusively Established As A Matter Of Both Fact And Law That There Was No Oral Or Written Contract, The Judgment Must Be Reversed With Directions To Enter Judgment in Defendants' Favor. Alternatively, Even If The Existence Of Only One Of The Contracts Is Negated, The Judgment Must Still Be Reversed And Remanded For A New Trial.

After trial, defendants moved for judgment notwithstanding the verdict on the ground there was no substantial evidence of an oral or written contract (CT 1830); the trial court denied the motion (CT 2199-2200). Above, we demonstrated the evidence conclusively established there was neither an oral nor a written contract. Accordingly, the motion for judgment notwithstanding the verdict should have been granted, and this Court should reverse with directions to enter judgment in defendants' favor. (E.g., McCoy v. The Hearst Corporation (1991) 227 Cal.App.3d 1657, 1661 ["[w]hen the plaintiff has had full and fair opportunity to present his or her case, a reversal of a judgment for the plaintiff based on insufficiency of the evidence should place the parties, at most, in the position they were in after all the evidence was in and both sides had rested. A judgment for defendant would then be entered. . . ."]; Bank of America Nat'l Trust and Savings Assn. v. Superior Court (1990) 220 Cal.App.3d 613, 624 [reversal for insufficiency of the evidence concludes the litigation as if trial court had correctly granted JNOV].)

But even if there were only one viable contract, either oral or written, reversal still would be required because, in its special verdict, the jury only determined that "a" contract was breached without specifying which one. (CT 1503-1504.) When an erroneous theory is presented to the jury, through evidence or instructions, the judgment must be reversed if it could have been based on the erroneous theory. (Cobbs v. Grant (1972) 8 Cal.3d 229, 234 ["Since there was a general verdict and we are unable to ascertain upon which of . . . two concepts [of liability] the jury relied, we must reverse and remand for a new trial"]; People v. Robinson (1964) 61 Cal.2d 373, 406 ["[R]eversal is required when it is impossible to determine whether the verdict was based on admissible evidence submitted under correct instructions, or on erroneous determination of questions improperly submitted to the jury"].) Under these principles, if this court determines that either the oral or the written contract is not legally supportable, it should reverse the entire judgment and remand for retrial.

III. THE JUDGMENT SHOULD BE REVERSED BECAUSE OF MULTIPLE PREJUDICIAL INSTRUCTIONAL ERRORS ON CENTRALLY IMPORTANT ISSUES.

The controlling issue in this case was whether the parties' preliminary negotiations ever matured into a binding contract. On that key issue, the court repeatedly misinstructed the jury in fundamental respects. Specifically, the court erroneously instructed that: (1) preliminary negotiations can result in a binding contract when the parties merely "understand" (i.e., comprehend) the material terms; in so instructing, the court excised from the standard BAJI instruction governing this issue (BAJI 10.65) crucial language requiring both "understanding and agreement" on the material terms; (2) in violation of established precedent, the court misinformed the jury that an industry's custom and practice can be used to determine the existence of a contract; in fact, such evidence can only be used to interpret a contract; and (3) the court wrongly told the jury that, if Basinger made any representation on any topic and Main Line relied upon it, Basinger was estopped to deny that she had agreed to act in Boxing Helena, even though the representation had nothing at all to do with whether she agreed to act in the film. The court then compounded its error in using the "and/or" special verdict form by refusing to instruct the jury that each defendant was entitled to separate consideration.

A. It Was Prejudicial Error To Instruct The Jury That Preliminary Negotiations May Result In Formation Of A Binding Contract When All Material Terms Are Merely "Understood."

This case turned on a single issue--whether the parties' preliminary negotiations ever blossomed into a binding contract. Only one instruction specifically addressed that issue. Unfortunately, it was erroneous. Rather than giving BAJI 10.65, the standard instruction on the issue, the court (over defendants' objection [RT 2845]) truncated the BAJI form and, in doing so, grossly misstated the governing law. A side-by-side comparison of the instruction given with BAJI 10.65 clearly reveals the immensity of the distortion:

Court's Instruction	BAJI 10.65
"Parties may engage in preliminary negotiations which may result in a binding contract when all material terms are definitely understood, even though the parties intended that a formal writing embodying these terms shall be executed later." (CT 1549; emphasis added.)	"Parties may engage in preliminary negotiations, oral or written, before reaching an agreement. These negotiations only result in a binding contract when all of the essential terms are definitely understood and agreed upon even though the parties intend that a formal writing including all of these terms shall be signed later." (Emphasis added.)

It is elementary that a contract can exist only where the parties have agreed on the material terms. (T.M. Cobb v. Superior Court (1984) 36 Cal.3d 273, 282 ["[M]utual consent of the parties is essential for a contract to exist"]; Russell v. Union Oil Co., supra, 7 Cal.App.3d at p. 114 ["[E]very contract requires mutual assent or consent"]; Civ. Code, §§ 1549 ["A contract is an agreement to do or not to do a certain thing"]; 1550 ["It is essential to the existence of a contract that there should be . . . consent. . . ."]; 1565 ["The consent of the parties must be: 1. Free; 2. Mutual; and, 3. Communicated by each to the other"].) Here, the indispensable element--agreement--was omitted; instead, the jury was erroneously told that preliminary negotiations can result in a binding contract if all the material terms are merely "understood."

Whether the parties "understood" (i.e., comprehended the meaning of) the material terms, however, is a far cry from whether they both understood and agreed to those terms. Here, for example, there was evidence that the participants--Philips, Wyman and Mazzocone--"understood" the meaning of material terms; this understanding, however, had nothing to do with whether there was ever an agreement as to those terms. Legally, agreement is required, yet under the court's erroneous version of BAJI 10.65, the jury was impermissibly allowed to find that the parties' preliminary negotiations resulted in a binding contract based solely on a determination that the parties understood the material terms, without requirement that such terms be both "understood and agreed upon."

The error was extremely prejudicial. It concerned the core issue in the case (whether preliminary negotiations ever resulted in formation of a binding contract), yet it permitted the jury to resolve the issue against defendants without considering the effect of key evidence establishing there was never any agreement. For example, Mazzocone himself conceded the parties were still negotiating and had not reached agreement on the vital issue of script approval when the execution draft was sent. (RT 1022-1025.) Moreover, there was never any agreement concerning "the extent of the nudity and the type of physical contact required in the scene," as required by the SAG agreement; indeed, the execution draft expressly left the details regarding nudity to future discussions (Ex. 76) and Mazzocone testified he understood that nudity issues were going to be dealt with on the set (RT 915). Under the court's instruction, however, the jury could conclude that the absence of agreement on these key provisions did not matter, so long as the parties' preliminary negotiations resulted in an "understanding" as to what "script approval" and "nudity" meant. If the jury had been told that both "understanding and agreement" were required, it might well have concluded that the preliminary negotiations never led to a binding contract, especially with regard to the written contract, which was decided by a razor-thin 9-3 vote.

In determining whether erroneous jury instructions are prejudicial, the appellate court will not speculate upon the basis for the verdict, but rather will assume that, if the correct instruction had been given, the jury might have rendered a verdict in favor of the losing party. (Henderson v. Harnischfeger Corp. (1974) 12 Cal.3d 663, 673-674; see Mock v. Michigan Millers Mutual Ins. Co. (1992) 4 Cal.App.4th 306, 322 [reviewing court "must assume that the jury, had it been given proper instructions, might have drawn different inferences more favorable to (the complaining party) and rendered a verdict in its favor on the issues as to which it was misinstructed"].) Under the law, it must be assumed that, had a correct version of BAJI 10.65 been given, the jury would not have concluded a contract had been formed. Reversal is required on this ground alone. But there is more.

B. It Was Prejudicial Error To Instruct That Industry Custom And Practice Can Be Used To Determine Whether A Contract Exists And In Refusing To Instruct Correctly On That Issue.

The prejudicial effect of erroneously cropping BAJI 10.65 was greatly magnified when the court committed further error in instructing with respect to the issue of contract formation. Defendants requested an instruction that, "[a]lthough evidence of custom and usage may be introduced to interpret a contract, it may not create one." (CT 1316.) The court refused and, once again, substituted an instruction of its own creation, namely, that "[i]n determining whether or not a contract exists, you may . . . consider the custom and practice of the industry. If the persons in a certain industry, such as the entertainment industry, negotiate and finalize contracts in a particular manner, then you may consider such manner in determining whether or not a contract was actually negotiated and finalized between the parties herein." (CT 1550; emphasis added.)

Defendants' proposed instruction was the correct one; the court's instruction flatly contradicted California law. Evidence of custom, trade and course of dealing is admissible only to explain or supplement the terms of a writing. (E.g. Code Civ. Proc., § 1856; Civ. Code §§ 1646, 1647.)[10/] Such evidence may not, however, be used to establish that a contract was made: "Although custom and usage may be introduced to interpret a contract, it may not be used to create one." (Roskamp Manley Assoc. Inc. v. Davin Development & Investment Corp. (1986) 184 Cal.App.3d 513, 520; Santandrea v. Siltec Corp. (1976) 56 Cal.App.3d 525, 528, overruled on other grounds Bauguess v. Paine (1978) 22 Cal.3d 626, 639 [evidence of a "trade usage" to put conditional words in an offer, but nevertheless to consider the offer unconditional, could not be used to establish a binding contract]; Rabin v. Craft (1950) 100 Cal.App.2d 808 [same].)

Giving the erroneous custom-and-usage instruction and refusing to give the correct one was highly prejudicial. For example, David Held testified that, in the entertainment industry, unsigned

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10/ Code of Civil Procedure section 1856 states: "The terms set forth in a writing . . . may be explained or supplemented by course of dealing or usage of trade." (Subd. (c); see Law Revision Comment, 1978 Amendment.) Civil Code section 1646 states: "A contract is to be interpreted according to the law and usage of the place where it is to be performed. . . ." Civil Code section 1647 provides: "A contract may be explained by reference to the circumstances under which it was made, and the matter to which it relates."

written agreements are relied on as binding. (RT 1991-1992, 1994, 2026-2027, 2029.)[11/] Under the court's errant instruction, the jury could have relied on Held's testimony to conclude that, because unsigned documents customarily are considered binding in the entertainment industry, a binding contract was created here even though massive other evidence, including all the objective manifestations of the parties, required execution as a condition precedent to formation of a binding contract. In short, the entire case could have been decided against defendants based solely on Held's testimony and the jury's reliance on the erroneous instruction improperly allowing it to utilize that testimony to create a binding contract.

The law, not Hollywood, determines what requirements must be fulfilled to create a binding contract. (Cf. Crocker-Anglo Nat. Bank v. Amer. Trust Co. (1959) 170 Cal.App.2d 289, 298 [bank practice not to require writing to create joint tenancy account could not supersede law requiring it]; Silberg v. California Life Ins. Co. (1974) 11 Cal.3d 452, 462 [scope of an insurer's duty to its insured is established by law, not by industry custom].) The court misinstructed the jury on the law. This, too, was prejudicial error compelling that the judgment be reversed. (See authorities cited, supra, at pp. 28-29.)

C. It Was Prejudicial Error To Instruct That Basinger Was Estopped To Deny The Key Fact That She Agreed To Perform In Boxing Helena If She Made Any Representation Regarding Any Issue.

The serious prejudicial errors in twice misinstructing on the core issue of contract formation were further compounded when the court gave an erroneous estoppel instruction. That instruction improperly allowed the jury to find the ultimate fact that Basinger had agreed to act in Boxing Helena (and, therefore, that a binding contract existed) if it found that Basinger made (and Main Line relied on) any representation on any issue, even though the representation had nothing whatever to do with whether she agreed to act in the movie.

11/ Before trial, defendants moved in limine to preclude David Held from testifying to industry custom and practice regarding the enforceability of unsigned contracts. (RT 53.) The court denied the motion. (RT 65.) For the reasons stated above, this ruling, too, was prejudicial error.

The court instructed that "Main Line contends that Ms. Basinger may not deny that Ms. Philips and others had the authority to bind Ms. Basinger to a contract[,] . . . that Ms. Basinger may not deny that she approved the 'Boxing Helena' script[, and] . . . that Ms. Basinger may not deny that she agreed to act in 'Boxing Helena.'" The court further instructed that, "[t]o establish this Main Line must prove four things": (1) Basinger "made a misrepresentations [sic] of fact" intending that Main Line rely on it; (2) Basinger knew the facts; (3) Main Line did not know the facts; and (4) Main Line reasonably relied on the representations to its injury. (CT 1554-1555.)

While the jury found that Main Line did not rely on any representations made by Basinger or her agents "on or after February 27, 1991" (CT 1501-1502), it was silent with respect to representations made before that date. The record contains evidence that Basinger made multiple representations before that date, representations which the jury--following the court's estoppel instruction--could have concluded estopped Basinger from denying she agreed to act in Boxing Helena. For example, Lynch testified that, in January 1991, Basinger represented that she thought the script was well-written and "magical" (RT 198); that she felt a kinship to the project (RT 200); and that she loved the screenplay (RT 239). Under the court's estoppel instruction, any of these representations would have permitted the jury to estop Basinger from denying that she agreed to act in Boxing Helena, even though none of these representations had anything to do with any such agreement. Liking a script and agreeing to act in a movie address two completely different subjects; a representation as to one does not mean the other follows. That Basinger may have represented she liked the script cannot properly estop her from denying she agreed to act in the movie. Yet, the erroneous jury instruction permitted exactly that conclusion.

A party is not permitted to prove a representation of one thing and obtain an estoppel to deny some other thing. Instead, if a representation is made, the party making the representation can only be estopped to deny what was represented. (Grasslands, etc. Assn. Lucky Etc. Co. (1952) 112 Cal.App.2d 776, 780 [estoppel arises when one party leads another to believe a thing to be true so "as to make it inequitable . . . for such party to defeat a justifiable reliance upon the thing believed to be true"]; Granberg v. Turnham (1958) 166 Cal.App.2d 390, 395 [reliance upon the fact which is claimed to work an estoppel is the essence of the doctrine].)

The court's gross distortion of the doctrine of estoppel prejudicially gutted a key element of Basinger's defense and furnished the jury--once again--with a wholly improper basis for finding that

Basinger "had agreed to act" in Boxing Helena. The error was enormously prejudicial, especially when considered together with the other instructional errors also misadvising on the central issue of contract formation. This error also requires reversal.

D. It Was Prejudicial Error To Refuse To Instruct The Jury That Each Defendant Was Entitled To Separate Consideration.

The trial court further prejudicially erred in rejecting defendants' request that the jury be instructed in conformity with BAJI 15.02, which would have cautioned the jury that every defendant is entitled to have his case decided separately. (RT 2659; CT 538.)[12/] The court refused the instruction because the court was unwilling to apply (or did not understand) the basic principle that a corporation and its shareholders are deemed separate unless and until the plaintiff presents evidence that the two are alter egos; astoundingly, the court dismissed this universally-established concept out of hand. (E.g. 1436-1449; 2652-2660.)[13/]

The concept is elementary. Under the law, corporations and individuals are presumptively separate entities, unless the party challenging separateness--here, Main Line--proves, under an alter ego theory, that the corporate entity should be disregarded. (MacPherson v. Eccleston (1961) 190 Cal.App.2d 24, 27 [corporate entity may be disregarded only when plaintiff proves elements of alter ego]; Union Bank v. Anderson (1991) 232 Cal.App.3d 941, 949 [a duly organized and incorporated entity is separate and distinct under the law from its shareholders].) "It is the plaintiff's burden to overcome the presumption of the separate existence of the corporation entity." (Mid Century Ins.

12/ BAJI 15.02 provides: "Although there is more than one defendant in this suit, it does not follow from that fact alone that if one is liable [both] [all] are liable. Each defendant is entitled to a fair and separate consideration of that defendant's defense and is not to be prejudiced by your decision as to the other[s]. Unless otherwise stated, the instructions apply to the case of each defendant. ¶ Decide each defendant's case separately."

13/ The court's remarkable misapplication or misunderstanding of this basic rule of law is evidenced by a number of its comments, including: (1) "The only discussion that I recall in the whole case about anything distinguishing the two was that Mighty Wind was a corporation . . ." (RT 2652); (2) "If you [defendants] [would] like to give an offer of proof as to what evidence you would have put on as to the separateness of these two, now is your chance" (RT 2655); and (3) "I'm not disputing that Mighty Wind does not exist as a separate corporation, just like I would probably guess that some of you may have professional corporations for your tax purposes. . . ." (RT 2656.)

Co. v. Gardner (1992) 9 Cal.App.4th 1205, 1212; MacPherson, supra, 190 Cal.App.2d at p. 27 [same].) No such allegation or evidence was ever presented here; indeed, Main Line expressly insisted it was not relying on the theory that Basinger and Main Line were alter egos. (RT 1440 ["This is not an alter ego claim"].)

The trial court apparently believed it could dispense with the established law of corporations simply because Mighty Wind was a personal service corporation. But there is no "personal service corporation" exception to the presumption that a corporation is a separate entity; indeed, personal service corporations are expressly permitted by law. (E.g., Int. Rev. Code, § 448(d)(2).) Our extensive research has not uncovered a single case which supports the trial court's startling view. At least one case, however, directly rejects that view.

In Fogelsong v. Commissioner of Internal Revenue (7th Cir. 1980) 621 F.2d 865, the Seventh Circuit reversed a tax court decision which disregarded a personal service corporation's separate existence and treated the income received by it as that of the individual, pointedly observing:

> "[I]f the issue is one of attributing the income of a corporation to its sole stockholder-employee who 'really' earned it, we encounter the important policy of the law favoring recognition of the corporation as a legal person and economic actor. . . . '[I]t leads nowhere to call a corporation a fiction. If it is a fiction it is a fiction created by law with intent that it should be acted on as if true. The corporation is a person and its ownership is a nonconductor that makes it impossible to attribute an interest in its property to its members.'" (At p. 868, quoting Klein v. Board of Supervisors (1930) 282 U.S. 19, 24, 51 S.Ct. 15, 16, 75 L.Ed. 140.)

The trial court's refusal to instruct on defendants' theory of the case--that each defendant was entitled to have its liability resolved separately--was both prejudicial per se (Phillips v. G.L. Truman Excavation Co. (1961) 55 Cal.2d 801, 806; Haycock v. Hughes Aircraft Co. (March 3, 1994) 94 Daily Journal D.A.R. 2721, 2732-2734) and prejudicial in fact. Had the trial court here instructed the jury on defendants' theory of the case--that Basinger and Mighty Wind were entitled to separate consideration--Basinger could well have been exonerated. (See discussion, supra, at pp. 24-25.) The court's refusal to require that the jury separately consider Basinger's and Mighty Wind's respective liability and defenses was prejudicially erroneous, once again requiring reversal.

E. Conclusion Regarding Erroneous Jury Instructions.

In three separate, pivotal instructions, the court grossly misstated the governing law on the key issue in this case--whether the parties' preliminary negotiations ever ripened into a binding contract--and invited the jury to decide this key issue on factually and legally impermissible premises. On another vitally important issue--determining the party, if any, with whom Main Line contracted--the court's failure to instruct on defendants' theory that they were entitled to separate consideration could well have induced the jury to impose liability (if a finding against one "and/or" the other defendant can be deciphered at all) against a defendant who was not found to be a contracting party. Any one of these errors standing alone would warrant reversal. Considered cumulatively, the case for reversal is overwhelming. The judgment must be reversed.

IV. THE DAMAGE AWARD IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE AND IS EXCESSIVE AS A MATTER OF LAW.

The $7,421,694 in compensatory damages which the jury assessed by 9 to 3 vote is grossly excessive. Independent analysis and uncontroverted juror declarations establish that the jury awarded gross lost profits, without deducting the cost of producing the movie or the percentages of profit that parties other than Main Line were entitled to receive. When these items are properly deducted as the law requires, the most Main Line would have been entitled to recover is $877,143 for net lost profits.

The jury also awarded preproduction costs of $258,694, but Main Line failed to satisfy its burden of establishing the claimed preproduction costs were damages it could recover from defendants; instead, the document it presented as "evidence" of those damages was simply a listing of charges that began March 8, 1991, and continued long after it was known that Basinger would not act in the film. At no point did Main Line ever prove that the listed charges were attributable to defendants' purported breach.

The only other evidence on which Main Line conceivably could rely to support the damage award is the testimony of its expert, Louis Wilde. His testimony, however, cannot qualify as substantial evidence of damages because he readily admitted his testimony was based solely on an

economic "theory" having no relationship whatever to lost profits. His "theory" also was defective because it was based on a comparison of how Boxing Helena would have performed with Basinger starring versus how it would perform with Fenn; however, defendants were responsible, if at all, only for any damages legally caused by their breach; under no circumstances could any breach by defendants legally have caused Main Line's independent decision to proceed with production of Boxing Helena starring Fenn or the economic consequences flowing from that decision.

For these reasons, each to be explained in detail below, the damage award is wholly insupportable.

A. The Jury's Award Of Gross, Rather Than Net, Lost Profits Was Erroneous As A Matter Of Law.

1. The jury award consisted of the difference between the foreign presales of the Basinger and Fenn films, plus the $3 million value of domestic presale rights to the Basinger film, plus preproduction costs.

Independent analysis, as well as uncontroverted juror declarations explaining the jury's calculations,[14/] conclusively establish exactly how the jury calculated its award. The only way the jury could have arrived at $7,421,694 in damages is as follows:

a. Main Line claimed $258,694 (actually $258,693.93, rounded up to $258,694) in preproduction costs as part of its damages. (RT 862-863.) Because the last three digits--694--

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14/ In Krouse v. Graham (1977) 19 Cal.3d 59, the Supreme Court held that declarations establishing a jury's discussion of, and agreement to award, impermissible attorney's fees concerned matters that were objectively verifiable and subject to corroboration and, thus, were admissible under Evidence Code section 1150. (At pp. 80-82.) Main Line nevertheless moved to strike the declarations (CT 2072); however, Main Line failed to obtain a ruling on its motion to strike. Rather, the court merely ruled that narrow portions of one juror declaration (which concerned why the juror changed his vote) were inadmissible. (CT 2199-2200; RT 2956, 2963-2964, 2981-2983, 2986.) Absent a ruling on Main Line's motion to strike, the evidence in the other portions of the juror declarations (whether actually admissible or not) must be deemed admitted. (Ann M. v. Pacific Plaza Shopping Center (1993) 6 Cal.4th 666, 670, fn. 1 [If a party fails to obtain a ruling on objections to inadmissible summary judgment evidence, "we must view the objectionable evidence as having been admitted in evidence and therefore as part of the record"].)

correspond to the jury award, it is clear the jury included $258,694 in preproduction costs in its damage award. Subtracting that sum from the total award leaves $7,163,000.

b. Where did the $7,163,000 come from? Sugar testified that foreign presales of Boxing Helena when marketed with Basinger were $6,899,000, but with Fenn they were only $2,736,000--a difference of $4,163,000. (RT 296, 305, 806.) There was also testimony that the value of domestic distribution rights to the Basinger film was approximately $3 million (RT 1578) and that, as of the time of trial, Main Line had not sold domestic distribution rights to the Fenn film (RT 2378); thus, there was a $3 million difference. When these two differences ($4,163,000 in foreign presales, plus $3,000,000 in domestic presales) are added together, they total $7,163,000--the balance of the jury award.[15/]

2. The damages are excessive because they reflect gross, rather than net, lost profits.

As the trial court properly instructed the jury (CT 1575), the measure of lost profits is net, not gross, profits. (Kuffel v. Seaside Oil Co. (1970) 11 Cal.App.3d 354, 366 ["in awarding damages for the loss of profits, net profits, not gross profits, are the proper measure of recovery"]; West Coast Winery v. Golden West Wineries (1945) 69 Cal.App.2d 166, 169 [same].) Net profits are the gains made from sales, less deductions for the cost of labor, materials, rent, interest, overhead and the like. (Gerwin v. Southeastern Cal. Assn. of Seventh Day Adventists (1971) 14 Cal.App.3d 209, 223; Guntert v. City of Stockton (1976) 55 Cal.App.3d 131, 149.)

Mazzocone testified, without contradiction, that he intended to use the entire $6,899,000 which Main Line expected to receive through foreign presales of the film starring Basinger to make

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15/ The uncontroverted juror declarations received in evidence and never stricken confirm this is exactly how the jury reached its award. The jurors stated they first awarded $4,163,000 as the difference between anticipated foreign presales for the Basinger film and actual foreign presales of the Fenn movie; the jury then added $3 million as the value of the domestic presales for the Basinger movie plus $258,694 in claimed preproduction costs, for a total award of $7,421,694. (CT 1677, 1688.)

That the jury included the value of domestic distribution rights in its award can also be inferred from the fact that the jury asked for a re-reading of Jeff Rose's testimony. (CT 1593.) Rose worked for Miramax and testified the domestic presale value of the movie with Basinger was "in the range of $3 million." (RT 1578.)

the Basinger movie. (RT 867.) Sugar, who testified as to the presales of the proposed Basinger film, admitted he did not deduct from his figures the cost of making the movie. (RT 370.) Thus, the foreign presales of the movie with Basinger attached, which the jury included as part of its damage award, failed to take into consideration the vital--and uncontested--fact that all the foreign presales received would be used to make the movie and, therefore, were costs required to be deducted in reaching a net profit figure.[16/] Thus, net profit, if any, could have been realized only from the $3 million which Main Line expected to receive for domestic distribution of the Basinger movie.

It was also uncontroverted that others besides Main Line were entitled to share in profits from the Basinger film--foremost among them was Mighty Wind itself. (Ex. 76; RT 2371.) Under the long form agreement on which Main Line's suit was premised, Mighty Wind's profit participation--above the guaranteed compensation--was 35% of the producer's adjusted gross receipts up to $1,000,000; 25% up to the second $1,000,000; and 15% for the rest of the adjusted gross receipts. (Ex. 76; RT 2371-2372.) This means that, with respect to the $3 million available for net profits, Main Line owed $750,000 to Mighty Wind for its share of the profits. (Ex 76.) Since Main Line would not have been entitled to keep that money had the Basinger film been made, it was not entitled to recover that sum as lost profits. (See Rosenthal v. Gould (1969) 273 Cal.App.2d 239, 246-248 [reversing lost profits award based on lost profits for 10 years when partnership was terminable at will because "[o]ne may not receive damages for the loss of a right that never existed"].) Accordingly, Mighty Wind's $750,000 profit participation should have been deducted before any award was made.

Others, on whose behalf Main Line did not purport to sue, also had a right to participate in profits. Mazzocone testified Lynch had a 2% share, while Ed Harris had 5%. (RT 2372.) According to Mazzocone, the remainder would be split 50-50 by Philippe Caland, who originated the Boxing Helena story (RT 182), and Main Line, until Main Line had received $2,000,000, at which point Caland would receive 85% and Main Line 15% (RT 2372-2374.)

16/ In fact, the jury did not even deduct the $600,000 guaranteed compensation Main Line would have paid for Basinger's services, resulting in the obvious inequity that part of the damages the judgment directs Mighty Wind "and/or" Basinger to pay consists of the very salary Mighty Wind would have earned had Basinger made the movie. Under the judgment, Main Line is allowed to pocket money that unquestionably would have been owed to defendants. This unfair and preposterous result should not be countenanced.

If expense and profit-participation interests were properly deducted, Main Line actually stood to clear no more than $877,143 from the $3 million it might have received for domestic distribution rights to the Basinger film. This is not even remotely close to the $7,421,694 actually awarded by the jury. For this reason, the judgment should be reversed as excessive.

B. The Preproduction Costs Award Was Not Supported By Substantial Evidence.

The $258,693.93 in preproduction costs (a figure the jury rounded up to $258,694) was also unsupported by substantial evidence. Mazzocone simply testified that Main Line incurred these costs (RT 862-863)[17/] and introduced an exhibit purporting to detail them. (Ex. 91.) The exhibit, however, was nothing but an unexplained list of charges for unidentifiable goods and services, including such routine overhead items as Main Line's rent, office supplies, telephone bills, tax-return preparation fees, that began on March 8, 1991 and continued through at least August of 1992, when this litigation was well under way.

Even if Basinger was bound to act in Boxing Helena (she was not), and even if there had been a breach of contract (there was not), neither Basinger nor Mighty Wind thereby became Main Line's overhead guarantor, charged with keeping its operations afloat until, someday, it could find someone else who would do so. If Main Line suffered damages because of defendants' breach, it was entitled to recover the damages it could establish by substantial evidence; Main Line was not, however, entitled to conduct its business from that point forward at defendants' expense. Main Line had the burden of proving that the expenses it incurred were caused by defendants' breach. (Walnut Creek Pipe Distributors, Inc. v. Gates Rubber Co. (1964) 228 Cal.App.2d 810, 819 ["The law is well settled that the burden of proof is upon the party claiming the damage to prove that he has suffered damage and to prove the elements thereof with reasonable certainty"]; Greening v. General

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17/ Mazzocone testified: "[Exhibit 91] This is a 'Boxing Helena' cost report of all costs on 'Boxing Helena' with the exception of the production of Sherilyn Fenn. . . . ¶ I went back and reviewed all the files, all the canceled checks that were ever written in our company from way back when the project came in to Sherilyn Fenn or anything dealing with -- I couldn't afford to pay all the bills that were left over from Kim Basinger, so I had to pay them even a year late so I went back all the way until I paid the last Kim Basinger bill and I listed all the checks in order. We also reviewed petty cash envelopes and American Express receipts, Corporate American Express receipts." (RT 862-863.)

Air-Conditioning Corp. (1965) 233 Cal.App.2d 545, 549 ["The plaintiff in a breach of contract action must prove that the breach was the cause of his damage"].) Main Line failed to satisfy that burden of proof.

C. There Is No Other Substantial Evidence On Which The Jury's Excessive Damage Award Could Possibly Be Premised.

In an attempt to increase or buttress its damage claim, Main Line proffered the "expert" testimony of Louis Wilde, an economist, who testified based on a so-called "profit differential" analysis that Boxing Helena with Basinger would have made between $5.1 million and $9.7 million more than the movie made with Fenn. (RT 2078-2079, 2089.)

Wilde reached his $5.1 million "minimum profit differential" by adding the Basinger foreign presales of $6.8 million to the $3 million Main Line hoped to receive for domestic distribution, then deducting the movie's cost ($6.8 million), leaving $3 million. (RT 2079-2082.) He did the same for Fenn; her foreign presales were $2.7 million and her domestic presales zero; however, the Fenn budget was $4.8 million, leaving a negative of $2.1 million. (RT 2082.) Adding the $3 million Main Line would have made on the Basinger film to the $2.1 million it would lose on the Fenn film created Wilde's minimum profit differential of $5.1 million. (RT 2080-2083.) In other words, Wilde's minimum profit differential consisted of the money the film would have made with Basinger and the money it would lose with Fenn.

Wilde also testified to "maximum profit differential" based on a studio-by-studio summary of total domestic and foreign gross revenues, from which he purported to predict how Boxing Helena might have performed had Basinger starred. (RT 2090-2097.)

None of Wilde's testimony qualifies as substantial evidence sufficient to support the damage award, for multiple compelling reasons:

1. Wilde's testimony was not based on any legally cognizable measure of damages. Although he defined his "profit differential" as "the difference in profits between the two" films (RT 2078), he readily conceded his analysis was merely an "economic theory" which really had nothing to do with profits at all. (E.g. RT 2083, 2089, 2133-2135.) Specifically, Wilde admitted: (a) His "profit differential" had nothing to do with actual profits and, therefore, he could not say whether

Main Line actually lost $5.1 million in profits--the "minimum profit differential"--when Basinger declined to act in the film (RT 2101-2102); (b) when he offered his opinion on "profit differential," he was not testifying that his figures reflected the net profit Main Line lost because Basinger was not in the movie (RT 2107-2108); (c) even if the Fenn movie produced "$20 million, that would make no difference" in his calculations; (d) "[his theory] doesn't by itself say anything about the profitability" of the film (RT 2083); (e) "[t]here is a whole range of issues connected with lost profits calculations" that he did not apply in his "profit differential" calculation (RT 2114); (f) the "total domestic revenues" he used in his calculation did not concern profits (RT 2112); and (g) he was "not doing an accounting approach" and his theory was not based on accepted accounting principles. (RT 2133-2135.)

2. Wilde's "profit differential" analysis was premised on a comparison of the presumed performance of the unmade Basinger movie with the movie made with Fenn--a comparison that was legally improper. The prerequisite to recovery of lost profits is legal causation; the lost profits must be the natural and direct consequence of the breach. (Nelson v. Reisner (1958) 51 Cal.2d 161, 171; Civ. Code, § 3300.) If Basinger was responsible for any damage to Main Line at all, she was responsible only for the damage her conduct caused, namely, Main Line's inability to make, and presumably profit from, a film starring Basinger. She could not legally have caused, or be held responsible for, Main Line's decision, made following her breach, to embark on a new project--to proceed with another production of Boxing Helena, to cast Fenn in the lead, and to go $2.1 million in debt to make that movie.[18/] These choices were solely Main Line's; thus, in terms of legal causation, the economic return (or lack of return) of the Fenn film had nothing at all to do with Basinger's breach and it could not therefore serve as a basis for the "profit differential" Wilde invented. When one removes the legally irrelevant Fenn portion of Wilde's "profit differential" analysis, all that is left is the Basinger portion which, as demonstrated above, could yield no more than the $3 million gross, and $877,143 net.

3. Damages reflecting lost profits must, by definition, deal with profits, and the "whole range of issues" that Wilde admittedly failed to include in his calculations must be included in them if a lost-profit damage figure is to be reliably projected. Specifically, lost profits cannot be

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18/ Mazzocone testified that, when he started the Fenn film, he knew the sale of distribution rights would reap $2 million less than the budget. (RT 2379.)

speculative. (See e.g. Lemat v. Barry (1969) 275 Cal.App.2d 671 [lost profits unavailable for basketball player's breach of contract because "damages . . . are speculative and uncertain and practically impossible to ascertain"]; Darmour Prod. Corp. v. H. M. Baruch Corp. (1933) 135 Cal.App. 351, 354 [producer awarded damages of $20,000 as the cost of finding a substitute actress, but not lost profits because "they would seem to be highly speculative"] overruled on other grounds I.J. Weinrot & Sons, Inc. v. Jackson (1985) 40 Cal.3d 327, 336 [holding no master-servant relationship existed between actress and production company]; Alder v. Drudis (1947) 30 Cal.2d 372, 382 [prospective profits were too speculative given uncertain commercial viability of instrument to produce three dimensional motion pictures].) Here, Wilde's "profit differential" analysis concerned an undertaking that was inherently speculative. Mazzocone was a first-time producer; Lynch was a first-time director; together, they were making a movie (itself an inherently dicey undertaking) on the bizarre subject of a man who amputates a woman's arms and legs and keeps her in a box in the hope of gaining her love--a subject it is safe to assume might have less than universal appeal.

The likely success of any movie venture--but particularly this one--is inherently speculative, thus defeating any right to recover lost profits beyond the $3 million Main Line hoped to receive for domestic distribution of the Basinger film.

4. Where lost profits are to be established through data from other operations, the other operations must be comparable to the business at issue. For example, in Berge v. International Harvester Co. (1983) 142 Cal.App.3d 152, the Court of Appeal held a lost profits damage award to a trucking company that was based on a national average profit margin was insupportable:

> "A plaintiff can rely on data from other enterprises only if she shows they operate under similar conditions, such as in the same area and with the same equipment. [Citation.] While the gross revenues earned by the 11 drivers working [for the same company] were relevant, the 16 percent profit margin achieved as a national average had no relation whatsoever to [plaintiff's] operation. For this reason, the net profit figure calculated was entirely speculative. . . ." (At p. 163.)

Berge applies here. Main Line failed to establish that it--a small, independent film company--was comparable to the established national studios, such as Disney, that Wilde used in his studio-by-

studio comparison. Nor did Main Line establish any similarity between Boxing Helena and the hundreds of movies that Wilde used for his comparison. Even the comparison between the Basinger and Fenn films was of widely different products, as evidenced by the huge disparities between their respective foreign and domestic presale projections.

5. Lost profits calculations may not be based on gross revenues, as Wilde's "maximum profit differential" was here. In McGlinchy v. Shell Chemical Co. (9th Cir. 1988) 845 F.2d 802, the Court of Appeals approved exclusion of an "expert's" testimony concerning lost profits where it was based on gross sales, was untied to a specific loss, and included market conditions that were not the same before and after the injury:

> "[The] report and testimony would pose a great danger of misleading a jury into believing that [plaintiffs'] losses associated with a decline in gross sales were the amount of damages to [plaintiffs] from 'lost profits'. . . . [The expert's] speculation about the amount of [plaintiffs'] 'lost profits' has no basis in the record. His study rests on unsupported assumptions and ignores distinctions critical to arriving at a valid conclusion. . . . The district court did not abuse its discretion in excluding [the] . . . testimony." (At p. 807; see Kuffel, supra, 11 Cal.App.3d at p. 366 [net profits, not gross profits, are the proper measure of recovery].)

For all these reasons, Wilde's "profit differential" analysis was pure fantasy, just a "theory" having no relation to any relevant criteria determinative of any lost-profit damages which any breach by defendants may have caused. Wilde's theory admittedly was not a lost profits calculation, nor was it based on any other measure of damages the law recognizes. As such, his evidence simply does not rise to the dignity of substantial evidence of any damage. (See, e.g., Hyatt v. Sierra Boat Co. (1978) 79 Cal.App.3d 325, 338-339 [expert testimony does not constitute substantial evidence if based on false premise]; Kitchell v. Acree (1963) 216 Cal.App.2d 119, 124 [even unobjected-to expert testimony does not constitute substantial evidence if it lacks probative value].)

The judgment must be reversed; it is excessive as a matter of law and not supported by substantial evidence. Under no view of the evidence can lost profits damages exceed $877,143.

V. THE TRIAL COURT PREJUDICIALLY ERRED IN DENYING DEFENDANTS' MOTION TO TAX COSTS, RESULTING IN AN IMPROPER AWARD OF $456,702.46 IN NON-RECOVERABLE ATTORNEY'S FEES AND $198,206.34 IN STATUTORILY-PROHIBITED OTHER COSTS.

A. Main Line Was Not Entitled To Recover Attorney's Fees.

"Unless authorized by either statute or agreement, attorney's fees ordinarily are not recoverable as costs." (Reynolds Metals Co. v. Alperson (1979) 25 Cal.3d 124, 127.) Civil Code section 1717 permits recovery of attorney's fees "[i]n any action on a contract" when the contract specifically provides for attorney's fees. (Subd. (a).)

Main Line claimed the parties' "written contract"--the unsigned execution draft--entitled it to attorney's fees because it stated:

> "Q. Miscellaneous: . . . Provided that Producer [Main Line] has made all payments which have become due hereunder, Employer [Mighty Wind] shall indemnify and hold harmless Producer . . . from any damages or expenses, including reasonable attorneys' fees, which may be suffered by any of them by reason of any claim by Artist for compensation, or any breach or failure by Employer or Artist to perform all representations, warranties and agreements herein contained." (Plaintiff's Ex. 76, pp. 20-21; CT 33, 2091-2092; emphasis added.)[19/]

Main Line is not entitled to recover attorney's fees because: (1) the asserted contract on which Main Line relied provided only for indemnity against claims brought by third parties and, thus, cannot be interpreted as a "contract" clause permitting recovery of attorney's fees by the prevailing party who sues "on a contract"; (2) even if the language of the indemnity clause could somehow be construed as allowing Main Line to recover attorney's fees, it expressly applied only to Mighty Wind, not Basinger; and (3) the court was not empowered to award attorney's fees

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19/ The main body of the execution draft refers to Mighty Wind as "Lender" (Ex. 76, p. 2); however, the Producer's Standard Terms And Conditions For An Actor/Actress-Loanout, which was attached to the execution draft and contained the clause upon which Main Line relies in claiming its attorney's fees, renames the "Lender" as "Employer." (Ex. 76, p. 14; CT 33.)

pursuant to a "memorandum of costs"; rather, a noticed motion was required and there was no such motion here.

1. The execution draft of the purported contract provided only for "indemnity" against claims made against Main Line by third parties.

In Myers Building Industries, Ltd., supra, 13 Cal.App.4th 949, this court held that a clause which contains the words "indemnify" and "hold harmless" is an indemnity clause which generally obligates the indemnitor to reimburse the indemnitee for any damages the indemnitee becomes obligated to pay to third persons. (13 Cal.App.4th at p. 969; see Somers v. United States F. & G. Co. (1923) 191 Cal. 542, 547 [an indemnitor in an indemnity contract generally undertakes to protect the indemnitee against loss through liability to a third person]; Varco-Pruden, Inc. v. Hampshire Constr. Co. (1975) 50 Cal.App.3d 654, 660 [indemnification agreements relate to third-party claims].) This court held that such clauses do not qualify as provisions permitting recovery of attorney's fees in an action "on a contract" within the meaning of Civil Code section 1717 because that statute makes reciprocal clauses which unilaterally provide for such fees, and such reciprocity makes no sense in the indemnity context. (Myers, supra, 13 Cal.App.4th at p. 968; Civ. Code, § 1717.) According to Myers, any other conclusion would defeat the purpose of indemnity agreements:

> "The very essence of an indemnity agreement is that one party hold the other harmless from losses resulting from certain specified circumstances. The provisions of Civil Code section 1717 were never intended to inflict upon the indemnitee the obligation to indemnify his indemnitor in similar circumstances. Indemnification agreements are intended to be unilateral agreements. The Legislature has indicated no intent to make them reciprocal by operation of law." (Myers, supra, 13 Cal.App.4th at p. 973; see also Meininger v. Larwin-Northern California, Inc. (1976) 63 Cal.App.3d 82, 84-85 [clause requiring party to "indemnify and hold and save" other harmless from "any and all" claims of "whatsoever kind and nature," including attorney's fees, did not provide for attorney's fees in an action "on a contract," as required to trigger Civil Code section 1717].)

Under Myers, the clause upon which Main Line was allowed to recover attorney's fees was unquestionably an indemnity clause and, therefore, cannot support the award of attorney's fees.

2. Even if the indemnity clause could somehow be construed as permitting recovery of attorney's fees, it applied only to Mighty Wind, not Basinger.

In any event, attorney's fees cannot be recovered from Basinger because the provision only applied to Mighty Wind. Specifically, the clause stated that "Employer"--Mighty Wind--shall indemnify the Producer. (Ex. 76, p. 21.) The provision contained nothing that could possibly be construed as obligating Basinger to pay such fees. Thus, if attorney's fees are recoverable at all (they are not), the judgment must be modified to limit such liability to Mighty Wind.

3. There could be no recovery of attorney's fees because the trial court was empowered to award Main Line attorney's fees only pursuant to noticed motion and no such motion was ever filed.

Even if there were an attorney's fees clause by which Main Line could recover attorney's fees, Main Line was not entitled to recover attorney's fees because it sought them by filing a memorandum of costs, even though a noticed motion is statutorily required. (CT 1835.)

Code of Civil Procedure section 1033.5 lists as allowable costs: "Attorney fees, when authorized by any of the following: (A) Contract. (B) Statute. (C) Law." (Subd. (a)(10).) It then provides: "Attorney's fees allowable as costs pursuant to subparagraph (A) or (C) of paragraph (10) of subdivision (a) shall be fixed either upon a noticed motion or upon entry of a default judgment, unless otherwise provided by stipulation of the parties. [¶] Attorney's fees awarded pursuant to Section 1717 of the Civil Code are allowable costs under section 1032 as authorized by subparagraph (A) of paragraph (10) of subdivision (a)." (Emphasis added.)

The comment accompanying the 1990 amendment states: "It is the intent of the Legislature in enacting this act to confirm that these attorney's fees are costs which are to be awarded only upon noticed motion, except where the parties stipulate otherwise or judgment is entered by default." (Stats. 1990, ch. 804, § 2; emphasis supplied.) As declared in Russell v. Trans Pacific Group

(1993) 19 Cal.App.4th 1717, 1725: "This declaration of legislative intent could not be more clear. Contractual attorney fees are to be claimed 'only' by a noticed motion, not by the mere filing of a memorandum of costs."[20/]

Main Line never filed a noticed motion for attorney's fees, as explicitly required by statute, even after its noncompliance was called to its attention. (CT 1886, 1898-1899.) Absent such a motion, Main Line could not recover attorney's fees.

For all these reasons, the portion of the judgment awarding $456,702.46 in attorney's fees should be reversed.

B. $198,206.34 Of The Costs Awarded Were Precluded By Specific Statutory Directive.

In addition to the erroneous award of attorney's fees, the trial court awarded Main Line almost $200,000 in costs that are expressly made non-recoverable by statute. Code of Civil Procedure section 1033.5, subdivision (b), provides: "The following items are not allowable as costs, except when expressly authorized by law: (1) Fees of experts not ordered by the court. (2) Investigation expenses in preparing the case for trial. (3) Postage, telephone, and photocopying charges, except for exhibits. (4) Costs in investigation of jurors or in preparation for voir dire. (5) Transcripts of court proceedings not ordered by the court."

The trial court violated this statute, awarding Main Line the following non-recoverable costs: $135,872.80, for fees of experts not ordered by the court (precluded by Code Civ. Proc., § 1033.5, subd. (b)(1)); $5,456.38, for research expenses including $4,989.44 for computer research (precluded by Code Civ. Proc., § 1033.5, subd. (b)(2), and by Ladas v. California State Auto. Assn. (1993) 19 Cal.App.4th 761 [fees for legal research, including computer research, are not recoverable]); $45,873.93, for postage, telephone, fax and photocopying charges for documents other than exhibits (precluded by Code Civ. Proc., § 1033.5, subd. (b)(3), and by Ladas, supra, 19 Cal.App.4th 761 [fax charges are nonrecoverable]); and $11,003.23, for transcripts of court

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20/ In Gunlock Corp. v. Walk on Water, Inc. (1993) 15 Cal.App.4th 1301, Division Two of the Second Appellate District held that a trial court has discretion to award attorney's fees even if the statutorily-required motion is not filed. Russell expressly (and correctly) disagreed with this holding "because it recreates the 'uncertainty' the Legislature so clearly sought to dispel in . . . amending section 1033.5 in 1990." (Russell, supra, 19 Cal.App.4th at p. 1728.)

proceedings not ordered by the court (precluded by Code Civ. Proc., § 1033.5, subd. (b)(5)). These impermissible costs total $198,206.34.

The right to costs is purely statutory. (Folsom v. Butte County Assn. of Governments (1982) 32 Cal.3d 668, 677; Perko's Enterprises, Inc. v. RRNS Enterprises (1992) 4 Cal.App.4th 238, 241.) Section 1033.5 extends discretion to the court only to award costs that are not mentioned in section 1033.5: "Items not mentioned in this section . . . may be allowed or denied in the court's discretion." (See Ladas, supra, 19 Cal.App.4th at p. 774 ["An item not specifically allowable under subdivision (a) nor prohibited under subdivision (b) may nevertheless be recoverable in the discretion of the court . . ."].) Here, the costs that were awarded are all expressly precluded by section 1033.5; accordingly, the trial court had no discretion to award such precluded costs.

No matter what the disposition of the other issues, the judgment includes $456,702.46 in impermissible attorney's fees and $198,206.34 in statutorily-prohibited costs, all of which must be stricken.

VI. THE JUDGMENT SHOULD BE REVERSED BECAUSE OF JUROR MISCONDUCT.

Not even the jury deliberations complied with the law. As demonstrated above, both independent analysis and uncontroverted evidence reveal that the jury disregarded the court's instruction to award net, not gross, profits and that this constituted misconduct requiring reversal. (See discussion, supra, at pp. 36-38; Krouse v. Graham, supra, 19 Cal.3d at pp. 80-81 [discussing and agreeing to increase verdict by including amount for attorney's fees was misconduct]; Glage v. Hawes Firearms Co. (1990) 226 Cal.App.3d 314, 328 [disregarding court's instructions is misconduct].)

This, however, was not the only act of misconduct. In reaching its decision, the jury also considered extraneous information related by several jurors. This, too, was egregious misconduct. (Andrews v. County of Orange (1982) 130 Cal.App.3d 944, 958 [communication to fellow jurors of information on an issue under litigation from sources other than the evidence constitutes misconduct]; Smith v. Covell (1980) 100 Cal.App.3d 947, 952-953 [communication of juror

experience with back pain was misconduct]; Lankster v. Alpha Beta Co. (1993) 15 Cal.App.4th 678, 682 [juror inspection of turnstiles was misconduct].)

As the uncontroverted declaration of one juror establishes, when the jury discussed the crucial issue whether an agreement on nudity had been reached, several jurors mentioned they had seen one of Basinger's prior movies, "9 1/2 Weeks," and stated that, given the risque nature of that movie, they doubted Basinger really had any problem with the nudity contemplated in Boxing Helena. (CT 1678.) Additionally, one of the jurors stated that he or she had seen the movie Cool World and that, since Basinger had played such an unsympathetic role in that film, he or she did not see why Basinger would have a problem with playing the role of Helena. (Ibid.)

During trial, the court rejected Main Line's proposal to show "9 1/2 Weeks" to the jury on the ground that Basinger's previous performances had no relevance to the issues of this case and that their admission into evidence could only serve to prejudice defendants. (RT 1417.) Neither "9 1/2 Weeks" nor "Cool World" was presented in evidence. (Ibid.) Nevertheless, the jury was improperly subjected to juror views about the excluded films, thus effectively circumventing the court's ruling. This was serious misconduct.

Once acts of jury misconduct are established, a presumption of prejudice is raised. (People v. Honeycutt (1977) 20 Cal.3d 150, 156 ["[A] presumption of prejudice arises from any juror misconduct . . . [which] presumption may be rebutted by proof that no prejudice actually resulted"]; Lankster, supra, 15 Cal.App.4th at p. 683 [same].) The burden then shifts to the prevailing party to overcome the presumption. (Lankster, supra, 15 Cal.App.4th at p. 683; Glage, supra, 226 Cal.App.3d at p. 321 [the presumption of prejudice caused by juror misconduct may be rebutted only by "an affirmative evidentiary showing that prejudice does not exist"].) Here, the evidence of juror misconduct was unrebutted. Faced with conclusive proof of juror misconduct, this court must reverse on this ground, too.

CONCLUSION

Prejudicial errors of the most fundamental kind permeated this case from beginning to end; they resulted in a grave miscarriage of justice. This court should reverse the judgment with directions to enter judgment for defendants because Main Line improperly induced the court to use an incomprehensible "and/or" special verdict form that failed to resolve the controverted issues in the case and stated it was willing to take the risk of error, and also because there was never any oral or written contract. At a minimum, the court should reverse and remand for a new trial because of repeated prejudicial instructional errors on key issues, an utter lack of substantial evidence to support the damage award, and prejudicial jury misconduct. Finally, the award of attorney's fees and costs must be stricken.

Dated: March 31, 1994

Respectfully submitted,

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