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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

CLIVE CUSSLER et al., Plaintiffs and Appellants, v. CRUSADER ENTERTAINMENT, LLC Defendant and Respondent.	B208738 (Los Angeles County Super. Ct. No. BC309114)

APPEAL from a judgment of the Superior Court of Los Angeles County, John P. Shook, Judge. Affirmed in part, reversed in part, and remanded with instructions.

Greenberg Glusker Fields Claman & Machtinger, Bertram Fields, Elisabeth A. Moriarty, and Caroline Heindel Burgos for Plaintiffs and Appellants.

O'Melveny & Myers, Marvin S. Putnam, William J. Charron and Jessica L. Stebbins for Defendant and Respondent.

INTRODUCTION

Plaintiff and appellant Clive Cussler, a widely read novelist, entered into a contract with defendant and respondent Crusader Entertainment, LLC (Crusader), a film producer. Under the contract, if certain conditions were satisfied, Crusader had the option of purchasing certain Clive Cussler books for the purpose of producing films. Crusader exercised its initial option and produced a film based on the novel Sahara. Prior to the release of the film, however, the relationship between the parties soured and Cussler[1] filed suit against Crusader. Crusader in turn filed a cross-complaint against Cussler.

Both parties accused each other of breaching the contract and committing various torts. After a 14-week trial, the jury returned a special verdict rejecting most of the causes of action asserted by both parties. The jury, however, found that Cussler breached the implied covenant of good faith and fair dealing and that Crusader incurred damages in the amount of $5 million as a result of that breach. The trial court then entered a judgment for that amount in favor of Crusader. Cussler appeals the judgment and requests that we enter a new judgment in his favor in the amount of $8,571,429.

We affirm the judgment with respect to Cussler's claims against Crusader. But we reverse the judgment with respect to Crusader's claim for breach of the implied covenant against Crusader. For reasons we shall explain, Crusader's breach of the implied covenant claim is barred as a matter of law.

BACKGROUND

1. *The contract*

Cussler and Crusader entered into a Memorandum of Agreement for Option and Purchase of Literary Material dated May 9, 2001. The contract contemplated that

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[1] Clive Cussler and plaintiffs Sahara Gold, LLC, Clive Cussler Enterprises, Inc. and Sandecker, RLLLP are the appellants and shall be collectively referred to as "Cussler." The entity plaintiffs are companies that hold rights in certain Clive Cussler novels, namely Shock Wave, Raise The Titanic, and Atlantis Found.

Crusader would produce a film franchise, i.e., a series of films, based on Cussler's novels featuring the character Dirk Pitt.

The contract provided that Crusader could exercise an initial option to produce a film based on Cussler's novel Sahara and a second novel to be designated by Crusader. It further provided that, if certain conditions were satisfied, Crusader "shall pay [Cussler] the sum of Twenty Million Dollars ($20,000,000) payable in seven equal annual instalments [*sic*] over a period of seven (7) years beginning on [the date the initial option is exercised] which shall constitute the Fixed Purchase Price for the novel entitled 'Sahara' which shall be the Initial Picture and one additional Theatrical Picture ('the Second Picture') based on the 'Second Novel.' "

Under the contract, Crusader also had the option of purchasing a third Dirk Pitt novel for a third film. This option could not be exercised unless certain conditions were satisfied. One condition was that Crusader was required to commence "principal photography" of Sahara within 24 months of the date it exercised its initial option. If Crusader failed to do so, then Cussler in its discretion could elect not to sell the rights to the third novel to Crusader.

2. *Crusader exercises its initial option, triggering a deadline for commencing principal photography for the film Sahara*

On November 6, 2001, Crusader exercised its initial option to acquire from Cussler film rights to Sahara and a second novel. Accordingly, in order to preserve its option of purchasing the rights to a third novel, Crusader was required to, inter alia, commence principal photography of the film Sahara on or before November 6, 2003.

3. *The development of the screenplay*

Before the contract was signed, Cussler approved a screenplay (the Approved Screenplay) for the film Sahara. The contract provided that Crusader would "not . . . change the Approved Screenplay . . . without Cussler's written approval exercisable in his sole and absolute discretion." However, once actual production of the film began, Cussler could not prevent the director of the film "from making the type of on[-]set changes . . . customarily made in the ordinary course of the production of a

motion picture[.]" Cussler also could not prohibit the producers of the film from "making changes required by the exigencies of production" or "making changes required by the company that issues the completion bond for the picture pursuant to customary provisions contained in completion bonds . . . ."

After the contract was executed, Crusader sought to change the Approved Screenplay. It hired and fired and sometimes hired again at least 10 different screenwriters who submitted more than two dozen screenplays.

Apart from the Approved Screenplay, Cussler did not approve the screenplays submitted to him. In one instance, Cussler disapproved a screenplay before he read it. After Crusader urged Cussler to review the document, he read the first 35 pages then threw it in the garbage. At a meeting with Crusader, Cussler flung the screenplay over his head and referred to it as "crap."

Meanwhile Cussler began writing his own drafts of the screenplay. Crusader did not approve of Cussler's scripts for creative and budgetary reasons. Further, Crusader was concerned that its use of a screenplay written by Cussler, who was not a member of the Writer's Guild, would violate Crusader's contract with the Writer's Guild. In addition, the film's distributor, Paramount, opposed Cussler writing the screenplay. Crusader thus asked Cussler to stop writing screenplays, but Cussler continued to do so.

Cussler's conduct made it difficult for Crusader to obtain the services of new screenwriters because it became known in Hollywood that Cussler would rewrite screenplays. Crusader also allegedly had difficulty recruiting actors because they did not like Cussler's proposed screenplays. This allegedly delayed the production of the film.

By April 2003, Cussler began to increasingly press for the use of *his* screenplay. Cussler advised Crusader that he did not trust other writers and that the only way to move forward with the production of the film was for Crusader to use Cussler's screenplay. When Crusader refused Cussler's demand, the relationship between the parties further deteriorated. Beginning in the Spring of 2003, Cussler stopped communicating with Crusader for several months. Although Crusader continued to send Cussler screenplays,

even after Crusader hired a director and began filming, Cussler stopped reading the screenplays he received because he felt that Crusader would not listen to his input.

4. *Cussler's public derogatory remarks regarding Sahara and his internet campaign to become the screenwriter*

Paragraph 17 of the contract expressly prohibited Cussler and his agents from publicly speaking about the subject matter of the contract without Crusader's approval, which could not be "unreasonably withheld."[2] However, in the fall of 2003, about a month before the first scene of Sahara was filmed, Cussler's publicist Carole Bartholomeaux began a campaign on Cussler's website requesting Cussler's fans to pressure Crusader to use Cussler's screenplay. In response to Bartholomeaux's campaign, Crusader began receiving about 20 emails a day from Cussler's fans.

At about the same time, Cussler began speaking about Sahara in radio and newspaper interviews. In these interviews, Cussler repeatedly made disparaging remarks about the film's screenplay. For example, in October 2003, Cussler said in a radio interview that Crusader had "gutted a lot of the dramatic scenes." Similarly, Cussler was quoted in the Denver Post in December 2003, as stating, "They've sent me seven scripts, and I've inserted each one in the trash can." (Castrone, *Ornery as ever, Clive Cussler lives life as one big adventure*, Denver Post (Dec. 4, 2003), p. F-01.)[3] A few weeks later, in an article in the Contra Costa Times, Cussler stated: "Right now, it looks like they

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[2] Paragraph 17 stated in part: "[Cussler] shall not, and shall not authorize any others, including but [not] limited to [Cussler's] agents, managers, publishers, and attorneys, by means of press agents or publicity or advertising agencies, employed or paid by [Cussler] or otherwise, circulate, publish, or otherwise disseminate any news stories or articles, books, or other publicity containing [Cussler's] name and relating directly or indirectly to the subject matter of this Agreement, any Theatrical Picture produced hereunder, the Granted Rights or the services to be rendered by [Cussler] or others in connection with any Theatrical Picture's [*sic*] hereunder unless the same are first approved by [Crusader], such approval not to be unreasonably withheld."

[3] All citations regarding Cussler's alleged statements to the media are taken from the record. We did not independently verify these statements.

might go forward with a screenplay [for Sahara] that I have not approved. Which means my readers are going to get disappointed because the screenplay I've seen is just awful." (Knapp & Lit, *The many adventures of Clive Cussler*, ContraCostaTimes.com (Dec. 28, 2003).)

In December 2003, Cussler's fans started an internet petition stating that Crusader was using a screenplay that Cussler did not approve in violation of Crusader's contract, and demanding that Crusader use a screenplay written by Cussler. The petition repeated Cussler's criticisms of the screenplay made in the Denver Post article.

In February 2004, Cussler told a London newspaper: "I don't know whose book they think they're adapting . . . but it sure isn't mine. I can't approve what they're doing. I've thrown away all the scripts they've sent me—seven or eight so far—and told them to go back and follow the book. But they refuse." (Shelden, *Why is Clive Cussler determined to sink a £100 million Hollywood adaptation of one of his bestselling adventure novels?*, The Daily Telegraph (London) (Feb. 23, 2004), p. 13.)

Cussler made similar remarks in other newspaper and radio interviews, as well as at the National Book Festival in October 2004. First-hand reports of Cussler's statements in newspapers were quoted in websites, blogs, and other newspapers. There is no evidence in the record that Cussler ever received Crusader's approval of any of the public statements he or his agents made regarding Sahara or its screenplay.

5. *The commencement of this action and the release of Sahara*

In January 2004, Cussler commenced this action by filing a complaint against Crusader in the superior court. Crusader, in turn, filed a cross-complaint against Cussler. Prior to the trial, on or about April 8, 2005, the film Sahara was released.

6. *Payments by Crusader to Cussler and the court*

Crusader paid Cussler four of the seven annual payments due for the first two films. These payments were each approximately $2,857,142, for a total of about $11,428,571. Prior to the trial, Crusader made the fifth payment in the amount of $2,857,142 and sixth payment in the amount of $2,857,143 to the court.

7. *The operative pleadings*

In his operative pleading, the third amended and supplemental complaint, Cussler set forth declaratory relief, breach of contract, and fraud causes of action. Cussler sought $100 million in compensatory damages, punitive damages and a declaration that "Crusader no longer has any right or option to acquire any rights in any further Cussler novels and that . . . Crusader has no further rights of any kind" under the contract. In his breach of contract claim, Cussler alleged that Crusader breached the contract by, inter alia, using a screenplay for Sahara that was not approved by Cussler, defaulting on its current obligations due under the contract (the fifth and sixth payments), and denying any future obligation to pay Cussler sums due under the contract (the seventh payment). In his fraud cause of action, Cussler alleged that Crusader never intended to keep his promise to not change the Approved Screenplay.[4]

In its operative pleading, the fourth amended and supplemental cross-complaint, Crusader alleged that Cussler "arbitrarily, irrationally, and destructively pursued his consultation and approval rights" relating to the screenplay for Sahara in violation of the implied covenant of good faith and fair dealing. Crusader further alleged that Cussler's disparaging statements about Sahara breached the implied covenant, as well as paragraph 17 of the contract. In addition, Crusader alleged that Cussler fraudulently promised that he would reasonably approve and support screenplays for Sahara with no intention of keeping that promise. Crusader also alleged that Cussler defrauded Crusader by falsely stating that over 100 million copies of his books had been sold.

Crusader set forth causes of action for breach of the implied covenant of good faith and fair dealing, breach of fiduciary duty, breach of contract by disparagement, trade libel, fraud, intentional interference with contract or prospective economic advantage, declaratory relief, fraud in the inducement, fraudulent concealment, and

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[4] Cussler also alleged a declaratory relief cause of action against defendant The Anschutz Company, who is not a party in this appeal, and a cause of action for reformation. These causes of action were not presented to the jury or referenced in the judgment.

negligent misrepresentation.[5] Crusader sought compensatory damages in the amount of $65 million, punitive damages, and a declaration that Crusader had "no obligation to make any payment to [Cussler] for the 'Second Picture' " identified in the contract.

8. *Arguments regarding the payments due under the contract*

In his opening statement at trial, Cussler promised the jury that the evidence would show that he was entitled to four separate items of damage arising from Crusader's breach of the contract. One of those items of damages was "about" $8 million in damages for money due under the parties' agreement. During the trial, Cussler testified that Crusader had failed to pay him approximately $8 million of the $20 million contract price. And at closing argument, Cussler argued that Crusader's breach of contract caused Cussler to incur four types of damages, including $8,571,429 in damages for money due under the contract.

Crusader denied that it owed Cussler $8,571,429 or any money for the second film, which was never made. Crusader also contended that under the contract it was obligated to pay Cussler $10 million per film, not $20 million for two films. Because Crusader had paid Cussler $11,428,571, Crusader sought to recover $1,428,571 as an overpayment for the first film, and a declaration that it did not owe Cussler $10 million for the second film.

9. *April 30, 2007, proceedings regarding Question No. 60*

On April 30, 2007, near the end of the trial, the court adjudicated a number of motions and finalized the special verdict form. One of the issues addressed was whether the court should submit Question No. 60, which stated: "Based on your decisions on the parties' claims, should Crusader Entertainment be obligated to pay Cussler for the 'second picture' under the parties [*sic*] agreement?"

The question related to Crusader's cause of action for declaratory relief. The trial court expressed concern that the question was "somewhat redundant." In response,

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[5] Crusader dismissed its trade libel and tortious interference causes of action before the special verdict was presented to the jury.

Crusader's counsel stated: "It is somewhat redundant. The claim is framed in the cross-complaint as an action for declaratory relief which is directed ultimately to your honor. We thought you might find it useful to get an advisory factual finding from the jury on this issue to be of assistance to you." After further argument, the trial court agreed to include Question No. 60 in the special verdict form "so the court can have an indication of how the jury feels with respect to the second payment, the second picture, obligations under the agreement."

10. *The verdict*

On May 15, 2007, after a 14-week trial and 9 days of deliberations, the jury rendered a special verdict. The jury found that Crusader had breached the contract but also found that Cussler was not harmed by that breach. The jury further rejected Cussler's fraud cause of action, finding that Crusader intended to perform its promises to Cussler.

All but one of Crusader's claims was also rejected. The jury found that Cussler breached the contract and intentionally and negligently misrepresented facts regarding the number of books he sold, but further found that Crusader did not suffer any harm from Cussler's breach of contract, intentional misrepresentation and negligent misrepresentation. Finding that Cussler intended to perform his promises and that he did not conceal any material facts, the jury rejected Crusader's causes of action for fraud based on a false promise and fraudulent concealment. But the jury found that Cussler breached the implied covenant of good faith and fair dealing, and awarded Crusader $2.5 million for past economic loss and $2.5 million for future economic loss, for a total of $5 million in damages.

The jury answered "no" to Question No. 57, which stated: "Did principal photography of the film 'Sahara' commence on or before November 6, 2003, within the meaning of the parties' agreement?" This question was relevant to Cussler's claim for a declaration that Crusader lost its option to purchase the rights to a third novel for a third film.

Finally, the jury answered "yes" to Question No. 60, which as we explained asked whether Crusader was obligated to pay Cussler for the second film. This question related to Crusader's declaratory relief claim that it was not obligated to pay Cussler $10 million for the second film and that it was entitled to a refund of $1,428,571 it already paid Cussler for the second film.

11. *Post-trial proceedings*

On July 3, 2007, Crusader dismissed its seventh cause of action for declaratory relief with prejudice. This dismissal was a response to the jury's answer to Question No. 60, which rejected Crusader's declaratory relief claim.

On July 6, 2007, Cussler filed a motion to include Question No. 60 in the judgment. In that motion, Cussler argued that the jury's response to Question No. 60 entitled Cussler to a judgment in the amount of $8,571,429.

Shortly thereafter, on July 18, 2007, Cussler filed a motion for leave to amend his third amended and supplemented complaint to conform to proof. Cussler sought to add allegations in his declaratory relief cause of action. Specifically, Cussler sought a declaration that Crusader owed Cussler $8,571,429 under the contract.

On January 3, 2008, the trial court denied Cussler's motion to include Question No. 60 in the judgment and Cussler's motion to amend his pleading. In its order denying the motions, the trial court stated: "The transcript of the 4/30/07 proceedings clearly shows that Question 60 was intended to be advisory in nature and was included as part of Crusader's cross-claim for declaratory relief. [Citation.] [Plaintiff] cannot now contend that the jury's response to Question 60 is tantamount to a judgment for $8,571,429."

On January 9, 2008, Cussler filed a proposed judgment that included the jury's answer to Question No. 60 and an award of $8,571,429 to Cussler. However, on February 14, 2008, the trial court rejected the proposed judgment as an improper motion for reconsideration, which failed to meet the procedural and substantive requirements of Code of Civil Procedure section 1008. On that same day, the trial court dismissed Cussler's first cause of action for declaratory relief as "moot."

12. *The judgment*

On May 15, 2008, the trial court entered a judgment. The judgment included a recital of the special verdict questions and the jury's answers thereto with the exceptions of Question Nos. 57 and 60. The judgment stated that jury's responses to those questions were "advisory" findings relating to subsequently-dismissed declaratory relief claims. The judgment deemed Crusader the prevailing party and awarded Crusader $5 million in damages, costs, and prejudgment interest. This appeal followed.

CONTENTIONS

Cussler makes four main arguments. Based on the jury's response to Question No. 60 and Crusader's dismissal of its declaratory relief cause of action, Cussler asserts a series of arguments relating to the $8,571,429 he claims is due under the contract from Crusader.[6] Cussler contends, inter alia, that Question No. 60 was not merely advisory, that the judgment is irreconcilable with the jury's response to Question No. 60, and that the judgment should have included Question No. 60, the jury's response thereto, and an award of $8,571,429 to Cussler. Cussler further argues that the trial court erroneously denied his motion for leave to amend his complaint in order to include a declaratory relief claim regarding the $8,571,429 Cussler contends is due under the contract.

Next, Cussler argues that the trial court erroneously dismissed his declaratory relief cause of action as moot. In light of the jury's response to Question No. 57, Cussler argues that the trial court should have granted him a declaration stating, inter alia, that Crusader's options on Cussler's books other than Sahara and a second book (Inca Gold) lapsed.

Cussler further argues that the award of damages to Crusader for breach of the implied covenant of good faith and fair dealing was not supported by substantial evidence. This argument has two major components. Cussler first contends that given the express provisions of the contract, Cussler's alleged conduct cannot, as a matter of

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[6] Cussler argues that the $5,714,286 Crusader paid into court should be applied to the $8,571,429 Crusader allegedly owes Cussler.

law, violate the implied covenant. Cussler also contends that even if he did violate the implied covenant, there was no substantial evidence that Crusader suffered any damages as a proximate result of Cussler's conduct.

Cussler's fourth and last major argument is that the trial court erred in excluding the testimony of his expert on the damages caused by Crusader's breach. The trial court refused to allow Cussler's expert, Professor Lew Hunter, to testify regarding the alleged financial impact of the many screenplay changes made by Crusader. Cussler contends that the trial court's error "fundamentally impacted the verdict," and that he is entitled to a new trial on the limited issue of damages caused by Crusader's breach of the contract.

Finally, Cussler argues that in light of its other errors, the trial court's finding that Crusader was the prevailing party and award of costs to Crusader was error. Cussler requests that this court state in its opinion that Cussler was the prevailing party entitled to recover trial court costs. We shall address each of Cussler's arguments in turn.

DISCUSSION

1. *The special verdict does not support Cussler's claim that he is entitled to recover $8,571,429 under the contract.*

" 'Unlike a general verdict (which merely *implies* findings on all issues in favor of the plaintiff or defendant), a special verdict presents to the jury each ultimate fact in the case. The jury must resolve all of the ultimate facts presented to it in the special verdict, so that "nothing shall remain to the court but to draw from them conclusions of law." (Code Civ. Proc., § 624.) [¶] The requirement that the jury must resolve every controverted issue is one of the recognized pitfalls of special verdicts. "[T]he possibility of a defective or incomplete special verdict, or possibly no verdict at all, is much greater than with a general verdict that is tested by special findings . . . ." [Citation.]' " (*Myers Building Industries, Ltd. v. Interface Technology, Inc.* (1993) 13 Cal.App.4th 949, 959-960; accord *Trujillo v. North County Transit Dist.* (1998) 63 Cal.App.4th 280, 285 (*Trujillo*).)

Here, Cussler argues that the jury's response to Question No. 60 supports a judgment in his favor. Specifically, he contends that in light of the jury's response to Question No. 60, his "right" to "contract payments" in the amount of $8,571,429 must be "in the judgment" or "reflected in the judgment." The special verdict, however, does not support such a judgment. Indeed, the special verdict indicates that the jury rejected Cussler's claim for $8,571,429.

In his pleadings and at trial, Cussler sought recovery of $8,571,429 in contract payments in his breach of contract cause of action. At closing argument, Cussler alleged he was entitled to recover the following damages:

Money due under the contract:	$ 8,571,429
Lost value of film rights:	$18,000,000
Lost value of gross receipts share:	$10,000,000
Reduced book advances:	$ 3,500,000
Total:	$40,071,429

The jury, however, rejected Cussler's breach of contract cause of action because it found that while Crusader breached the contract, Cussler was not harmed by that breach. By finding that Cussler did not sustain *any* damages, the jury necessarily found that Cussler did not sustain $8,571,429 in damages as a result of Crusader's failure to pay money allegedly due under the contract.

The jury's response to Question No. 60 does not support a contrary conclusion. "A cause of action for breach of contract requires proof of the following elements: (1) existence of the contract; (2) plaintiff's performance or excuse for nonperformance; (3) defendant's breach; and (4) damages to plaintiff as a result of the breach." (*CDF Firefighters v. Maldonado* (2008) 158 Cal.App.4th 1226, 1239.) In response to Question No. 60, the jury merely found that Crusader was obligated under the contract to pay Cussler for the second picture. The jury did *not* find that Crusader breached the contract

by failing to pay Cussler $8,571,429[7], or that Cussler sustained damages in that amount or any amount. The special verdict therefore does not support Cussler's claim that he is entitled to recover $8,571,429 as a result of Crusader's alleged breach of contract.

Cussler argues that the jury's response to Question No. 60 was irreconcilable with the jury's finding that Cussler was not harmed by Crusader's breach of contract. According to Cussler, by adopting an allegedly "irreconcilably inconsistent" verdict, the trial court deprived him of his "contract rights." We disagree.

Contrary to Cussler's contention, Question No. 60 was merely advisory. Cussler is correct that "[w]here an action for declaratory relief is in effect used as a substitute for an action at law for breach of contract, a party is entitled to a jury trial as a matter of right." (*Patterson v. Insurance Co. of North America* (1970) 6 Cal.App.3d 310, 315.) However, Crusader's declaratory relief cause of action was not a substitute for an action at law for breach of contract. Rather, Crusader was seeking equitable declaratory relief regarding future payments, not damages for breach of contract. Cussler therefore did not have a right to a jury trial on Crusader's declaratory relief cause of action. Question No. 60 was thus appropriately used as an advisory question to aid the trial court in adjudicating Crusader's declaratory relief cause of action. It had nothing to do with Cussler's breach of contract cause of action for damages.

Moreover, we can conceive of ways the jury's findings are not irreconcilable. For example, the jury's response to Question No. 60 could have been a rejection of Crusader's claim that it was only obligated to pay Cussler $10 million per picture. The jury could have found that while under the contract Crusader was obligated to pay $20 million for two pictures, Crusader did not *breach* the contract by failing to make the fifth, sixth, and seventh payments due under the contract, totaling $8,571,429, because Cussler

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[7] In response to Question No. 5, the jury found that Crusader breached the contract. However, the jury did not specifically find that the breach was a failure to pay Cussler $8,571,429 for the second film, and we cannot imply such a finding. (See *Trujillo*, *supra*, 63 Cal.App.4th at p. 285.) The jury could have found, for example, that Crusader's breach was its failure to use the Approved Screenplay.

was barred from recovery by Crusader's unclean hands defense. This defense bars a breach of contract claim, regardless of its merits, if the plaintiff engages in sufficiently unconscionable conduct that relates directly to the cause at issue. (*Kendall-Jackson Winery, Ltd. v. Superior Court* (1999) 76 Cal.App.4th 970, 978-979.)

Here, there was evidence that Cussler acted in a manner that sabotaged Crusader's ability to successfully produce a second film. The jury was instructed regarding Crusader's unclean hands defense[8], and we must presume the jury understood and correctly applied its instructions. (*Linden Partners v. Wilshire Linden Associates* (1998) 62 Cal.App.4th 508, 523.)

Cussler contends that the trial court should have granted him a declaratory judgment stating that he is entitled to recover $8,571,429 from Crusader for payments due for the first two films. In his pleadings and at trial, however, Cussler did not seek such a declaration. Rather, as stated, Cussler pursued recovery of $8,571,429 allegedly due for the first two films *in his breach of contract cause of action*, which was rejected by the jury. Question No. 60 ironically was requested by Crusader in support of its declaratory relief cause of action.

Cussler argues that the trial court should have granted him leave to amend his complaint after the trial to conform to proof. Specifically, Cussler contends that the trial court should have allowed him to modify his declaratory relief cause of action so that it included a claim for the $8,571,429 he claims is due under the contract. We review the trial court's decision to deny Cussler's motion for leave to amend under an abuse of discretion standard. (*Garcia v. Roberts* (2009) 173 Cal.App.4th 900, 909; *North Pacifica LLC v. California Coastal Com.* (2008) 166 Cal.App.4th 1416, 1427.)

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8 "In an action at law, 'the trial court has discretion whether to submit an equitable defense [such as unclean hands] to the jury.' " (*Jogani v. Superior Court* (2008) 165 Cal.App.4th 901, 911, fn. 4.)

Cussler's proposed declaratory relief cause of action was based on allegations that were an integral part of his breach of contract cause of action, namely that Crusader breached the contract by failing to make the fifth, sixth, and seventh payments due under the contract for the first two films, totaling $8,571,429. The trial court's decision to prohibit Cussler from asserting a claim already rejected by the jury was not arbitrary, irrational or capricious. We thus hold that the trial court acted well within its discretion in denying Cussler leave to amend his complaint to modify his declaratory relief cause of action.

Cussler further argues that Crusader's dismissal of its declaratory relief action was a retraxit and a judgment on the merits in favor of Cussler. He contends that since Crusader's declaratory relief cause of action alleged that Cussler was *not* entitled to the balance of contract payments, the dismissal of that cause of action with prejudice was a "binding determination" that Cussler *is* entitled to the balance of the contract payments. For reasons we shall explain, Cussler is wrong.

"A dismissal with prejudice is the modern name for a common law retraxit." (*Torrey Pines Bank v. Superior Court* (1989) 216 Cal.App.3d 813, 820 (*Torrey*).) "Dismissal with prejudice is determinative of the issues in the action and precludes *the dismissing party* from litigating those issues again." (*Ibid.*, italics added.)

A retraxit "invokes the principles of res judicata" (*Rice v. Crow* (2000) 81 Cal.App.4th 725, 734 (*Rice*)) because it is the equivalent of a judgment on the merits (*Torrey*, *supra*, 216 Cal.App.3d at p. 820), which is an essential element of res judicata. (7 Witkin, Cal. Procedure (5th ed. 2008) Judgment, §335, p. 940 (Witkin).) Res judicata has two aspects—claim preclusion and issue preclusion, also known as collateral estoppel. (*Rice*, at p. 734.) Claim preclusion bars a party from relitigating the same cause of action, i.e., a claim based on the same primary rights, in a second suit. (See *Noble v. Draper* (2008) 160 Cal.App.4th 1, 11; *Burdette v. Carrier Corp.* (2008) 158 Cal.App.4th 1668, 1684.) Issue preclusion bars a party from relitigating an issue actually litigated and necessarily decided in a former proceeding. (*Lucido v. Superior Court* (1990) 51 Cal.3d 335, 341.)

"Res judicata gives conclusive effect to a former judgment only when the former judgment was in a *different action*; an earlier ruling in the same action cannot be res judicata, although it may be 'law of the case' if an appellate court has determined the issue." (7 Witkin, *supra*, Judgment, § 334, p. 939, italics added.)

When these principles are applied to this case, Cussler's argument falls apart. Under the doctrine of res judicata, Crusader's dismissal of its declaratory relief cause of action bars *Crusader* from asserting a cause of action based on the same primary right or relitigating the same issue in a *subsequent action*, but has no effect on *Cussler's* causes of action against Crusader *in this action*.

2. *The trial court did not abuse its discretion in dismissing Cussler's declaratory relief cause of action as moot.*

Under Code of Civil Procedure section 1060 (section 1060), any person with an interest in a written contract, "may, in cases of actual controversy relating to the legal rights and duties of the respective parties," bring an action "for a declaration of his or her rights and duties" under the contract. (Code Civ. Proc., § 1060.) Code of Civil Procedure section 1061 provides that the trial court "may refuse to exercise the power granted by [section 1060] in any case where its declaration or determination is not necessary or proper at the time under all the circumstances." (*Id.*, § 1061.) "This is a discretionary determination, subject to reversal only if that discretion is abused." (*Otay Land Co. v. Royal Indemnity Co.* (2008) 169 Cal.App.4th 556, 563; accord *Meyer v. Sprint Spectrum L.P.* (2009) 45 Cal.4th 634, 647 [trial court's denial of declaratory relief is reviewed for abuse of discretion].)

Here, Cussler sought a declaration that Crusader no longer had the option to purchase Cussler novels under the contract.[9] The contract provided that "[u]pon and

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[9] Cussler argues that in light of the jury's finding that principal photography of the film Sahara did not commence on or before November 6, 2003, he is entitled to a declaration stating: "(1) [Crusader] did not begin principal photography of 'Sahara' by November 6, 2003; (2) as a result, [Crusader's] options on Cussler's books other than 'Sahara' and [the second novel] 'Inca Gold' lapsed; and (3) [Crusader] is obligated to designate a third novel, and [Cussler] have a continuing option to sell [Crusader] that

subject to commencement of principal photography" of the second picture, Crusader shall pay Cussler $10 million for the rights to a third Cussler novel to produce a third picture. The contract also provided that, if certain conditions did not occur, Cussler could terminate Crusader's option to purchase the rights to a third novel. One such condition was that the principal photography of the initial picture, Sahara, had to commence within 24 months of the exercise of the initial option by Crusader, i.e., on or before November 6, 2003. The parties hotly disputed this issue. To resolve the matter, the jury was given Question No. 57, which asked: "Did principal photography of the film 'Sahara' commence on or before November 6, 2003, within the meaning of the parties' agreement?"

The contract further provided that Cussler could terminate Crusader's option to purchase the rights to a third novel if the principal photography for the *second* picture did not commence within two years of the theatrical release of Sahara. Because Sahara was released on April 8, 2005, that deadline was April 8, 2007. It is undisputed that Crusader did not commence principal photography of the second picture. Thus on April 8, 2007, while the trial in this action was underway, Cussler could have terminated Crusader's option to purchase rights to a third novel regardless of how the jury answered Question No. 57.

At closing argument, Crusader conceded that "during the course of this trial" its option rights to the third novel "lapsed." Subsequently, the jury rendered a verdict in which it answered Question No. 57 in the negative. Cussler thus had a right to terminate Crusader's option rights to the third novel for two independent reasons.

Cussler argues that the trial court should have included in the judgment a declaration that Crusader had no option rights beyond the first two books. He contends that since the contract refers to options, "potential buyers of the rights and lenders on the

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novel . . . ." However, in his pleadings and at trial Cussler did not seek a declaration regarding matters (1) and (3) and thus forfeited his arguments regarding these matters on appeal. (*Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.* (2006) 136 Cal.App.4th 212, 226.)

security of those rights will be unlikely to rely on anything less than a judgment freeing the rights from that cloud." We agree that the trial court could have granted Cussler declaratory relief under these circumstances. However, we do not review the trial court's decision de novo; we review it for abuse of discretion.

At the time the trial court dismissed Cussler's declaratory relief cause of action, it had a reasonable basis to conclude that there was no longer an actual controversy regarding whether Crusader had the option rights to a third novel. Accordingly, the trial court's dismissal of Cussler's declaratory relief cause of action was not arbitrary and was not an abuse of discretion.

3. *Cussler's alleged conduct was not a breach of the implied covenant and good faith and fair dealing as a matter of law*.

"It has long been recognized in California every contract contains an implied covenant of good faith and fair dealing that ' "neither party will do anything which will injure the right of the other to receive the benefits of the agreement." ' [Citations.] This covenant is 'read into contracts "in order to protect the express covenants or promises of the contract, not to protect some general public policy interest not directly tied to the contract's purpose." ' " (*Wolf v. Walt Disney Pictures & Television* (2008) 162 Cal.App.4th 1107, 1120 (*Wolf*).)

The implied covenant cannot vary the express terms of the contract (*Carma Developers (Cal.) Inc. v. Marathon Development California, Inc.* (1992) 2 Cal.4th 342, 374 (*Carma*)) or impose duties or limits beyond the express terms. (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 349-350 (*Guz*).) The parties to a contract " 'may, by express provisions of the contract, grant the right to engage in the very acts and conduct which would otherwise have been forbidden by an implied covenant of good faith and fair dealing. . . .' " (*Carma*, at p. 374.) The implied covenant "will only be recognized to further the contract's purpose; it will not be read into a contract to prohibit a party from doing that which is expressly permitted by the agreement itself." (*Wolf*, *supra*, 162 Cal.App.4th at p. 1120.)

The implied covenant cannot be imposed on a subject that is completely covered by the contract's express terms. (*Third Story Music, Inc. v. Waits* (1995) 41 Cal.App.4th 798, 804 (*Third Story Music*).) Thus, to the extent an implied covenant claim "seeks simply to invoke terms to which the parties *did* agree, it is superfluous." (*Guz*, *supra*, 24 Cal.4th at p. 352.) In other words, if the allegations supporting a breach of the implied covenant claim "do not go beyond the statement of a mere contract breach and, relying on the same alleged acts, simply seek the same damages or other relief already claimed in a companion contract cause of action, they may be disregarded as superfluous as no additional claim is actually stated." (*Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1395 (*Careau*); accord *Aragon-Haas v. Family Security Ins. Services, Inc.* (1991) 231 Cal.App.3d 232, 240 (*Aragon-Haas*) [holding that a breach of the implied covenant claim "adds nothing because the same conduct on defendant's part is alleged to constitute breach of both the employment contract and the covenant"].)

In *Third Story Music*, the court addressed the following issue: "When an agreement expressly gives one party absolute discretion over whether or not to perform, when should the implied covenant of good faith and fair dealing be applied to limit its discretion?" (*Third Story Music, supra,* 41 Cal.App.4th at p. 802.)

To answer that question, the *Third Story Music* court reviewed the Supreme Court's analysis in *Carma*. The *Third Story Music* court pointed out that *Carma* sets up "an apparent inconsistency between the principle that the covenant of good faith should be applied to restrict exercise of a discretionary power and the principle that an implied covenant must never vary the express terms of the parties' agreement." (*Third Story Music*, *supra*, 41 Cal.App.4th at p. 804.)

In one line of cases examined by *Carma*, the parties intended to create a contract but due to the sole discretion given to one party there was no mutuality and the contract was illusory and unenforceable. The *Third Story Music* court found that in this line of cases, "the courts were forced to resolve contradictory expressions of intent from the parties: the intent to give one party total discretion over its performance and the intent to

have a mutually binding agreement. In that situation, imposing the duty of good faith creates a binding contract where, despite the clear intent of the parties, one would not otherwise exist. Faced with that choice, courts prefer to imply a covenant at odds with the express language of the contract rather than literally enforce a discretionary language clause and thereby render the agreement unenforceable." (*Third Story Music*, *supra*, 41 Cal.App.4th at p. 805; see also *Perdue v. Crocker National Bank* (1985) 38 Cal.3d 913; *Cal. Lettuce Growers v. Union Sugar Co.* (1955) 45 Cal.2d 474; *Zilg v. Prentice-Hall, Inc.* (2nd Cir. 1983) 717 F.2d 671.)

In the other line of cases examined by *Carma*, the contract was unambiguous and there was consideration so that the implied covenant was not needed to effectuate the parties' expressed desire for a binding agreement. The *Third Story Music* court found that in those cases, "one of the parties was expressly given a discretionary power but regardless of how such power was exercised, the agreement would have been supported by adequate consideration. There was no tension between the parties' express agreement and their intention to be bound, and no necessity to impose an implied covenant to create mutuality." (*Third Story Music*, *supra*, 41 Cal.App.4th at p. 808; see also *Balfour, Guthrie & Co. v. Gourmet Farms* (1980) 108 Cal.App.3d 181; *Brandt v. Lockheed Missiles & Space Co.* (1984) 154 Cal.App.3d 1124; *Gerdlund v. Electronic Dispensers International* (1987) 190 Cal.App.3d 263; *Carma*, *supra*, 2 Cal.4th at p. 376.)

The court reconciled these cases with the following rule: "The conclusion to be drawn is that courts are not at liberty to imply a covenant directly at odds with a contract's express grant of discretionary power except in those relatively rare instances when reading the provision literally would, contrary to the parties' clear intention, result in an unenforceable, illusory agreement. In all other situations, where the contract is unambiguous, the express language is to govern, and '[n]o obligation can be implied . . . which would result in the obliteration of a right expressly given under a written contract.' [Citation.]" (*Third Story Music*, *supra*, 41 Cal.App.4th at p. 808.)

In *Third Story Music*, TSM assigned to Warner its rights to market and sell certain recordings by singer/songwriter Tom Waits in exchange for a fixed sum of money and the right to receive a percentage of the amount earned by Warner from its exploitation of the music. The contract provided that Warner could "at [its] election" refrain from marketing and selling the music. After Warner refused to license four of the assigned recordings to a third party who sought to include them in a compilation album featuring Waits's music, TSM sued Warner for breach of the implied covenant. (*Third Story Music*, *supra*, 41 Cal.App.4th at pp. 801-802.)

The court noted that although Warner's promise to market and sell Waits's music was illusory, that promise was not the only consideration given by Warner. Warner also agreed to pay TSM a guaranteed minimum amount. The court thus held TSM could not maintain a cause of action for breach of the implied covenant based on Warner's alleged failure to exercise its discretion in good faith. (*Third Story Music*, *supra*, 41 Cal.App.4th at pp. 808-809.)

In reaching its decision, the *Third Story Music* court stated: " 'The courts cannot make better agreements for parties than they themselves have been satisfied to enter into or rewrite the contracts because they operate harshly or inequitably. It is not enough to say that without the proposed implied covenant, the contract would be improvident or unwise or would operate unjustly. Parties have the right to make such agreements. The law refuses to read into contracts anything by way of implication except upon grounds of obvious necessity.' (*Walnut Creek Pipe Distributors, Inc. v. Gates Rubber Co.* (1964) 228 Cal.App.2d 810, 815 [39 Cal.Rptr. 767].) TSM was free to accept or reject the bargain offered and cannot look to the courts to amend the terms that prove unsatisfactory." (*Third Story Music*, *supra*, 41 Cal.App.4th at p. 809; see also *Wolf*, *supra*, 162 Cal.App.4th at pp. 1121-1122.)

In the present case, Crusader argues that Cussler breached the implied covenant in "numerous ways," but does not articulate any specific conduct that supports its claim apart from (1) Cussler's alleged bad faith disapproval of screenplays and associated delays in the production of the film Sahara, (2) Cussler's public statements regarding the

film Sahara, and (3) Cussler's alleged unreasonable delay in approving actor Steve Zahn. Applying the principles of *Carma*, *Third Story Music*, and the other cases we have cited, we shall conclude that Crusader's cause of action for breach of the implied covenant of good faith and fair dealing fails as a matter of law.

a. *Crusader's alleged bad faith disapproval of the screenplay.*

Crusader's implied covenant claim is based mainly on Cussler's failure to approve Crusader's numerous proposed screenplays. As stated, Crusader expressly promised to *not* change the Approved Screenplay unless Cussler, in his sole and absolute discretion, approved. We cannot excuse Crusader from its express obligation to use the Approved Screenplay and take away Cussler's express right to reject unapproved screenplays unless, contrary to the parties' intention, a literal interpretation of the contract would render it illusory and unenforceable. (*Third Story Music*, *supra*, 41 Cal.App.4th at p. 808.)

Under the plain and literal terms of the contract, Cussler could reject unapproved screenplays for unreasonable reasons (e.g., a desire to write the screenplay himself) or for no reason at all.[10] Nonetheless, Crusader received consideration under the contract regardless of how Cussler exercised his discretion. That is because Crusader could have, if it chose, used the Approved Screenplay to produce the film Sahara. Thus the contract is not illusory even if Cussler unreasonably exercised his discretion to withhold approval of a different screenplay. The implied covenant therefore should not be imposed.

The bargain struck by Crusader and Cussler did not require Cussler to act reasonably or in good faith in approving screenplays. Rather, the agreement expressly gave Cussler the right to approve screenplays "in his sole and absolute discretion." The parties were free to grant Cussler by express terms such discretion even if such discretion

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[10] In its pleadings, at trial and on appeal Crusader argued that Cussler had a bad motive to withhold his approval of proposed screenplays, namely pressuring Crusader to allow Cussler to write the screenplay. The law, however, generally does not distinguish between good and bad motives for breaching a contract. (*Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 516.)

would otherwise be forbidden by the implied covenant. (*Carma*, *supra*, 2 Cal.4th at p. 374.) Indeed, the parties clearly understood the difference between "absolute" and "reasonable" discretion because another provision of the contract prohibited Crusader from "unreasonably" withholding approval of Cussler's public statements regarding the film Sahara. We cannot rewrite the contract simply because Crusader believes, with hindsight, that using the Approved Screenplay or giving Cussler unfettered discretion to reject other screenplays was not a commercially wise endeavor. (*Third Story Music*, *supra*, 41 Cal.App.4th at p. 809; *Wolf*, *supra*, 162 Cal.App.4th at p. 1122.)

b. *Cussler's alleged derogatory statements regarding Sahara and its screenplay.*

Crusader argues that Cussler's negative public statements regarding the film Sahara was a breach of the implied covenant of good faith and fair dealing. These statements, however, were a breach of the express terms of paragraph 17 of the contract and purportedly caused the same damages that a breach of that express provision caused. Accordingly, to the extent Crusader's breach of the implied covenant cause of action was based on the public statements of Cussler and his agents regarding Sahara, the cause of action is superfluous and should be disregarded. (*Guz*, *supra*, 24 Cal.4th at p. 352; *Careau*, *supra*, 222 Cal.App.3d at p. 1395; *Aragon-Haas*, *supra*, 231 Cal.App.3d at p. 240.)

c. *Cussler's alleged delay in approving actor Steve Zahn.*

The contract states that "Cussler shall have sole and absolute approval of the actors playing the roles of 'Dirk Pitt' and 'Al Giordino' " in the film Sahara. Although the agreement does not specify a time period for such approval, Crusader contends that Cussler's delayed approval of Steve Zahn to play the character Al Giordino was a breach of the implied covenant of good faith and faith dealing. However, Crusader does not cite any evidence, and we have found none, that supports a finding that Cussler's alleged delay in approving Mr. Zahn caused Crusader any damages. Accordingly, this alleged conduct cannot support a $5 million judgment in Crusader's favor.

4. *The trial court did not abuse its discretion in excluding Cussler's expert testimony regarding damages*.

Cussler argues that the trial court erroneously excluded certain testimony of his expert Professor Lew Hunter. Specifically, Cussler sought to ask Professor Hunter whether Sahara would been a financial success had the film been based on the Approved Screenplay. Cussler made a proffer that Professor Hunter would testify that the film Sahara would have "at least have made its money back" had the film been based on Cussler's July 2002 screenplay.[11]

The trial court excluded Professor Hunter's testimony regarding the film's potential revenue for two reasons. First, the court found that Professor Hunter was not sufficiently expert in the financial aspects of the entertainment business. Second, the court found that in light of Professor Hunter's testimony at his deposition regarding the limited scope of the opinion he would offer at trial, it was not fair to allow Professor Hunter to opine at trial regarding the film's potential revenue.

"[W]e review the trial court's rulings regarding the admissibility of evidence under the deferential abuse of discretion standard." (*Molenda v. Department of Motor Vehicles* (2009) 172 Cal.App.4th 974, 986.) Under that standard, we uphold the evidentiary ruling challenged here.

At his deposition, Professor Hunter stated that he would not give an opinion regarding the "box office" revenue Sahara would have had if a different screenplay had been used because that was not his area of "expertise." Professor Hunter further testified that although he could not provide a "specific dollar" amount, it was self-evident that if a better screenplay had been used more people would have seen the film and the film would have made more money.

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[11] The Approved Screenplay was written by an author other than Cussler. However, Cussler approved his own July 2002 screenplay, and thus Crusader could have used it to produce the film without breaching its contract with Cussler.

"When an expert deponent testifies as to specific opinions and affirmatively states those are the only opinions he intends to offer at trial, it would be grossly unfair and prejudicial to permit the expert to offer additional opinions at trial." (*Jones v. Moore* (2000) 80 Cal.App.4th 557, 565 (*Jones*).) In light of the rule enunciated in *Jones*, the trial court did not abuse its discretion in excluding Professor Hunter from testifying that Sahara would have at least made its money back had a different screenplay been used. In order to conclude that the film would have broken even, Professor Hunter would have had to determine a specific dollar amount of revenue, which is precisely the topic he claimed to not have an opinion about because of his lack of expertise.

Even assuming we find that the trial court erred in excluding certain testimony by Professor Hunter, we cannot reverse the judgment unless we find that there was a miscarriage of justice. (Evid. Code, § 353, subd. (b).) This means that it is reasonably probable that a result more favorable to Cussler would have been reached in the absence of the error. (*Yield Dynamics, Inc. v. TEA Systems Corp.* (2007) 154 Cal.App.4th 547, 557.)

Cussler did not meet his burden of showing that the trial court's alleged error resulted in a miscarriage of justice. Although Cussler contends that "[h]ad the film only broken even, the revenue to Cussler from his contractual percentage of gross receipts was a simple mathematical calculation," he does not explain this argument or provide citations to the record supporting it. Accordingly, we consider the miscarriage of justice issue forfeited. (*Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784-785 ["When an appellant fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority, we treat the point as waived".)[12]

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12 The contract states that Cussler is entitled to receive as "Contingent Compensation" 10 percent of Crusader's "Gross Receipts." Gross Receipts are "accounted for individually and without any set-off between individual Theatrical Pictures except for [Crusader's] right to recoup the Initial Fixed Purchase Price and the Second Fixed Purchase Price from the Contingent Compensation otherwise payable to [Cussler] from [Crusader's] Gross Receipts from the Initial Picture, the Second Picture and the Third Picture on a cross-collateralized basis . . . ." Cussler does not explain with

5. *The trial court must reexamine the issue of who is the prevailing party.*

The trial court determined that Crusader was the prevailing party. In light of our reversal of the $5 million award to Crusader, the trial court must reexamine that issue.

DISPOSITION

Except as provided herein, the judgment is affirmed. The judgment is reversed with respect the $5 million award to Crusader in connection with its cause of action for breach of the implied covenant and good faith and fair dealing. The judgment is also reversed with respect to the trial court's findings that Crusader is the prevailing party and that Crusader is entitled to recover costs. The case is remanded to the trial court so that it can determine whether there is a prevailing party and, if so, whether that party is Cussler or Crusader. If the trial court determines that there is a prevailing party, it should also determine the amount of costs, if any, that party should recover. The parties are to bear their own costs on appeal.

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KITCHING, J.

We concur:

CROSKEY, Acting P. J.

ALDRICH, J.

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citations to the record why he would have earned Contingent Compensation had the film Sahara broken even.