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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 TWO

QUINCY JONES, Plaintiff and Appellant, v. MJJ PRODUCTIONS, INC., Defendant and Appellant.	B285986 (c/w B289609) (Los Angeles County Super. Ct. No. BC525803)

APPEAL from a judgment of the Superior Court of Los Angeles County. Michael L. Stern, Judge. Affirmed in part, reversed in part and remanded with directions.

McKool Smith Hennigan, J. Michael Hennigan, Lee W. Potts, Michael Swartz, Elizabeth S. Lachman, Kirk D. Dillman; McKool Smith, Mike McKool; Robert E. Allen; Gradstein &

Marzano, Henry Gradstein and Maryann R. Marzano for Plaintiff and Appellant.

Kinsella Weitzman Iser Kump & Aldisert, Howard Weitzman, Jonathan P. Steinsapir, Zachary T. Elsea; Katten Muchin Rosenman, Zia F. Modabber, Tami Kameda Sims, Leah E.A. Solomon; Greines, Martin, Stein & Richland and Alana H. Rotter for Defendant and Appellant.

Quincy Jones (Jones) produced three record albums for Michael Jackson (Jackson) and sued to recover $30 million in producer royalties for record sales and license fees from MJJ Productions, Inc. (MJJP), Jackson's production company.[1] The jury interpreted the parties' 1978 and 1985 producer agreements (the Producer Agreements), found that MJJP breached them in multiple respects, and issued awards in five categories for a total of $9,423,695.

On appeal, MJJP challenges two categories of damages awards: $5,315,787 in royalties on record sales and licenses received as profits by MJJP from its joint venture (Joint Venture)

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[1] MJJP contends that Jones was paid $17 million since 2009 and is not entitled to more.

with Sony Music (Sony)[2] that Jones claims should have been paid to him under section 4(a) of the Producer Agreements; and $1,574,128 for fees Jones claims he would have received if MJJP had given him the right of first opportunity to remix Jackson's master recordings[3] (Masters) as required under section 2 of the Producer Agreements.

These two awards must be reversed. Interpretation of the Producer Agreements was solely a judicial function, yet the trial court allowed the jury to perform that function and ultimately misinterpret the relevant terms. Section 4(a) of the Producer Agreements provided Jones with nothing more than a right to receive payments correlating to a 10 percent basic royalty rate[4] on the base royalty price for record sales. The $5,315,787 award is based on alleged breaches of section 4(a) and improperly includes licensing income and, presumably, income based on the jury determining that Jones was entitled to more than a 10 percent royalty on record sales. Further, section 2 did not entitle Jones to fees for remixing Masters and, alternatively, the remix

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[2] Initially, the Joint Venture involved a different Jackson entity other than MJJP. As later amended, MJJP became a party. Because all Jackson entities were essentially treated as one below, and because the distinctions do not impact this appeal, we refer to them all as MJJP.

[3] A master recording is the completed recording of a song that has been produced and mixed to a record company's satisfaction.

[4] One of the Producer Agreements provided Jones with a basic royalty rate of 11 or 12 percent for sales in excess of 10 or 20 million units. To simplify our discussion, we refer only to the 10 percent basic royalty rate.

damages were too speculative. On remand, the trial court is directed to amend the judgment to reflect that Jones is no longer entitled to these two awards.

Jones filed a cross-appeal. He contends that the trial court erred when it refused to allow him to conform the pleading to proof to allege a claim for financial elder abuse. On the theory that he proved this claim, he asks us to modify the judgment to include a finding of financial elder abuse and remand the matter for an award of attorney fees pursuant to Welfare and Institutions Code section 15657.5, subdivision (a). We deny this request. Next, Jones contends that the trial court erred when it denied mandatory and/or discretionary prejudgment interest on the jury's awards. We find no error.

FACTS

Background

Jackson entered three recording agreements (Recording Agreements) with Sony,[5] the first in 1975 as part of The Jackson Five, the next in 1981 as a solo artist, and a third in 1985 through MJJP. The Recording Agreements governed their relationship for Jackson's *Off the Wall*, *Thriller* and *Bad* albums, respectively. For record sales, Jackson was entitled to a royalty that was derived by applying his basic royalty rate[6] or a reduced

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[5] The Recording Agreements were between Jackson and Sony's predecessors in interest, either EPIC or CBS Records. For ease of reference, we refer to these subscribing record companies collectively as Sony.

[6] Jackson's basic royalty rate increased over time from 28 percent in 1975, to 37 percent in 1981, to 39 percent in 1985. Those rates increased by 1 or 2 percent if sales met certain benchmarks.

royalty rate[7] to the price of a record.[8] The 1981 and 1985 recording agreements entitled Jackson to a 50 percent share of net receipts when Sony licensed the Masters to third parties.

Pursuant to the Producer Agreements, Jones agreed to produce Jackson's music. The 1978 producer agreement governed their relationship for *Off the Wall* and *Thriller*, and the 1985 producer agreement governed their relationship for *Bad*. Section 4(a) of the Producer Agreements entitled Jones to a basic royalty rate of 10 percent of the wholesale price[9] for records,

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Donald Shaw Passman (Passman), Jones's music industry attorney, was asked to define a basic royalty rate. He testified: "Royalty contracts, in those days in particular, would have what they call the Basic Royalty Rate which would be the headline royalty; originally for vinyl and then it moved to cassettes. Everything else was a percentage of that. For example, foreign would be a reduction. Singles would be a reduction. When CDs came along, they became a reduction."

[7] As an example of reduced royalty rates, we note that the 1981 recording agreement stated that Jackson's royalty rate was reduced to 12 percent for foreign sales, 28 percent for singles and 8 percent for club sales.

[8] The price of a record was an agreed upon portion of the wholesale price. In the 1975 recording agreement, the wholesale price was reduced by a container charge of 10 or 25 percent. The 1981 and 1985 recording agreements specified, inter alia, that the "Royalty Base Price" was "the applicable Wholesale Price of Phonograph Records . . . less the applicable container charge."

[9] The 1978 producer agreement stated the royalty as 5 percent of the retail price. This is equivalent to 10 percent of the wholesale price. For ease, we generally refer to the latter royalty rate.

subject to being reduced, prorated and calculated the same as Jackson's royalties in the Recording Agreements. The Producer Agreements gave Jones a right of first opportunity to remix the Masters. Finally, section 12 of the 1985 producer agreement gave Jones the right to receive a share of license income from videoshows.

Historically, Jackson paid Jones a share of all license fees for the use of Masters,[10] not just license fees covered by section 12 of the 1985 producer agreement for videoshows. Jackson did so even though section 4 of the Producer Agreements is the only other section that provides for royalties, and even though there is no mention of licenses or license fees in section 4.[11]

In 1991, MJJP and Sony formed the Joint Venture to, among other things, sell records and license the Masters. Each party was entitled to 50 percent of the net profits.

Between 1993 and 2008, Jackson released a variety of remixes of the Masters done by well-known artists such as Kanye West and will.i.am. Jones was not offered the opportunity to perform these remixes.

After Jackson died in 2009, his estate negotiated an amendment to the Recording Agreements and the Joint Venture in a single agreement (2009 Amendment). MJJP's share of net profits was increased from 50 percent to 66 2/3rds percent.

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[10] License fees are often referred to as master use fees by the parties. They are synonymous.

[11] As we note later in this opinion, an MJJP witness asserted that these payments were gifts.

A documentary about Jackson entitled *This Is It* was made using Masters and then released in December 2009. It grossed over $500 million.

This Action

In October 2013, Jones sued MJJP for breach of the Producer Agreements and an accounting. He claimed: he was owed fees for the remixing work that should have been offered to him; he was entitled to share in the increased revenues paid to MJJP when it began receiving 66 2/3rds percent of the net profits under the 2009 Amendment; and he was not paid his full producer's royalty for use of the Masters in the videoshow *This Is It*.

The matter went to trial.[12] In opening argument, Jones's attorney stated, inter alia, that the Producer Agreements entitled Jones to receive a proportional share of every dollar that Jackson received for the sale or licensing of the Masters, and that Jones had been denied the first opportunity to remix Masters. Jones and MJJP put on evidence regarding the parties' past practices, custom in the music industry, and calculations related to damages.

During trial, Jones moved for leave to conform the pleading to proof by adding a financial elder abuse claim. The motion was denied.

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[12] MJJP moved for summary judgment or adjudication prior to trial and argued that interpretation of the Producer Agreements was a legal issue for the trial court to decide because there was no conflicting extrinsic evidence regarding their meaning. The trial court concluded that there were "issues that require testimony and interpretation and fact-finding[.]"

The trial court instructed the jury that it was required to interpret the Producer Agreements and determine if Jones had proved his interpretation.

The jury returned a special verdict. It found that Jones was entitled to $1,574,128 for MJJP's failure to provide him with the right of first opportunity to remix Masters; he was entitled to $5,315,787 of the Joint Venture profits paid to MJJP; he was entitled to $1,960,167 for licensing of the Masters in the videoshow *This Is It*; he was entitled to $180,718 related to SoundExchange,[13] foreign public performance income,[14] and foreign income tax deductions under the 1985 producer agreement; and MJJP agreed that it owed $392,895. The special verdict form did not ask the jury to determine the meaning of any of the specific terms in the Producer Agreements.

Jones moved for $3,319,295 in mandatory or discretionary prejudgment interest under Civil Code section 3287, subdivisions

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[13] SoundExchange is a nonprofit entity that collects public performance royalties from digital radio companies such as Sirius or Pandora when a song is played on their platforms, i.e., when the company uses a master recording. SoundExchange pays artists directly. Artists do not get a royalty if a local radio station plays a song over the airwaves in the United States. The award of $180,718 includes license fees the jury found Jones should have received from payments made by SoundExchange to Jackson/MJJP.

[14] An artist receives a royalty if one of his or her songs is played (and a master is thereby used) on local radio or digital radio in a foreign country. The award of $180,718 includes license fees the jury found Jones should have received out of payments by foreign entities to Jackson/MJJP for playing his songs on digital or local radio.

(a) and (b). The trial court denied the motion except as to $43,287 in interest on the $392,895 that MJJP agreed that it owed to Jones.

Final judgment was entered and stated that Jones shall recover $9,423,695 in damages plus costs. It contained $43,287 in prejudgment interest.

Appeal; Cross-Appeal

MJJP appealed.

Jones cross-appealed.

THE APPEAL

MJJP raises two issues on appeal: (1) whether section 4(a) of the Producer Agreements entitled Jones to a share of the profits MJJP received from the Joint Venture in addition to the money he was previously paid, and (2) whether section 2 entitled him to remix fees.

I. Rules of Contract Interpretation; Standards of Review.

A trial court must provisionally receive extrinsic evidence to determine if a contract is ambiguous, i.e., whether it is reasonably susceptible to two interpretations. (*Southern Cal. Edison Co. v. Superior Court* (1995) 37 Cal.App.4th 839, 848; *Winet v. Price* (1992) 4 Cal.App.4th 1159, 1165; *Benach v. County of Los Angeles* (2007) 149 Cal.App.4th 836, 847 (*Benach*).) "The trial court's determination of whether an ambiguity exists is a question of law, subject to independent review on appeal. [Citation.]" (*Ibid*.)

The type of evidence that can be provisionally received includes evidence of the parties' negotiations, their conduct and the circumstances of the contract's execution, including the nature and customs of the business that the contract concerns. (Civ. Code, §§ 1636-1656; *Bergin v. Van Der Steen* (1951) 107

Cal.App.2d 8, 13–14; *Magna Development Co. v. Reed* (1964) 228 Cal.App.2d 230, 236.) In contrast, a party's undisclosed intent or understanding is "'immaterial'" because "'the outward manifestation or expression of assent is controlling.' [Citation.]" (*Titan Group v. Sonoma Valley County Sanitation District* (1985) 164 Cal.App.3d 1122, 1127.)

As one court explained, "[p]arol evidence is admissible only to prove a meaning to which the contractual language is 'reasonably susceptible'; not to flatly contradict the express terms of the agreement. [Citation.] Thus if the contract calls for the plaintiff to deliver to defendant 100 pencils by July 21, 1992, parol evidence is not admissible to show that when the parties said 'pencils' they really meant 'car batteries' or that when they said 'July 21, 1992' they really meant May 13, 2001." (*Consolidated World Investments, Inc. v. Lido Preferred Ltd.* (1992) 9 Cal.App.4th 373, 379 (*Consolidated World Investments*).)

Only if the language is reasonably susceptible to an interpretation urged is the extrinsic evidence admitted to aid in interpreting the contract. (*ASP Properties Group, L.P. v. Fard, Inc.* (2005) 133 Cal.App.4th 1257, 1269.)

"Interpretation of a written instrument becomes solely a judicial function . . . when it is based on the words of the instrument alone, when there is no conflict in the extrinsic evidence, or when a determination was made based on incompetent evidence. [Citations.]" (*City of Hope National Medical Center v. Genentech, Inc.* (2008) 43 Cal.4th 375, 395.) When there is no conflict as to the facts but there are conflicting inferences, contract interpretation remains a judicial function and is not a jury question. (*Wolf v. Walt Disney Pictures & Television* (2008) 162 Cal.App.4th 1107, 1134, fn. 18.) In contrast, if ascertaining the intent of the parties at the time they executed a contract turns on the credibility of conflicting extrinsic evidence, the credibility determination as well as the interpretation of the contract are questions that can be submitted to a jury to resolve. (*Ibid*.)

If there is no conflicting evidence, we review the fact finder's interpretation of a contract de novo. (*San Pasqual Band of Mission Indians v. State of California* (2015) 241 Cal.App.4th 746, 756.) This remains true even if there are conflicting inferences. (*Medical Operations Management, Inc. v. National Health Laboratories, Inc.* (1986) 176 Cal.App.3d 886, 891; *Consolidated Theatres, Inc. v. Theatrical Stage Employees Union* (1968) 69 Cal.2d 713, 724, fn. 11 ["the fact that conflicting inferences may be drawn from evidence *which is not itself in conflict* does not require that an appellate court accept the trial court's interpretation of the instrument based upon such evidence"].) But if interpretation turns on the credibility of conflicting evidence, we will not overturn the trier of fact's interpretation if it is supported by substantial evidence. (*Benach*, *supra*, 149 Cal.App.4th at p. 847.)

II. The Trial Court Erred.

Before giving contract interpretation to the jury, the trial court was required to provisionally receive the extrinsic evidence and then make a preliminary determination that specific language in the Producer Agreements was reasonably susceptible to at least two interpretations, and that one of those interpretations was advocated by Jones. If so, the trial court was required to admit the extrinsic evidence. Next, the trial court was required to determine if any of the extrinsic evidence relevant to contract interpretation was in conflict. If yes, then the matter could be given to the jury. If not, then the trial court was required to interpret the contract itself. The trial court did not perform these judicial functions; instead, it allowed the jury to act in a judicial capacity.

III. The Joint Venture Profits Award.

MJJP argues that we must independently interpret section 4(a) of the Producer Agreements because there was no relevant conflicting extrinsic evidence as to its meaning. Turning to the language of section 4(a), MJJP contends that it provided Jones with a basic royalty rate of 10 percent for the sale of records, and it established how Jones's royalty should be adjusted if Jackson was entitled to less than his basic royalty rate under the Recording Agreements. Therefore, in effect, MJJP posits that the Joint Venture profits award must be reversed because it improperly includes amounts under section 4(a) for (1) more than a 10 percent royalty on record sales, and (2) a share of net receipts for Master use licenses.

Jones, in contrast, argues that the extrinsic evidence was conflicting, and it showed that the Producer Agreements entitled him to a proportional share of every dollar Jackson received[15] and that their royalties are always tied together. This leads Jones to contend that pursuant to section (4)(a) of the Producer Agreements, he is entitled to an increase in his basic royalty rate if Jackson's basic royalty rate increased, and to a share of net receipts for Master use licenses.

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[15] Jones takes the position that MJJP's share of the Joint Venture's profits were royalties for the sale and licensing of records embodying Masters.

As we discuss below, section 4(a) was not reasonably susceptible to Jones's interpretation even in light of the extrinsic evidence. The parties' extrinsic evidence was, therefore, inadmissible. Interpretation of section 4(a) was solely a judicial function, and the trial court erred when it gave that issue to the jury. The jury impliedly adopted Jones's interpretation, and that was impermissible because it rewrote the terms of section 4(a). (*Great Western Drywall, Inc. v. Interstate Fire & Casualty Co.* (2008) 161 Cal.App.4th 1033, 1043.) The award of $5,315,787 must be reversed because it was based on the jury's improper conclusion that: (1) the Producer Agreements entitled Jones to a share of net receipts for Master use licenses; and (2) the Producer Agreements entitled Jones to more than 10 percent of record sales if Sony increased Jackson's basic royalty rate over time in the Recording Agreements.[16]

A. *The Language of Section 4(a)*.

Section 4(a) in the Producer Agreements state: "We shall pay to you in respect of records embodying Masters hereunder the following royalties upon the terms and conditions hereinafter set forth[.]"

In the 1978 producer agreement, section 4(a)(i) states: "With respect to sales of records embodying Masters hereunder for which Artist is entitled to a full royalty in accordance with the terms and conditions of the Recording Agreement, a royalty at the rate of five percent (5%) of the suggested retail list price from

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16 Regarding this second point, we acknowledge that Jones never specifically argued that he should get more than 10 percent of a record sale. But that was the only possible message of his argument that he was entitled to a proportional share of every dollar that Jackson received.

time to time of such records (hereinafter 'basic royalty rate') or its wholesale price equivalent based on [Sony's] wholesale price to its distributors[.]. . . "[17]

Section 4(a)(i)(A) in the 1985 producer agreement differs and provides: "With respect to net sales of long-playing record albums embodying solely Master produced by you hereunder through [Sony's] normal retail channels in the United States for which Artist is entitled to a full royalty in accordance with the terms and conditions of the Recording Agreement ('USNRC Net Sales'), a royalty at the rate of ten percent (10%) of the applicable wholesale royalty base price utilized by [Sony] for the computation of royalties under the Recording Agreement for such records (hereinafter 'basic royalty rate') or such equivalent price as [Sony] may utilize for the computation of our royalties under the Recording Agreement. . . ." Further, section 4(a)(i)(B) entitles Jones to a higher royalty rate if certain sales goals are achieved.

Section 4(a)(ii) in both the 1978 producer agreement and the 1985 producer agreement are the same and provide that the royalties payable to "you hereunder shall be based upon one hundred percent (100%) of net sales for which payment has been received or credited to [Sony's] account; provided, however, in the event and to the extent the Recording Agreement provides for payment to Artist on less than one hundred percent (100%) of net sales, the royalties payable to you hereunder shall be based on such other percentage of net sales as Artist is paid."

Section 4(a)(iii) in the 1978 producer agreement provides: "The royalties payable to you hereunder shall otherwise be calculated, prorated and reduced (with respect to packaging

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[17] The wholesale price is 10 percent, as indicated in section 4(a)(i) in the 1985 producer agreement.

charges, free goods, budget records, etc.) in the same manner as the royalties payable to Artist with respect to such sales are so prorated, calculated and reduced. We shall provide you with the applicable provisions of the Recording Agreement regarding these matters[.]" The 1985 producer agreement contains similar language but refers to royalties calculated, prorated and reduced with respect to "foreign sales, singles, club and any other reduced-rate sales, budget records, packaging charges, free goods, etc." Also, it provides that Jackson "need not provide you with our actual royalty rates under the Recording Agreement[.]"

B. *Jones's Interpretation Must be Rejected*.

We must infer the jury's interpretation of section 4(a) because the special verdict form did not ask the jury to determine its meaning. The only reasonable inference of the record is that the jury adopted Jones's interpretation of section 4(a) when it found in MJJP in breach.

1. *Section 4(a) is not Reasonably Susceptible to Jones's Interpretation as it Relates to Record Sales.*

Jones makes no argument that specific language in section 4(a) is reasonably susceptible to his interpretation that he was entitled to a proportional increase on royalties for record sales if Jackson got an increase. This is telling. More importantly, section 4(a) does not provide for that.

Section 4(a) provides Jones a royalty of 10 percent on wholesale record sales when Jackson is entitled to a full royalty under the Recording Agreements. The dictionary definition of "full" is "containing all that can be held;" "complete," "entire," or "maximum." (<https://www.dictionary.com/browse/full> [as of May 5, 2020], archived at <https://perma.cc/W5NC-MCNK>.) The plain meaning of "full royalty" is Jackson's maximum royalty.

Whether his full royalty was 28 percent, 37 percent, or 39 percent under the Recording Agreements, Jones was still only entitled to, at most, 10 percent of the wholesale price. We have reviewed all of Jones's extrinsic evidence, but we need not recount it. Suffice it to say, none of it is relevant because the language of section 4(a) cannot be tortured to mean that Jones's maximum royalty rate increased proportionally if Jackson's maximum royalty rate increased. Jones's basic royalty rate of 10 percent was fixed.[18]

We note that Civil Code section 1644 provides: "The words of a contract are to be understood in their ordinary and popular sense, rather than according to their strict legal meaning; unless used by the parties in a technical sense, or unless a special meaning is given to them by usage, in which case the latter must be followed." Civil Code section 1645 provides: "Technical words are to be interpreted as usually understood by persons in the profession or business to which they relate, unless clearly used in a different sense." At no point did Jones offer evidence that his interpretation was supported by the technical meaning of words in the music industry or by special meaning given to them by usage. Specifically, no expert testified to the effect that everyone in the music industry knows that 10 percent of record sales

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[18] Jones's music industry expert Scott Brisbin (Brisbin) testified that 10 percent of the wholesale price of a record sale is about as high as a producer's royalty gets in the industry. He also testified that Jones's basic royalty rate would be fixed unless there was a contrary provision in the Producer Agreements. Rounding this out, Brisbin testified: "I do not see any provisions that would change [Jones's] [basic] royalty rate for the sale of phonograph records." As explained in footnote 19, Brisbin also testified that Jones's basic royalty rate could increase. That testimony was stricken.

means 10 percent of records sales unless the artist's basic royalty increases, in which case the producer's basic royalty also increases.[19]

At oral argument, Jones's counsel argued that there was a factual issue as to whether section 4(a)(iii) entitled him to an aliquot share (a set percentage) of Jackson's royalties for record sales. Though Jones's counsel claimed there was an ambiguity, he did not identify any language in section 4(a)(iii) that was reasonably susceptible to his interpretation that a royalty "calculated, pro-rated and reduced" the same as Jackson's refers to an aliquot share. The language is not susceptible to this interpretation because section 4(a)(iii) contains no reference to a ratio, percentage or aliquot share, and because Jones's interpretation would nullify section 4(a)(i), which gives him only a 10 percent basic royalty rate. (*Brandwein v. Butler* (2013) 218

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19 Brisbin testified that Jones gets an increased royalty rate if Jackson gets an increased royalty rate, and that the ratio between the Jones's royalty rate and Jackson's royalty rate was always the same. But Brisbin did not tie his opinion to any contractual language. The trial court instructed the jury: "[Brisbin] expressed an opinion that when an artist and a producer form a relationship, a producer ratio is established using the producer's Basic Royalty Rate as the enumerator [*sic*] and the artist Basic Royalty Rate as the denominator. And that once this ratio is established, if the artist's royalty rate changes, then the producer's royalty rate will be increased to ensure that the producer ratio stays the same. [¶] The testimony on these subjects by Mr. [Brisbin] is stricken and should be disregarded[.]" At oral argument, Jones argued that Brisbin's testimony about the ratio between his royalty rate and Jackson's royalty rate was not stricken. This appears to be semantics. Ultimately, it does not matter.

Cal.App.4th 1485, 1505 (*Brandwein*) [a written contract must be read as a whole; preference is given to reasonable interpretations].) Also, it makes no sense that section 4(a)(iii) refers to an aliquot share because it contemplates royalty calculations that are the same as Jackson's royalty calculations, but clearly Jackson does not receive an aliquot share of his own royalties. That would be an absurdity. The parentheticals in section 4(a)(iii) prove the point. Under the principle *ejusdem generis*, "where specific words follow general words in a contract, 'the general words are construed to embrace only things similar in nature to those enumerated by the specific words.' [Citation.]" (*Nygard, Inc. v. Uusi-Kerttula* (2008) 159 Cal.App.4th 1027, 1045 (*Nygard*).) An aliquot share is not similar to packaging charges, free goods, etc. Simply put, Jones's theory contradicts the plain language of section 4(a)(iii) and attempts to rewrite it by adding different terms.

2. *Section 4(a) is not Reasonably Susceptible to Jones's Interpretation as it Relates to Net Receipts for Master Uses.*

Section 4(a) entitles Jones to a royalty on record sales. It does not mention net receipts for Master use licenses or entitle him to a share. The only time Jones is entitled to a share of net receipts for Master use licenses is for videoshows under section 12 of the 1985 producer agreement.

Jones admits that section 4(a) does not refer to net receipts for Master use licenses. He argues, however, that Jackson's history of paying a producer's share of net receipts for Master use licenses should control. *Crestview Cemetery Assn. v. Dieden* (1960) 54 Cal.2d 744 does not support Jones's position. It iterated that when a contract is ambiguous, the practical construction given to a contract by the parties' conduct will, when reasonable, be adopted and enforced by the courts. (*Id*. at p. 753.) The problem for Jones is twofold. First, Jones does not argue that section 4(a) is ambiguous with respect to whether he is entitled to a share of net receipts for Master use licenses. Second, section 4(a) is not reasonably susceptible to his interpretation, which is that his share of net receipts for Master use licenses is a fraction (Jones's basic royalty rate over Jackson's basic royalty rate) multiplied by the net receipts for Master uses licenses received by Jackson. Regarding this latter point, we note that it is impossible to construe section 4(a)—which gives Jones 10 percent of the wholesale price for record sales—as expressing one royalty formula for record sales and an entirely different royalty formula for net receipts for Master use licenses.

Jones relies on the language in section 4(a)(iii) to support his theory of the case as to Master use licenses, but his reliance is unwarranted. This provision states that his royalties shall "be calculated, prorated and reduced . . . in the same manner as the royalties payable to Artist with respect to . . . sales[.]" It applies to sales, not net receipts for master use licenses. The other signpost that this provision has a circumscribed reach are the parentheticals indicating that any related calculation, proration or reduction of a sales based royalty is triggered by packaging charges, free goods, budget records, foreign sales, singles, club and other reduced-rate sales, budget records, and the like. Under the principle *ejusdem generis*, the words calculation, proration and reduction cannot be construed to include the calculations of fees for Master use licenses. (*Nygard, supra*, 159 Cal.App.4th at p. 1045.) They are not similar in nature to listed items that impact the calculation of a royalty for a record sale for both Jones and Jackson. Also, it would be unreasonable to conclude that the parties intended section 4(a)(iii) to entitle Jones to a share of Master use fees for licenses, thereby substantially negating the plain language of section 4(a)(i) entitling Jones to a royalty only for record sales. We must read the contract as a whole. (*Brandwein*, *supra*, 218 Cal.App.4th at p. 1505.)

Next, Jones adverts to the testimony of his music industry auditor, Gary William Cohen (Cohen). He was asked if he would agree there was no language in the 1978 producer agreement that says Jones gets paid if a Master is licensed for use in a movie. Cohen replied, "Well, it says paid as [Jackson] is paid, prorated[,] adjusted and computed. [¶] [Jackson] gets paid on licensing income and has been for the last 30 years. And [Jones] has been paid on licensing such as synch and such as streaming for the last 30 years." In addition, Cohen testified, "Typical producer agreements state that the producer is to be paid as the artist is paid." Based on the preceding, Jones states that the industry custom "along with Jackson's consistent payment of license fees to [Jones] for over 30 years[] confirms the parties understood section 4[(a)] of the [Producer Agreements], including the words 'record' and 'sales,' to include all forms of payment." This argument is infirm.

As case law establishes, the parties' conduct cannot prove a meaning that flatly contradicts sections 4(a). (*Consolidated World Investments*, *supra*, 9 Cal.App.4th at p. 379.) Therefore, the 10 percent of record sales formula in section 4(a) cannot also mean the formula Jones advocates for sharing net receipts for Master use licenses. Presuming for the sake of argument that Jones is trying to suggest that the parties understood that "record" and "sales" independently mean all economic events, including the payment of Master use license fees, we reject any suggestion that these words are terms of art in the music industry that are understood to mean all economic events. There is no evidence that it is custom and practice in the industry for the words "record" and "sales" to signify sales as well as license fees for Master uses. The extrinsic evidence introduced below, in fact, indicates that the music industry refers to license fees in a unique manner that does not involve the words "record" or "sales." Section 12 of the 1985 producer agreement states that "if any Master hereunder is utilized in any . . . [videoshow] which is commercially exploited by us or by our authority, then . . . your royalty account hereunder shall be credited in accordance with the foregoing: [¶] (i) There shall be credited to your royalty account hereunder an amount equal to our Net Receipts . . . in respect of such commercial exploitation of such Videoshow multiplied by a fraction, the numerator of which is one-half (1/2) of your basic royalty rate . . . and the denominator of which is our royalty rate under the Recording Agreement which corresponds to your royalty rate[.]" Section 9.03 of the 1981 recording agreement refers to net receipts in the context of a Master "leased by [Sony] to others[.]" The evidence shows that net receipts is the key phrase tied to license income.

Moreover, we note that Cohen offered an opinion on the meaning of section 4(a). The general rule is that "a witness is incompetent to give an opinion on the meaning of the contract language. [Citation.]" (*DVD Copy Control Assn., Inc. v. Kaleidescape, Inc.* (2009) 176 Cal.App.4th 697, 715.) Consequently, "[e]xpert opinion on the legal interpretation of contracts has . . . been found to be inadmissible." (*Summers v.*

A.L Gilbert Co. (1999) 69 Cal.App.4th 1155, 1180.) Based on case law, we disregard Cohen's opinion.

By adverting to the parties' understanding, Jones is essentially arguing that there was a mutual mistake by the parties regarding the meaning of section 4(a) as to license income. This was not Jones's theory of the case, and Jones cannot pursue it on appeal. Jones did not allege mistake in his complaint (*Thrifty Payless, Inc. v. The Americana at Brand, LLC* (2013) 218 Cal.App.4th 1230, 1243 ["Mistake must be pleaded with some particularity so that there is 'a clear recitation of facts showing how, when and why the mistake occurred'"] and he did not apply to the trial court to revise the Producer Agreements. "If there is 'a mutual mistake of the parties,' a written contract 'may be revised, on the application of a party aggrieved, so as to express that intention, so far as it can be done without prejudice to rights acquired by third parties, in good faith and for value.' [Citation.]" (*Hess v. Ford Motor Co.* (2002) 27 Cal.4th 516, 524; citing, Civ. Code, § 3399.)

In any event, any notion of mutual mistake is not borne out. Jackson's music lawyer, John Branca (Branca), testified, "We paid [Jones] as if he did have a provision that he would get paid on the [M]aster use license, even though he did not." Later in the trial, Branca consistently testified that "[Jones's] agreement does not provide contractually that he's entitled to a share of licensing revenue. We did that voluntarily to be fair. But if you read his actual agreement, he would get none of this [licensing] income."

After noting Branca's testimony, Jones claims the idea of Jackson making payments as a gift is "barely believable on its face" and was contradicted by other evidence during the trial. To show contradicting evidence, Jones cites testimony that Cohen never heard that Jones was not owed a share of license fees under the Producer Agreements. Also, Jones testified that he was entitled to get paid any time Masters were licensed. When an MJJP lawyer at trial indicated that the Producer Agreements did not entitle Jones to get paid for licenses, Jones said, "I don't care about these words," "I don't care about the contracts, man," "I don't care what the contract says," and "I don't give a damn." In his view, "If we made the record, we deserve to get paid. It's that simple." At best, Jones's testimony suggests he made a unilateral mistake. Case law provides that "there can be no relief in equity against a unilateral mistake" "in the absence of fraud or knowledge on the part of the other party[.]" (*Martinelli v. Gabriel* (1951) 103 Cal.App.2d 818, 823; *Banning Ranch Conservancy v. Superior Court* (2011) 193 Cal.App.4th 903, 915 ["a party's undisclosed subjective intent cannot be used to override the contractual terms themselves"].) Civil Code section 3399 dictates, "When, through . . . a mistake of one party, which the other at the time knew or suspected, a written contract does not truly express the intention of the parties, it may be revised on the application of a party aggrieved[.]" Jones did not assert a unilateral mistake theory, he did not apply to revise the Producer Agreements and, regardless, he cites no evidence that any such mistake was known to Jackson.

C. *The Award Must be Reversed*.

The jury's award of Joint Venture profits to Jones must be reversed because it is based on an impermissible interpretation of the Producer Agreements. Jones is not entitled to recover any Joint Venture profits.

IV. Remix Fees.

MJJP argues that the remix provisions did not entitle Jones to remix fees because they did not contain price terms, and because the only compensation for any of his services was his producer's royalty. Jones avers that a right of first refusal for services need not contain a price term, and a breach of it supports a damages award measured by what third parties were paid for doing the remixes.

Once again, the parties debate whether contract interpretation was a legal issue for the trial court or whether the matter was properly submitted to the jury. Because there was no conflicting extrinsic evidence as to the relevant language, the trial court erred when it declined to interpret the provision as a question of law.

Based upon our independent review, we conclude that even though Jackson breached section 2 of the Producer Agreements by not giving Jones the right of first opportunity to remix Masters, section did not require Jones to be paid for fees for remixing services. The only compensation Jones was entitled to receive was royalties from record sales on remixes, and the evidence indicates he received them. If he wanted remixing fees, he had to negotiate them in separate agreements. No such separate agreements were negotiated. Thus, remix fees were an improper measure of damages for the breach and the award of $1,574,128 for remix fees must be reversed.

Alternatively, we conclude that the damages award must be reversed as speculative.

A. *Section 2 of the Producer Agreements*.

Section 2 of the 1978 producer agreement stated: "You shall receive in respect of your production services hereunder the non-returnable sum of Thirty Thousand Dollars ($30,000.00), payable one-half (1/2) upon commencement of the recording sessions for the Masters hereunder (receipt of which is hereby acknowledged) and one-half (1/2) upon your delivery of the LP and acceptance thereof by [Sony] as to be satisfactory in accordance with the terms and provisions of the recording agreement between [Sony] and us regarding the recording services of Artist. . . . Said sum shall be one-half (1/2) recoupable and one-half (1/2) non-recoupable. We shall provide that [Sony] shall not have any other person re-mix or re-edit any Masters produced by you hereunder without first providing you with a reasonable opportunity to perform such re-mixing and/or re-editing as [Sony] shall require."

Section 2(a) of the 1985 producer agreement stated: "You shall receive in respect of your production services hereunder an advance (the 'Advance') equal to One Million Dollars ($1,000,000) payable promptly after the execution hereof. The Advance shall be recoupable from all royalties payable to you hereunder. We shall not and shall not permit [Sony] to have any person other than you re-mix or re-edit any Masters produced by you hereunder without first providing you with a reasonable opportunity to perform such re-mixing and/or re-editing as we or [Sony] shall require."

B. *No Conflicting Extrinsic Evidence*.

Brisbin testified that a remix right "provides that nobody may remix the recording until the producer has the first opportunity to do so. [¶] Now, it could say a lot more than that. [¶] The record company might say, 'Well, if we need it, you have to do it within a certain number of days. We're only going to pay so much money for you to do it.' Or, 'we're going to pay the expenses, but we're not going to pay you as the producer to do it. And we will or will not pay you royalty to do it.' [¶] So you can negotiate all those limitations and restrictions to the remix right when it's initially granted to the producer in the producer agreement." He explained that one reason a producer has a remix right is to maintain creative control. Also, if a producer agreement does not specify a separate payment, that would have to be negotiated at the time the remixing is required.

Owen J. Sloane (Sloane), MJJP's music industry expert, said nothing contrary. He was asked if there is a custom and practice that a producer must be paid to do a remix. He testified that it would be reasonable to assume a producer would not get paid for remixing an album if the record company concluded that the original mix was not acceptable.

This extrinsic evidence was not conflicting.

Jones contends that interpretation of the remix provision was properly given to the jury because there was conflicting extrinsic evidence on (1) whether the remix provisions apply to the remixes that MJJP released after 2009, and (2) what the parties meant by the phrases "[Sony] shall require" and "as we or [Sony] shall require." This contention—that a conflict in extrinsic evidence as to some contract interpretation issues means that all interpretation issues can be given to a jury—is not backed by supporting case law.

Because there was no conflicting evidence as to whether Jones was entitled to remix fees, we must interpret the remix provision de novo.

C. *Interpretation*.

The parties agree that the remix provisions do not contain a payment term. The question remains whether the parties intended Jones to get paid for remixing services beyond the normal royalty for record sales.

The plain language of section 2 of the Producer Agreements does not require Jackson to pay Jones remixing fees. Of course, extrinsic evidence can reveal a latent ambiguity in what is otherwise a clear term. But a review of the extrinsic evidence fails to reveal any such ambiguity.

Brisbin, Jones's own expert, testified that additional terms beyond the right to do remixes would have to be negotiated either when the producer agreement is executed or when remixing is required. He stated that a record company may or may not want to pay a producer. Sloane's testimony indicated that a producer would not get paid for remixing when the initial mix was rejected. The extrinsic evidence established that payment had to be negotiated. In contrast, there was no extrinsic evidence suggesting that a right of first opportunity to remix masters automatically comes with a right to remix fees. Nothing in the record supports Jones's interpretation.

Jones argues that case law establishes his right to remix fees. This argument fails because the contractual language controls. Moreover, the cases are inapposite.

In *Nelson v. Reisner* (1958) 51 Cal.2d 161 (*Nelson*), a cross-complainant had a right of first refusal of a new lease after the original lease expired with respect to land used for raising crops. (*Id*. at pp. 163–164.) After the cross-defendant leased to a third party, the cross-complainant alleged a breach of his rights. The trial court found that he was willing and able to execute a lease on the same terms and conditions as those contained in the new lease with the third party. (*Id*. at pp. 168–169.) The cross-complainant was awarded $2,212 for the profits he would have made if he had not been denied his right to execute a new lease. (*Id*. at pp. 170–171.) *Nelson* did not involve a right of first refusal to provide services, and it did not hold that such a right entitles a person to be paid for those services in the absence of an additional term.

The other cases cited by Jones are unavailing for the same reasons. (*Schwartz v. Shapiro* (1964) 229 Cal.App.2d 238, 255–256 ["[A]greements whereby a party is given the 'first opportunity' or the 'first right' or the 'first privilege' or the 'first refusal' to purchase property or to renew a lease have been upheld in this state"]; *Mercer v. Lemmens* (1964) 230 Cal.App.2d 167, 169–173 [affirmed damages award of $12,000, the difference in the preemptive price of $10,000 in a right of first refusal to buy property and the market price of $22,000]; *Moreno v. Blinn* (1947) 81 Cal.App.2d 852, 856 [affirming specific enforcement of a right of refusal to purchase property at the price for which it was offered to third party].)

D. <u>*Speculative Damages*</u>.

"'[D]amages may not be based upon sheer speculation or surmise, and the mere possibility or even probability that damage will result from wrongful conduct does not render it actionable.' [Citations.] 'Damage to be subject to a proper award must be such as follows the act complained of as a legal certainty . . . .'" (*Ferguson v Lieff, Cabraser, Heimann & Bernstein* (2003) 30 Cal.4th 1037, 1048.) "No damages can be recovered for a breach of contract which are not clearly ascertainable in both their nature and origin." (Civ. Code, § 3301.) It is speculative to conclude that Jackson[20] would have

[20] Jones maintains that Sony hired the various other producers for the remixes and was in control. We refer to

had his musical compositions remixed if he had to work with Jones. It may be that Jackson wanted to have them remixed only if it was by certain people. Even if Jackson would have let Jones do the remixing, it is speculative to conclude that they would have negotiated the same rates that Jackson agreed to pay others. Producers are not fungible, and just because Jackson was willing to pay other producers a certain fee does not mean he was willing to pay the same to Jones. The fact that the jury awarded Jones an average of what Jackson paid to other producers does not make the award any less speculative.

All other issues are moot.

THE CROSS-APPEAL

Jones contends:

(1) We should amend the judgment to include a finding of financial elder abuse and order the trial court to award attorney fees under Welfare and Institutions Code section 15657.5 because financial elder abuse was within the scope of the pleadings, the trial court should have allowed him to amend to conform to proof, and he proved it at trial.

(2) The trial court should have awarded either mandatory or discretionary prejudgment interest.

I. Amendment of the Judgment is not Warranted.

As we discuss below, Jones has not demonstrated that the trial court should have granted him leave to amend his pleading to conform to proof, or that he proved financial elder abuse. We

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Jackson given that he was in the Joint Venture with Sony and was the artist. Jones cited no evidence that remixes would have been done without Jackson's consent regarding the remixes and the producers.

find no basis to amend the judgment or to order the trial court to award attorney fees.

A. *Relevant Proceedings*.

Jones filed this action in October 2013.

MJJP requested a continuance of the October 11, 2016, trial date. That request was granted on October 4, 2016. Three days later, the trial court granted Jones's request for a trial preference.

On October 12, 2016, Jones moved for leave to file a first amended complaint to add a fourth cause of action for financial elder abuse pursuant to Welfare and Institutions Code sections 15657.5 and 15657.6. Jones stated that he did not move to amend earlier because he did not want to jeopardize the trial date. He moved to amend only after the trial date was vacated.

In the proposed first amended complaint, Jones sought damages and punitive damages of at least $10 million, and he sought attorney fees pursuant to Welfare and Institutions Code section 15657.5, subdivision (a).

MJJP opposed and argued that it would be prejudiced if the motion was granted.

At the hearing, the trial court stated, "[Jones] had multiple opportunities to amend the complaint. This is a Johnny-come-lately, to say the least, which would require as is suggested by the opposition, depositions, summary judgment motions, further discovery, possible medical and psychological tests that would be requested." The trial court concluded that "[t]rial preparations would begin anew. The hard-earned trial priority that [Jones's] side most recently has vigorously asserted would be put in question. There are new theories, legal theories that would require work. All of the above . . . would be prejudicial to [MJJP's] side. Things cost."

The trial court denied the motion.

In motion in limine No. 12, MJJP moved to preclude evidence and argument related to financial elder abuse and concealment. Jones opposed. The trial court stated, "I agree with [MJJP] . . . , preliminarily, that we've gone up this mountain and come down the other side . . . before." Jones's counsel argued that "[e]very piece of evidence that would be relevant to elder abuse is, indeed, also relevant to the breach of contract case." The trial court granted motion in limine No. 12.

Jones later moved to conform to proof during trial. MJJP's counsel stated, "I think your Honor has already found at least twice when they tried to add it at the beginning and then at the final status conference in the motion in limine, that there was substantial prejudice to this coming in." The trial court denied the motion, stating that it "was too little and too late[.]"[21] It noted, "You have a classic breach of contract situation with differences of opinion about how to interpret the contract."

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[21] In addition, the trial court stated, "I just don't see it based on the evidence that's been presented regarding . . . undue influence or being taken advantage of. And that's the key part of the third element that has to be satisfied in order to put it into the mix as a cause of action." This was a misstatement of the law. Financial abuse of an elder occurs when a person or entity takes the personal property of an elder "for a wrongful use or with intent to defraud, or both," *or* when a person or entity takes the personal property of an elder by undue influence. (Welf. & Inst. Code, § 15610.30, subd. (a)(1) & (3).) Although undue influence can support a cause of action for financial elder abuse, it is only one of three theories of recovery. Jones's theory was based on wrongful use, not undue influence.

B. *Authority to Amend the Judgment*.

An appellate court may modify any judgment, and may direct the proper judgment or order to be entered. (Code Civ. Proc., § 43.) "Where the result, were we to remand, is foreordained from the record, we should exercise this power to dispose of the case without further proceedings." (*Harlow v. Carleson* (1976) 16 Cal.3d 731, 739.)

C. *Motions to Conform to Proof*.

A trial court has discretion to allow a party to conform the pleading to proof provided the amended pleading is based on the same general set of facts as those upon which the complaint was originally grounded. (*Duchrow v. Forrest* (2013) 215 Cal.App.4th 1359, 1377–1378 (*Duchrow*).) The trial court will usually consider whether there was reasonable excuse for the delay, the amendment relates to facts or only to legal theories, and/or whether the opposing party will be prejudiced. (*Id*. at pp. 1378–1379; *Garcia v. Roberts* (2009) 173 Cal.App.4th 900, 912 ["[I]f a proposed amendment during trial is prejudicial to the opposing party, it is reversible error to grant leave to amend to conform to proof"].) Allowing an amendment to conform to proof is an abuse of discretion if it introduces new and substantially different issues into the case. (*Duchrow*, *supra*, at p. 1378.) A denial of leave to amend to conform to proof is reviewed for an abuse of discretion. (*Id*. at p. 1377.)

Prejudice results when an amendment changes the amount of damages being sought, or when it exposes the opposing party to an award of attorney fees. (*Duchrow*, *supra*, 215 Cal.App.4th at p. 1381.) It also results when a new theory of liability would have caused the opposing party to give more thought to settling the case. (*Ibid*.)

D. *Financial Elder Abuse*.

Financial abuse of an elder occurs when a person or entity "[t]akes, secretes, appropriates, obtains, or retains real or personal property of an elder . . . for a wrongful use or with [an] intent to defraud, or both." (Welf. & Inst. Code, § 15610.30, subd. (a)(1).) The conduct is wrongful if the person or entity "knew or should have known" it was "likely" to be harmful to the elder. (Welf. & Inst. Code, § 15610.30, subd. (b).) This statute protects a person who is over the age of 65 at the time of the wrongful acts. (Welf. & Inst. Code, § 15610.27.)

To establish a wrongful use of property to which an elder has a contractual right, a plaintiff must demonstrate a breach of contract or other improper conduct. (*Paslay v. State Farm General Ins. Co.* (2016) 248 Cal.App.4th 639, 656.) It is sufficient if the defendant "reasonably should be aware of the harmful breach." (*Id*. at p. 658.)

"Where it is proven by a preponderance of the evidence that a defendant is liable for financial abuse, . . . the court shall award to the plaintiff reasonable attorney's fees and costs." (Welf. & Inst. Code, § 15657.5, subd. (a).)

E. *The Motion to Conform the Pleading to Proof was Properly Denied*.

Jones never provided a satisfactory explanation for waiting so long to seek leave to amend. We conclude his delay in seeking leave to amend was unjustified. Further, we conclude the amendment would have prejudiced MJJP. The proposed amendment implicated new factual issues, e.g., whether MJJP's principals had sufficient knowledge regarding the various alleged breaches of contract. It would have increased MJJP's exposure because it raised the specter of punitive damages as well as an award of attorney fees.

The trial court did not abuse its discretion.

In arguing that the trial court erred, Jones posits that MJJP would not have been prejudiced by an amendment. *Rainer v. Community Memorial Hospital* (1971) 18 Cal.App.3d 240 does not persuade us. It involved a medical malpractice claim, and the evidence at trial established that the plaintiff's mother was induced to consent to two operations for the plaintiff after being given false information. The trial court refused to allow the plaintiff to amend to allege lack of informed consent/battery. The reviewing court reversed. There was no showing of prejudice because the defendants did not argue that they "were taken by surprise or that additional investigation would be required, which would necessitate an interruption and a continuance of the trial proceedings." (*Id*. at p. 255.) The court explained, "Where additional investigation and discovery is not required to meet the new issue, it would appear that it would constitute an abuse of discretion not to permit the amendment of a complaint even at the outset of trial, where the amendment merely adds a new theory of recovery on the same set of facts constituting the cause of action." (*Id*. at p. 254.) Here, MJJP argued that it would suffer prejudice. The trial court had previously concluded that an amendment would result in a continuance, necessitate additional discovery, and lead to new motions. Unlike in *Rainer*—where lack of informed consent involved a single transaction and was not disputed—the disputed issue of whether MJJP reasonably should have been aware of harmful breaches involved an untold number of transactions that would have triggered a continuance and substantial discovery.

We recognize that the trial court misstated the law when it suggested that evidence of undue influence was necessary for financial elder abuse. (*Prigmore v. City of Redding* (2012) 211 Cal.App.4th 1322, 1334 ["It is an abuse of discretion for a trial court to misinterpret or misapply the law"].) But the context of the trial court's ruling indicates that it denied the motion during trial for the same reasons it had previously denied the motion to amend prior to trial. Those reasons were the unexplained delay and prejudice to MJJP. The trial court's statements about whether Jones could prove financial elder abuse were superfluous and did not render the ruling erroneous.

Even if the ruling was erroneous, any error was harmless because the evidence did not support Jones's position. (*People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*) [error is harmless unless it is reasonably probable that the result would have been different absent the error].)

F. *Jones does not Point to Evidence Suggesting Financial Elder Abuse*.

To establish financial elder abuse, Jones had to show a breach of contract and knowledge of a harmful breach as to some or all categories of damages that we did not reverse—the agreed damages of $392,895, the damages of $1,960,167 pertaining to *This Is It* royalties, and the damages of $180,718 related to SoundExchange, foreign public performance income, and foreign income tax deductions.

1. $392,895.

The record shows that Cohen completed an audit on March 5, 2012, covering January 2009 through June 2011. This lawsuit was filed in 2013. Cohen submitted a Revised Expert Report of Damages and Profits dated May 6, 2016, and claimed, for example, that Jones was entitled to "betterments" that Jackson received from the Joint Venture agreement. Sony provided written responses on June 14, 2017, and it disagreed, inter alia, that Jones was entitled to any supposed betterments. Sony determined that Jones was owed $392,895. Broken down, this was comprised of $78,458 for digital downloads even though Cohen claimed it was $4,778,938; $18,982 for subscription income even though Cohen claimed it was $89,000; $45,906 for markups even though Cohen claimed it was $169,000; $72,752 for free goods even though Cohen claimed it was $136,338; $135,333 for failure to report "royalties-videos" even though Cohen claimed it was $282,000; $10,815 for ancillary income, which is the amount Cohen claimed was owed; and $30,648 for foreign income taxes.

To demonstrate that MJJP consciously withheld money from him, Jones cites to testimony from Branca. Branca testified that he is the co-executor of Michael Jackson's estate and the chief executive officer of the "Jackson Enterprise Entities." He was asked, "Do you agree that there is money owed by you to [Jones]?" He replied, "Well, we do believe that [Jones] is owed some money, yes." In his estimation, it was $2 or $3 million. That was the amount MJJP offered in settlement. Later, Branca testified that he misspoke. He stated, "Sony recommended a settlement in the range of $300,000" because it determined that "mistakes had been made, and [Jones] was owed this money[.]" Branca said he approved the amount.

Branca testified, "Sony has the accounting system. [¶] It would have been impossible for [Jackson] or any artist to compute those royalties." David Jay Moro (Moro), Sony's vice-president of royalty audits, testified that the accounting for Jackson's recordings is a "very complex task." The royalty statement issued to Jones for *Thriller* in the second half of 2011 alone was approximately 128,000 pages. This was typical of the royalty statements for Jackson's and Jones's royalty accounts. Sony calculates Jones's royalties and then pays him directly.

Sony typically initiates 20 to 30 audits a year. It is normal for Sony to conclude money is owed.

This evidence does not show that MJJP should have been reasonably aware of harmful breaches related to these various amounts. Sony did the calculations. There is no inference MJJP knew what it owed until after Sony responded to Cohen's damages report in June 2017, which was long after this litigation had commenced. And MJJP offered to settle for what it thought it owed.

On top of this, we add that Jones has not explained why he was contractually entitled to subscription income, money for the failure to report video royalties (which relate to the sale of music videos), ancillary income (which is licensing income), and foreign tax. As to these items, Jones has not shown contract breaches.[22] The fact that MJJP conceded it owed these amounts at trial does not mean that it committed financial elder abuse and knew of harmful breaches. Consequently, from what we can determine, the breaches relevant to the financial elder abuse issue related to digital downloads, markups and free goods but nothing else.

At oral argument, Jones took the position that MJJP committed financial elder abuse because it knew about Cohen's audit prior to the lawsuit and did not pay.

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[22] The record sufficiently suggests that digital downloads, markups and free goods implicate the amount of royalties on record sales.

In its appellate briefs, Jones did not cite to Cohen's March 5, 2012, audit, and it does not appear to be in the record. We cannot confirm whether it demanded payment of the individual amounts that MJJP later agreed that it owed as to digital downloads, markups and free goods. The inference is that it did not because Cohen's May 6, 2016, report demanded payment of higher amounts. Even if there was an accurate, noninflated demand prior to the lawsuit, that does not establish financial elder abuse related to the failure to pay $78,458 for digital downloads, $45,906 for markups, and $72,752 for free goods. The record establishes that this case raised complex accounting and contract interpretation issues, and that Jones grossly overreached in his demands for payment. The fact that Jones made excessive demands does not mean that MJJP had reasons to know of harmful breaches related to complex accounting issues Sony had yet to vet. All MJJP had reason to know in 2012 was that Jones had made a demand.

At oral argument, Jones claimed that MJJP still has not paid any money. We infer that Jones would call this financial elder abuse. But he has not cited any law or made any argument supporting a finding that financial elder abuse occurs when there is litigation, the plaintiff grossly overreaches, and the plaintiff refuses to accept a settlement of what the defendant concedes that it owes. "It is not our responsibility to develop an appellant's argument." (*Alvarez v. Jacmar Pacific Pizza Corp.* (2002) 100 Cal.App.4th 1190, 1206, fn. 11.)

2. <u>$1,960,167 and $180,718</u>.

Jones cites no evidence that MJJP had knowledge that Sony failed to pay all royalties for *This Is It*. As to the damages related to SoundExchange, foreign public performance income, and foreign income tax deductions, Jones has not cited terms in the Producer Agreements that govern them. Thus, as to these items, he has not shown financial elder abuse.

II. Mandatory Prejudgment Interest.

Jones argues that he was entitled to mandatory prejudgment interest on the awards related to *This Is It*, foreign public performance income, Joint Venture profits and remix fees. Because we reversed the latter two awards, we analyze the issue only as to the former two awards.

We conclude that Jones failed to establish a right to mandatory prejudgment interest.

A. Relevant Law.

Prejudgment interest is mandatory when (1) the damages are "certain, or capable of being made certain by calculation" and (2) the right to recover them "vested in [the plaintiff] upon a particular day[.]" (Civ. Code, § 3287, subd. (a).) Damages are certain when a defendant knew the amount owed or could have computed the amount owed from reasonably available information. (*Wisper Corp. v. California Commerce Bank* (1996) 49 Cal.App.4th 948, 960.) We independently review whether damages were ascertainable unless there is a factual dispute as to what information was known or available to the defendant at the relevant time. (*Collins v. City of Los Angeles* (2012) 205 Cal.App.4th 140, 151.)

B. Foreign Public Performance Income.

Jones informs us that foreign public performance income is paid on a license basis and that the jury awarded him a $139,793 share. Section 4(a) does not provide Jones with a share of license income. This means that neither Jackson nor MJJP owed that money to Jones. Because Civil Code section 3287, subdivision (a) applies only if money was owed on a date certain, and because $139,793 was never owed, Jones is not entitled to mandatory prejudgment interest on that amount.[23]

C. <u>*This Is It*</u>.

Regarding *This Is It* damages pursuant to section 12 of the 1985 producer agreement, the question is whether Jones showed what he was owed on applicable due dates.

He did not.

Jones avers: "After the jury returned its verdict, Cohen calculated prejudgment interest on those categories for which the jury awarded damages. His calculations included vesting dates based on when [Jones] should have been paid based on when [MJJP] was paid. For example, for damages related to the *This Is It* videoshow, Cohen breaks out the 12 accounting periods in which Jackson received *This Is It* payments ('period') and calculates damages and interest from the date of the following accounting period, three months later ('period + 3 mo'), which is when [Jones] would have been accounted to under his agreements."

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[23] We recognize that MJJP chose not to appeal the award of $139,793. Jones may well contend that it is entitled to mandatory prejudgment interest because MJJP has conceded that the money was owed. We disagree. No judgment shall be set aside unless there has been a miscarriage of justice. (Cal. Const., art. VI, § 13; Code Civ. Proc., § 475.) Jones does not explain why there is a miscarriage of justice if the award is based on a misreading of the Producer Agreements. (*Bed, Bath & Beyond of La Jolla, Inc. v. La Jolla Village Square Venture Partners* (1997) 52 Cal.App.4th 867, 884 ["the error was harmless, as plaintiff has not shown any resulting prejudice"].)

This argument contains two fatal omissions. In his briefs, Jones has not identified the contractual provisions establishing when he was supposed to be paid, nor has he explicated the damages evidence. We have no obligation to make an unassisted study of the record. (*Sprague v. Equifax, Inc.* (1985) 166 Cal.App.3d 1012, 1050.)

We could find a waiver. Nonetheless, we have reviewed section 12(b)(i) of the 1985 producer agreement as well Jones's damages evidence.

Section 12(b)(i) provides, "We shall furnish you with statements as to any royalties payable to you pursuant to this paragraph 12, together with payment of any such royalties which may be due to you hereunder, semi-annually within ninety (90) days after each June 30 and each December 31 of each calendar year." Given that there were 90-day windows—June 30 to September 28 and December 31 to March 30—Jones was not owed until at least March 30 and September 28. The exhibit offered by Cohen indicated that Jones was entitled to be paid on 12 dates. None of those dates are March 30 or September 28. This indicates that when Cohen calculated interest, he did not consult section 12(b)(i), and that Jones therefore did not meet his burden to establish that he was entitled to mandatory prejudgment interest.

III. Discretionary Prejudgment Interest.

Jones contends the trial court abused its discretion when it denied discretionary prejudgment interest.

Civil Code section 3287, subdivision (b) provides: "Every person who is entitled under any judgment to receive damages based upon a cause of action in contract where the claim was unliquidated, may also recover interest therefrom from a date prior to the entry of judgment as the court may, in its discretion, fix, but in no event earlier than the date the action was filed." Case law teaches that "[b]y allowing an award of prejudgment interest, but only for a limited time period and only if the trial court finds it reasonable in light of the factual circumstances of a particular case, Civil Code section 3287, subdivision (b), seeks to balance the concern for fairness to the debtor against the concern for full compensation to the wronged party. [Citation.] An award of prejudgment interest is not automatic. [Citation.]" (*Lewis C. Nelson & Sons v. Clovis Unified School Dist.* (2001) 90 Cal.App.4th 64, 69.)

The denial of discretionary prejudgment interest under Civil Code section 3287, subdivision (b) is reviewed for an abuse of discretion. (*Union Pacific Railroad Co. v. Santa Fe Pacific Pipelines, Inc.* (2014) 231 Cal.App.4th 134, 204.)

We do not consider Jones's request with respect to Joint Venture profits and remix fees because those awards are infirm. Jones has not identified a contractual basis for the award of $180,718 related to SoundExchange, foreign public performance income, and foreign income tax deductions, so that award does not implicate Civil Code section 3287, subdivision (b). Our focus is on the award of $1,960,167 under section 12 of the 1985 producer agreement for *This Is It*.

Jones provides no specific argument regarding the *This Is It* damages. He merely states that discretionary prejudgment interest should be awarded on all damages, and he objects that the trial court only expressly considered mandatory prejudgment interest.[24] His argument is a "general assertion, unsupported by specific argument." (*People v. Stanley* (1995) 10 Cal.4th 764, 793.) He "apparently assum[es] this court will construct a theory supportive of his" appeal, but that "is not our role." (*Ibid.*) "One cannot simply say the court erred, and leave it up to the appellate court to figure out why. [Citation.]" (*Niko v. Foreman* (2006) 144 Cal.App.4th 344, 368.) Jones fails to explain why it would be reasonable in light of the factual circumstances to award discretionary prejudgment interest with respect to damages for *This Is It* royalties.

Additionally, we point out that we indulge all intendments and inferences to affirm the judgment unless the record expressly contradicts them. (*Brewer v. Simpson* (1960) 53 Cal.2d 567, 583.) Ordinarily, it would be fair and reasonable to award a party prejudgment interest after it has been deprived of money owed under contract. Here, however, we cannot find fault with the denial of prejudgment interest because Jones is substantially to blame for the delay in payment given that he forced MJJP to litigate unfounded claims for millions of dollars that it did not owe. Beyond that, it was speculative as to how much the jury would award. Jones claimed that three productions (*This Is It* and two Cirque du Soleil live shows) were videoshows. Therefore, what qualified as a videoshow was in doubt. And in fact, the jury concluded that the two Cirque du Soliel live shows were not videoshows. The existence of a bona fide dispute of a complicated nature is a factor for a trial court to consider when deciding to

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[24] In its order denying prejudgment interest, the trial court analyzed mandatory prejudgment interest but not discretionary prejudgment interest.

deny discretionary prejudgment interest. (*Moreno v. Jessup Buena Vista Dairy* (1975) 50 Cal.App.3d 438, 448.) We conclude that the trial court made an implied finding that the factual circumstances did not justify discretionary prejudgment interest, and that it properly exercised its discretion.

Even if the trial court erred in not specifically considering discretionary prejudgment interest, the error was harmless because it is not reasonably probable that Jones would have obtained a better result absent that error. (*Watson*, *supra*, 46 Cal.2d at p. 836.) In its ruling, the trial court indicated it thought the case was complex, and that prejudgment interest is less appropriate when, as here, there is a great disparity between the complaint and the damages awarded. It is not probable that the error, if any, caused prejudice. Consequently, Jones has not established a miscarriage of justice requiring reversal. (Cal. Const., art. VI, § 13.)

DISPOSITION

As to the appeal, we reverse the awards of $1,574,128 for remix fees and $5,315,87 for Joint Venture profits. We affirm the awards of $1,960,167 for Master use fees from *This Is It*, $180,718 related to SoundExchange, foreign public performance income, and foreign income tax deductions under the 1985 producer agreement, and $392,895 in money and $43,287 in prejudgment interest that MJJP agreed that it owed to Jones. The trial court is directed to amend the judgment accordingly.

As to the cross-appeal, we affirm the denial of the motion to conform the pleading to proof to allege financial elder abuse, the denial of mandatory prejudgment interest, and the denial of prejudgment interest.

MJJP shall recover its costs on appeal.

<u>NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS</u>.

________________________, J.
ASHMANN-GERST

We concur:

_________________________, P. J.
LUI

________________________, J.
HOFFSTADT