

SUPERIOR COURT FOR THE STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

Gianni Nunnari,

Plaintiff,

vs.

Vittorio Cecchi Gori, et al.,

Defendant

) Case No.: BC390245

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) Statement of Decision following Bench

) Trial.

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And Related Cross-Action

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Table of Contents

I.	Summary of Pertinent Evidence.	6
A.	VCG's Father Takes Nunnari under His Wing.	6
B.	VCG Forms PentAmerica to Develop and Produce Motion Pictures in the U.S.	7
C.	VCG's Distribution Business Takes Off in the Mid-1990s.	10
D.	VCG Allows Nunnari to Works as a Producer-for-Hire on Seven	12
E.	HGP Negotiates Directly with Disney for Nunnari's Producer Services on Ferrari.	13
F.	Nunnari Proposes Terms for a Written Employment Agreement with CGP.	14
G.	Nunnari Expands His Staff in Los Angeles.	17
H.	Nunnari and his Subordinate Execute an Option Conveying CGUSA's Rights in Silence to HGP	19
I.	HGP Develops and Produces 300.	20
J.	VCG and Nunnari Negotiate the 2003 Employment Agreement.	22
K.	Nunnari Hires Flores as General Counsel and Sues Scorsese.	25
L.	VCG Extends Nunnari's Employment for Two More Years	27
M.	Nunnari Continues to Work for VCG and Negotiates for CGUSA and HGP on Everybody's Fine.	28
N.	VCG Closes CGP's and CGUSA's Los Angeles Office.	32
II.	The Evidence Supports a Decision in Favor of Defendants on their Cross Complaint.	33
A.	Nunnari Owed Several Discrete Fiduciary Duties to his Employers, CGP and CGUSA.	33
B.	Nunnari Breached his Employment Agreements, Breached Fiduciary Duties, and Engaged in Concealment and Constructive Fraud.	35
1.	Nunnari's Work Developing and Producing Motion Pictures for HGP Violated Fiduciary Duties Owed to CGP and CGUSA.	36
2.	Nunnari's Failure to Disclose His Dual Agency and Proposed Transactions as a Dual Agent Was in Breach of His Fiduciary Duties.	37
3.	VCG's Agreement that Nunnari Could Work as a "Producer-for-Hire" Was Not a Waiver of Nunnari's Obligation to Place his Employers' Interests Ahead of his Own.	40
4.	The 2003 Employment Agreement Does Not Bar Defendants' Claims.	41
5.	Nunnari Also Breached Duties by Using CGP and CGUSA Employees and Assets for His Own Benefit.	42
C.	Defendants Failed to Prove any Breach of Duty, Breach of Contract, or other Tortious Conduct with Respect to Immortals/War of Gods.	43
III.	There Is Insufficient Evidence of a Current and Justiciable Controversy over Ownership of Any Project other than Silence.	43
IV.	Legal Analysis of Nunnari's Complaint	45
A.	Nunnari Cannot Prevail on his Breach of Contract, Fraud, or Promissory Estoppel Claims because There Is No Credible Evidence that VCG Promised to Extend the 2005 Agreement or Pay Severance.	45

B.	Nunnari's Interference with Economic Advantage Claim Fails.	46
C.	Nunnari Failed to Prove Breach of Contract, Conversion, and Claim and Delivery.	46
V.	Remedies	47
A.	Damages	47
B.	Accounting	48
C.	Injunction	48
D.	Constructive Trust	48
E.	HGUSA Owns all Intellectual Property Rights in Silence Ostensibly Conveyed under the 2001 HGP Option Agreement.	49
F.	There Is No Present Claim or Controversy to Adjudicate with Respect to Ownership of other Film Projects	49
VI.	Further Proceedings	50

This action arises out of the breakdown of a 25 year friendship and employment relationship between Vittorio Cecchi Gori (VCG), an Italian motion picture producer doing business through various corporations under the Cecchi Gori name (collectively Cecchi Gori Group (“CGG”)), and Gianni Nunnari, who served as President of two Cecchi Gori companies in Los Angeles: Cecchi Gori Pictures, Inc. (“CGP”) and Cecchi Gori USA, Inc. (“CGUSA”).

According to VCG, the relationship sharply deteriorated in 2006, after VCG visited CGP’s Los Angeles office, unannounced, and discovered that Nunnari was using CGP’s Los Angeles office to operate his own company, Hollywood Gang Productions, LLC (“HGP”). By April 2008, VCG came to the conclusion that Nunnari was using CGP employees, assets and corporate opportunities to advance HGP’s motion picture development and production business in direct competition with CGP and CGUSA. After consulting with CGP’s former General Counsel, Claire Ambrosio, VCG decided to close down the Los Angeles office. Nunnari was en route to a filming in Connecticut when, on April 7, 2008, VCG’s attorney, William Moore, terminated most of the CGP and CGUSA employees, including CGP’s General Counsel, Craig Flores.

Nunnari and HGP (collectively “Plaintiffs”) filed this action against VCG, CGP and CGUSA alleging wrongful termination and claiming more than \$2.5 million in damages.¹ CGP and CGUSA (collectively “Defendants”) cross-complained against Nunnari and

¹ The following causes of action in Nunnari’s First Amended Complaint were tried to the court: (1) breach of contract (Nunnari vs. CGP, CGUSA); (2) fraud (Nunnari vs. VCG, CGP and CGUSA); (3) promissory estoppel (Nunnari, HGP vs. CGP, CGUSA); (4) conversion (Nunnari, CGP vs. VCG, CGP, CGUSA); (5) claim and delivery (Nunnari, HGP vs. VCG, CGP, and CGUSA); (6) intentional interference with economic advantage (Nunnari, HGP vs. VCG, CGP, CGUSA); (10) breach of contract (reimbursement) (HGP vs. CGP, CGUSA); (11) accounting (HGP vs. CGP, CGUSA); and (13) declaratory relief (Nunnari, HGP vs. VCG, CGP, CGUSA).

HGP for alleged breach of fiduciary duties, fraud and other claims.² All parties waived their rights to a jury trial and presented evidence in a court trial from May 24, to July 2, 2010.

Although the long course of dealing among the parties is factually complex, the principles of agency law that govern the case are axiomatic and well established. As explained more fully below, the court finds that Defendants proved several claims alleged in their Cross-complaint by a preponderance of the evidence, and finds that Plaintiffs failed to prove, by a preponderance of evidence, the claims alleged in their Complaint.

I. Summary of Pertinent Evidence.

A. VCG's Father Takes Nunnari under His Wing.

Mario Cecchi Gori was a pioneer in the Italian film business who produced more than 200 motion pictures in Italy. He brought his son, VCG, into the business, and they worked together for many years, developing and producing motion pictures under the Cecchi Gori banner.

From an early age, Nunnari aspired to become a motion picture producer and idolized Mario Cecchi Gori. Like VCG, he worked in his father's business in Italy, which

² CGP and CGUSA's First Amended Cross-complaint alleges (1) breach of employment contract (CGP vs. Nunnari); (2) breach of fiduciary duty (CGP, CGUSA vs. Nunnari, HGP); (3) constructive fraud (CGP, CGUSA vs. Nunnari, HGP); (4) fraudulent concealment (CGP, CGUSA vs. Nunnari, HGP); (5) breach of loyalty (CGP, CGUSA vs. Nunnari, HGP); (6) conversion (CGP, CGUSA vs. Nunnari, HGP); (7) unfair business practice (CGP, CGUSA vs. Nunnari, HGP); (8) unjust enrichment (CGP, CGUSA vs. Nunnari, HGP); (9) accounting (CGP, CGUSA vs. Nunnari, HGP); (10) declaratory relief (CGP, CGUSA vs. Nunnari, HGP); and (11) declaratory relief (CGP, CGUSA vs. Nunnari, HGP). o

involved purchasing motion pictures, including CGG motion pictures, for distribution in Greece. Nunnari was only 23 years old when his father passed away. Mario made a promise to Nunnari's father that he would look after Nunnari and followed through on that promise by employing Nunnari in various CGG companies. After Mario died years later, VCG continued to employ Nunnari in positions that allowed him to learn the motion picture production and distribution business in Italy. Nunnari excelled in these positions and became one of VCG's closest friends and most trusted confidants.

B. VCG Forms PentAmerica to Develop and Produce Motion Pictures in the U.S.

Nunnari's self-taught fluency in English was one of many reasons why VCG sent Nunnari to Los Angeles in the late 1980s to spearhead CGG's acquisition of the rights to distribute U.S. motion pictures in Italy. Soon after Nunnari arrived, VCG and Italian businessman Silvio Berlusconi formed Penta Pictures, Inc. (later known as PentAmerica Communications, Inc.)(collectively "PentAmerica"), a joint venture charged with continuing CGG's distribution business and developing and producing motion pictures in the United States. By this time, Nunnari aspired to be a U.S. motion picture producer and got his first taste of that business as President of PentAmerica. As Nunnari explained at trial, Berlusconi's money made PentAmerica a serious Los Angeles company with a mandate to buy and also produce movies.

Nunnari signed a written employment agreement with PentAmerica. For his exclusive services as President, PentAmerica agreed to pay \$250,000 in annual salary and a producer fee -- \$100,000 per film the first year and \$150,000 after that -- for each motion picture that PentAmerica completed during his tenure (February 1, 1991

Employment Agreement (“PentAmerica Agreement”), Exh. 137). The PentAmerica Agreement went to some length to reiterate, as promises under the agreement, many of the fiduciary duties that California law requires of all employees and agents. See *generally*, Restatement (Third) of Agency §§ 8.01 *et seq.* For example, Nunnari promised to comply with instructions from the company (¶1), to render services “solely and exclusively to [PentAmerica]” (¶1), to protect his employer’s trade secrets and confidential information (¶ 9), to refrain from competing or engaging in activities adverse to the employer (¶1), and to account for profits (¶ 10).

Nunnari developed dozens of film projects at PentAmerica, three or four of which were produced and released. Nunnari uses the term “creative producer” to describe his role at PentAmerica on the projects that were not produced (and the pre-production work on those that were produced). He considers himself a “creative producer” today and uses the term to describe all of his work since PentAmerica. According to Nunnari, a “creative producer” identifies and acquires the motion picture rights in a novel or other literary property and enhances its value by “attaching” (obtaining commitments from) writers, directors, actors, and other talent willing to work on the film. For example, the idea for the PentAmerica project, *Silence*, a motion picture based on Shusaku Endo’s novel of the same name, arose out of discussions between Mario Cecchi Gori and the renowned motion picture director, Martin Scorsese. PentAmerica developed the project, enhancing its commercial viability by obtaining Scorsese’s commitment to direct it if and when it was ever produced (March 1, 1990 Agreement, Exh. 444).

Although PentAmerica was based in Los Angeles, it followed the Italian film industry's business model, developing motion picture projects and financing production under the same roof – a model that the Hollywood studios had abandoned years before. The major U.S. studios are now primarily in the business of advancing the significant funds required to produce a motion picture in exchange for the lion's share of profits made in theatrical release and distribution in various media including DVDs, cable, satellite, and television. Their executives entertain proposals to finance fully developed motion pictures packaged by outside "creative producers," i.e., projects with a screenplay, director, actors and other talent committed to perform if and when the project is produced. Much as PentAmerica paid a producer fee to Nunnari for each motion picture produced during his tenure, the major studios commonly pay producer fees to producers-for-hire, who are engaged to manage pre-production, principal photography, and post-production, and paid as each phase commences.

Operating under the Italian business model, PentAmerica was not profitable and, by 1993, Berlusconi wanted out of the business. VCG was similarly disheartened and, according to Nunnari, would have given up on producing U.S. movies altogether, but for Nunnari's urging to the contrary. In the end, Cecchi Gori Group Europa N.V. ("CGGE") bought out Berlusconi's interest and kept the U.S. production business alive by acquiring the rights to the PentAmerica projects under development (the "PentAmerica Projects" identified on Schedule A to Exhibit 89).

After PentAmerica disbanded, VCG employed Nunnari in Los Angeles as President of CGP, to continue the distribution business as well as the development and

production of film projects. He also appointed Nunnari as President of CGUSA, the company that succeeded CGGE as owner of all rights in the PentAmerica Projects.

C. *VCG's Distribution Business Takes Off in the Mid-1990s.*

While PentAmerica was struggling, VCG changed direction to embrace a new opportunity created when the Italian government abandoned its monopoly on television networks to allow private entities to own and operate commercial networks. VCG's cohort in PentAmerica, Silvio Berlusconi, founded one or more of the new networks and was eager to find content to fill the many new hours of programming. With Nunnari in Los Angeles, CGG was well positioned to serve as a middleman between Berlusconi and U.S. studios and other entities eager to sell foreign distribution rights in their motion pictures and television shows.

For the next several years, VCG, Nunnari, and a CGG consultant in Italy, Faruk Alatan, worked together very closely on this business, speaking to one another on a daily basis, spending time together at film festivals, on vacations, and in Rome. In the process, they became close personal friends. It was apparent from his testimony at trial that Nunnari enjoyed his relationship with VCG during these years. Although he always felt undercompensated for his efforts, Nunnari admired VCG's nimbleness in changing direction to make a profit. Anna Gross, a former PentAmerica and CGP Development Executive who testified at trial, likewise portrayed VCG as the consummate entrepreneur, doing business, first and foremost, to make a profit. VCG's testimony underscored the point. While VCG is passionate about his work, he focuses on profitability rather than artistry for its own sake. Indeed, VCG attributes his success in

the motion picture business to his skill in recognizing, from the outset, a commercially viable film concept development or .

In his testimony, VCG came across as a voluble, expansive, and sometimes emotional personality who focuses on the big picture and delegates as many details as possible to trusted advisors like Nunnari. He does business on the basis of trust and relationships. He prefers face to face meetings and avoids communicating by letter, fax, email or other less personal means. VCG does not speak English and his trust in Nunnari was so unquestioning that, at Nunnari's request, he apparently signed his name on agreements and memoranda without translating or understanding them. VCG's employees in Rome were similarly trusting of Nunnari. Over the years, they promptly paid and rarely questioned Nunnari's requests for reimbursement of expenses for business, travel and entertainment on the assumption that they were incurred for legitimate CGP and CGUSA expenses.

While VCG's distribution business thrived, he set off in many new directions, investing in an Italian soccer team, fine art, an Italian television network, a theater in Beverly Hills, and luxury residential properties in Los Angeles, often relying on Nunnari to advise him in these endeavors. Nunnari worked very hard on VCG's various business endeavors meanwhile accommodating VCG's personal requests such as renting yachts, arranging vacations, and the like. Meanwhile, without the PentAmerica producer fees, Nunnari was making less money than before and was chagrined that VCG was unwilling to finance production of U.S. motion pictures. VCG apparently appeased Nunnari's demands for additional compensation by promising to supplement

his salary with annual bonuses, but failed to follow through. Nunnari therefore took steps to earn producer fees outside of CGG by working as a producer for hire.

D. VCG Allows Nunnari to Works as a Producer-for-Hire on Seven

By all accounts, VCG encouraged Nunnari's efforts in this regard. He agreed, for example, to allow CGP to loan out Nunnari's production services on the former PentAmerica Project, *Seven*. Under a March 17, 1994 agreement, Katja Productions agreed to pay CGP a \$300,000 producer fee for Nunnari's work as a producer for hire, and promised as much as \$200,000 in additional income out of net profits (the "Katja Agreement," Exh. 207). Although his production work on *Seven* took Nunnari away from CGP and CGUSA for eight weeks of on site pre-production and the additional time necessary for principal photography, CGP turned the entire \$300,000 producer fee over to Nunnari (Exh. 207, ¶3.2).

E. HGP Negotiates Directly with Disney for Nunnari's Producer Services on Ferrari.

After working as a producer for hire on *Seven*, Nunnari created his own limited liability companies (initially Tex Films, Inc. and later, HGP) to displace CGP as the entity loaning out his production services. It is common practice in the film industry for self-employed producers to form wholly owned corporations to "employ" them and to "loan out" their services so that they can deduct, from the company's taxable income, business expenses such as office overhead, employee salaries and accounting services. HGP's initial business – producing commercials – was not a business that CGP or CGUSA engaged in or that VCG had any interest in. However, Nunnari and

Gross soon focused HGP's business on development of motion pictures projects – CGP's core business.

For example, in early fall of 1996, Nunnari embarked on negotiations with Disney for production of another PentAmerica Project known as *Ferrari*. Without any disclosure to VCG or GCC in Rome, he negotiated with Disney both as President of CGP (representing CGGE) and as the managing member of HGP. As of September 4, 1996, Nunnari signed two separate agreements with Disney. He sold an option on CGGE's rights in *Ferrari* (for \$100,000 up front, another \$100,000 for any extension of the option, and an additional \$118,000 if and when Disney commenced principal photography (Exh. 140)). Nunnari signed a separate agreement, under which he and two other entities sold their producer services to Disney in exchange for a fixed producer fee of \$2,000,000 if and when Disney produced the film. Nunnari's fixed payment was \$500,000 and he stood to earn as an additional \$325,000 on the film as a percentage of "adjusted gross receipts" (Exh. 141)). Since Nunnari's producer agreement on *Ferrari* identifies three producers and provides for a lump sum payment rather than payment for each stage of production services (preproduction, production and post-production), the compensation appears to be unrelated to the services typically rendered by a producer for hire. Disney never produced *Ferrari*, but if it had, Nunnari would have earned, for his role as a "creative producer," roughly twice as much as CGGE's maximum potential return for sale of its rights in the project. As CGP's top creative executive, Nunnari's negotiation for this compensation was a conflict of interest and a breach of his fiduciary duties.

F. Nunnari Proposes Terms for a Written Employment Agreement with CGP.

While the *Ferrari* Producer Agreement was in the works, Nunnari asked VCG to formalize his employment arrangement in a written agreement. Nunnari collaborated with his partner in HGP, CGP's Development Executive Anna Gross, to come up with a proposal. As Gross candidly explained in her testimony at trial, she and Nunnari formed HGP because they shared a thirst for production – and because they needed to augment their income. Gross' notations, marking up a copy of Nunnari's PentAmerica Agreement, are evidence of their efforts to create a proposal that would allow HGP to compete with CGP in the motion picture development and production business (Exh. 137).

Nunnari and Gross crafted language that continued Nunnari's \$250,000 annual salary (with 10 percent annual increases) but did not request payment of any producer fees. Instead, they proposed that Nunnari be engaged "to render his exclusive services to the Company as [President and Chief Operating Officer], but non-exclusive to the Company as a producer-for-hire" (Exh. 1). They also deleted the provisions in the PentAmerica Agreement reiterating, as promises, the duties of loyalty imposed under California law.

. Based on this language, Gross and Nunnari believed, and continue to believe, that VCG agreed that Nunnari could develop motion picture projects for HGP while engaged in exactly the same business for CGP. They base their belief on the wording of the 1996 Agreement and their claim that VCG acceded to this arrangement, i.e., that

he knew all about HGP's business and waived the duties of loyalty that Nunnari, Gross and other employees owed to him as their employer.

Gross testified, for example, to a conversation she had with VCG in 1996 or 1997 while she and Nunnari were in Tuscany for HGP's production of a \$3 million commercial. Gross says that she told VCG (in Italian) all about HGP's business of producing motion pictures and commercials. She testified that VCG said he was not interested in the business, even after she invited him to invest in HGP.

Gross's credibility was compromised, however, because she was Nunnari's partner in HGP (while serving as an executive for CGP) and has a continuing business relationship as a paid consultant for HGP. With regard to the conversation with VCG in 1996 or 1997, it is plausible that she mentioned HGP to VCG and that he expressed no interest in producing commercials. Given VCG's generous personality, it is also plausible that he supported their efforts and did not make an issue out of the time they spent away from their duties at CGP to shoot the commercial in Italy. It is not credible, however, that a businessman like VCG had no interest in knowing that, instead of working on CGP/CGUSA's motion picture business, his top employee in Los Angeles engaged in the very same business on their own account. In other words, it is not credible that VCG's lack of interest was based on an adequate disclosure of HGP's real business plan.

G. Nunnari Expands His Staff in Los Angeles.

From 1996 on, Nunnari expanded the number of people on CGP's payroll and directed them to work on developing motion picture projects for CGP and for HGP out of

the Los Angeles Office. By the fall of 2000, Nunnari had hired a financial officer/treasurer (Roland Liliois), one or more development executives (initially Anna Gross, succeeded by Paula Kahlenberg, Scott Coleman, Nathalie Peter-Contesse and others), a development consultant, Alessandro Camon (Exh. 205), and a personal assistant, Marina Salvo – all of whom reported to and were loyal to him. He added a new position in November 2000, hiring attorney Claire Ambrosio as General Counsel and Vice President of Business Affairs, reporting directly to him (Exh. 208). According to her employment agreement, Ambrosio was employed to service several CGG entities (CGP, CGUSA, Robert Lane Estates, Inc., and CPW Acquisition Corporation). After she joined CGP, Nunnari directed her to work for HGP as well.

In her testimony, Ambrosio portrayed Nunnari as a hard-driving executive who frequently expressed impatience by raising his voice and occasionally throwing papers or other objects at employees. Although she admitted that she walked off the job after Nunnari threw something at her in a conference room, the court found her to be a credible and unbiased witness. Other former CGP employees downplayed Nunnari's explosive propensities but uniformly regarded him as a "take charge" and very "hands on" executive who made all decisions of any importance in the office. h

According to Ambrosio, Nunnari took steps to conceal HGP's activities from Rome and carefully monitored whether office correspondence went out under CGP or HGP letterhead. After the staff created separate files for CGP and HGP correspondence, Ambrosio noticed that the office used CGP letterhead on initial correspondence soliciting interest in CGP projects and switched to HGP letterhead after

the CGP addressee expressed interest in working on the project. Ambrosio also noticed that the office never sent anything on HGP letterhead to VCG or others at CGG's headquarters in Rome. She also remembered a day when Nunnari's assistant, Marina Salvo, specifically instructed everyone in the office to avoid doing so. Ambrosio's testimony about the policy was corroborated by the dearth of correspondence with Rome on HGP letterhead or correspondence that mentioned or referred to it.

Although Nunnari and Salvo denied that there was a policy of concealing HGP's business dealings from VCG, Nunnari did not deny that he made the decision whether a project would proceed as a CGP or an HGP development project. Nunnari's testimony at trial -- that if he had an idea that was his passion, it went through HGP, but if the idea came from Rome or VCG, it went through CGP -- suggested that he made his decision as an artist rather than a businessman. His assertion in a June 28, 2008 email -- that he only cares about credit, position and money -- is more consistent with his decisions whether to advance the projects under the HGP or CGP name (Exh. 641).

H. CG Treasurer Assigns CGP's Rights in Silence to HGP

The circumstances leading up to CGUSA's purported assignment, to HGP, of its option rights in *Silence* lends credence to Ambrosio's observation that projects with promise of success ended up in HGP's inventory. In 1998, after CGGE acquired the rights to Endo's novel, Scorsese's loan out company signed a further agreement with CGGE (executed by Nunnari) to direct *Silence* as his next motion picture after *Kundun* (February 2, 1998 Agreement, Exh. 444). When CGUSA succeeded CGGE on these rights, *Silence* became one of CGP's most promising development projects.

In a series of questionable 2001 memoranda and agreements, Nunnari documented CGUSA's transfer of its interest in *Silence* to HGP. Nunnari testified that he set the transfer in motion in the spring of 2001 by convincing VCG that Nunnari should be fully empowered to act for CGP when VCG was unavailable. Nunnari testified that, on that basis, VCG signed two memoranda (written in English) "an April 30, 2001 memorandum authorizing CGP and CGUSA executives "to enter into any necessary option/purchase agreements with [HGP]" for *Silence*, *Ferrari*, and other specified projects; and a May 1, 2001 memorandum conferring the same authority "for any project owed by or assigned to CGUSA" (Exh. 23).

There is no evidence that Nunnari ever disclosed to VCG that a CGUSA officer (one of Nunnari's subordinates) was meanwhile transferring an option on CGUSA's rights in *Silence* to HGP for a nominal sum. On the same day that VCG authorized CGP and CGUSA to confer any option rights in *Silence*, a Also on May 1, 2001, CGUSA's Treasurer, Roland Lilavois, signed an Option/Assignment of Rights Agreement (the "2001 HGP Option" Exh. 35) accepting \$5,000 from HGP as consideration for an 18-month option on *Silence* against a purchase price of \$786,000 (the amount that VCG had invested in this PentAmerica Project to date), a commitment to give VCG "executive producer" credit on the film along with five percent of potential net profits. The 2001 HGP Option and extensions signed by Lilibois' successor, Ludy Blasco, put Nunnari in the driver's seat on the project with Scorsese's commitment to direct it on the horizon.

I. HGP Develops and Produces 300.

Nunnari is credited as co-producer on *300*, the commercially successful motion picture based on Frank Miller's graphic novel about the Battle of Thermopylae in the Peloponnesian War. VCG claims that he had the idea, all along, to make a "sword and sandal" motion picture on the same subject and testified that, for years, Nunnari rebuffed his suggestions. Nunnari claims that his passion for the subject matter began when he was a schoolboy in Italy and crystallized in 2000, when he came across Miller's graphic novel in a bookstore and recognized its commercial potential.³

Nunnari immediately instructed his staff to investigate optioning the rights to the novel. Acting for CGP, Ambrosio commissioned a copyright search on the title and corresponded on CGP letterhead with Miller's agent in November 2000 (Exhs. 12, 209). Nunnari meanwhile forwarded a copy of the graphic novel to producer Jerry Bruckheimer in March 15, 2001, using a CGP logo note card. Nunnari testified that at around the same time, he also sent a copy of the novel to Rome and asked VCG to invest money in the project, commenting that "if I had the money, I'd do it right away." According to Nunnari, VCG said he had no interest, especially in a graphic novel, and wished him "good luck."

Although Nunnari told VCG "if he had the money" he would invest it in *300*, he invested very little. Instead, consistent with the role of a "creative producer," he set out to find others willing to partner with HGP on developing the project. Knowing that

³ Testimony from producer Carlos Carlei raises questions about Nunnari's credibility. Carlei testified that he brought the novel to Nunnari's attention and that Nunnari cut him out of further development activities. On that basis, Carlei filed a lawsuit against Nunnari which settled out of court.

producer Mark Canton's assistant, Michael Gordon, was an aspiring screenwriter, Nunnari (HGP) paid Gordon a nominal sum, \$7,500, to hastily write a screenplay for *300* (October 7, 2002 Agreement, Exh. 134). Although Nunnari shopped Gordon's screenplay to various studios and producers, only Gordon's boss, Mark Canton, expressed any interest. Two months after commissioning Gordon to write the screenplay, Canton agreed to pay HGP \$150,000 for a 50% interest in Gordon's script and co-produce the project with Nunnari, sharing any potential producer fees 50/50 (December 16, 2002 co-production agreement, Exh. 28). They eventually persuaded Warner Brothers to finance production, and the motion picture was released in March 2007.

Nunnari testified that he was very open with VCG as he progressed with *300* letting him know, for example, when he obtained the rights to shop *300* to the various studios.⁴ Nunnari also testified that his involvement in the project was widely reported in U.S. trade magazines – magazines that VCG admitted reading, in translated synopsis form – and that VCG congratulated him on the movie's success, never asking for any share of Nunnari's earnings on it. There was no evidence, however, that Nunnari ever disclosed the terms of any prospective agreements that he or HGP entered into with respect to *300* or disclosed that CGP employees were working on the project.

⁴ Nunnari's openness with VCG apparently did not apparently never revealed his dual role in HGP and CGO to Canton. extend to Mark Canton, his co-producer on *300*. Until he was called to testify in this case, Canton had no idea that Nunnari was President of CGP and CGUSA or that Nunnari he had any affiliation with any company other than HGP.

J. VCG and Nunnari Negotiate the 2003 Employment Agreement.

As *Silence* and *300* moved toward production under the HGP banner in 2002, Nunnari's written employment with CGP came up for renewal. By that time, VCG's successful Italian distribution business had died out and CGG was struggling to meet basic obligations and Nunnari was an invaluable advisor and intermediary with U.S. companies involved in restructuring CGG's obligations, such as Merrill Lynch Capital Markets, Ltd. Nunnari's pivotal role in such matters explains why VCG agreed to extend his employment agreement by executing an "Addendum to Employment Agreement" (the "2002 Extension") (Exh. 3). In that document, VCG agreed to pay Nunnari \$250,000 on October 1, 2001, and to additional payments adding up to for to pay . to make good on \$1,650,000 in bonuses that VCG had verbally promised Nunnari over the years (Exh. 3, ¶2). VCG also promised to pay \$2.5 million in severance for termination without cause and personally guaranteed all of his companies' obligations under the 2002 Extension (Exh. 3, ¶ 4).

When CGP missed the October 1, 2002 bonus payment, Nunnari took immediate steps to tie up VCG's \$12 million residential property in Los Angeles. VCG had formed Robert Lane Estates, Inc. ("RLE") to hold title in the property. Relying on RLE stock pledged to him as collateral for VCG's guarantees under the 2002 Extension, Nunnari drafted an agreement a five year option to purchase the property at the below-market price of \$4 million. Nunnari signed the agreement on behalf of both sides – for RLE as "optionor" and for himself "optionee" (Exhs. 228, 229). Consistent with his practice in executing other agreements to his benefit, Nunnari did not disclose the real estate

transaction to VCG before he signed it. He did, however, record the option with the Los Angeles County Recorder, placing any potential purchaser on notice that he alone had the right to purchase the property until 2007.

VCG was understandably dismayed when he found out about Nunnari's recorded option. He hired New York attorney, Nicholas Gianuzzi, to settle Nunnari's claims related to the bonus payment and to get the lien removed. On December 23, 2002, Gianuzzi proposed terms for a new written employment agreement to Nunnari's lawyer, Leo Cotugno (Exh. 240). Among them was a provision requiring Nunnari to promise not to compete with CGG for two years following termination. Although this term is not in the signed version of the agreement, VCG's request for a non-competition clause is significant. VCG had, of course, given Nunnari his blessing to provide producer services on *Seven*. If he knew and was content to have Nunnari currently competing with CGP through an independent company, he had no reason to ask Nunnari to refrain from competing after the termination of his employment. In other words, this request was consistent with VCG's testimony he had no idea that Nunnari was operating HGP out of CGP's offices or that they were competing with his companies in the motion picture development business.

After additional negotiation, VCG and Nunnari signed a February 3, 2003 Revised and Restated Employment Agreement and Resolution of Claims Agreement with CGP, CGUSA, VCG, and various CGG entities (the "2003 Agreement") (Exh. 4). The 2003 Agreement reconfirmed Nunnari's obligation to render services as President of CGP through October 1, 2005, with the same duties and responsibilities as in the 1996 Agreement (Exh. 4, p.1). Harkening back to the 1996 Agreement, which allowed

Nunnari to work as a producer-for-hire on a non-exclusive basis, the 2003 Agreement acknowledged that “Nunnari has the right to engage in independent productions and that his work in connection therewith is not in breach of any terms of this Agreement or any prior agreements” (Exh. 4, ¶ 4).

With Nunnari a key player in CGG’s ongoing financial crises (e.g., Exh. 30), VCG agreed to raise Nunnari’s annual salary to \$475,000 and to supplement that salary with semi-annual payments sufficient to increase his compensation by \$250,000 after taxes. VCG also restated his promise to pay Nunnari \$2.5 million in severance for any termination without cause (¶ 8(a)). Since the parties had claims against each other – Nunnari’s claim to unpaid bonuses and VCG’s claims with respect to the RLE property – the 2003 Agreement includes a mutual release of any and all claims, both known and unknown (¶16). It also includes standard language confirming that any waiver of performance under the agreement, going forward, would not be a waiver of any succeeding breach (¶14).

Although Nunnari gave testimony suggesting that HGP’s profitable independent film development business was a further basis for obtaining a release from VCG, there was no corroborating evidence that this issue or that it was part of the negotiations such as , emails – the company through which Nunnari was conducting all of his independent activities -- In ¶16, the CGG entities only released “Nunnari and his agents, representatives and assigns” whereas Nunnari released all of the named CGG entities “and their respective agents, representatives, assigns *and affiliated companies*” (emphasis added). HGP’s , executed by ’s managing member VCG was really intending to release Nunnari from all claims arising out of his independent business ventures.

K. Nunnari Hires Flores as General Counsel and Sues Scorsese.

Soon after entering into the 2003 Agreement, Nunnari hired Craig Flores, an attorney with approximately four years experience, to replace Ambrosio as CGP’s General Counsel. Flores worked on various legal matters relating to CGG’s burgeoning financial problems -- negotiating a workout of CGG’s deal with Rupert Murdoch’s Italian cable company, Sky Italia; overseeing litigation involving CGG’s ownership of a theater in Beverly Hills; and separately negotiating claims asserted by New Line, MGM and Miramax for past due royalties on CGUSA’s purchase of Italian distribution rights. He also worked extensively on HGP projects. Unlike Ambrosio,

Flores had firsthand knowledge that HGP was garnering profits on projects serviced by CGP employees. The documents that he authored during his tenure with CGP demonstrate a clear understanding that HGP was using CGP employees and assets to develop competing projects and concealing its activities from Rome (Exhs. 315, 357, 410).

For example, Flores was directly involved in HGP's 2003 lawsuit against Scorsese. After Scorsese reneged on his promise to direct *Silence* as his next motion picture after *Kundun*, Nunnari (HGP) hired a New York City contingency fee attorney to make a claim against Scorsese for breach of contract (Exh. 250). Flores represented HGP in pre-litigation settlement negotiations, sending chain of title documents to opposing counsel to prove, among other things, that HGP had validly optioned *Silence* from HGUSA in 2001 (May 7, 2003 letter, Exh. 35). A few weeks later, Flores supplemented his chain of title documents by forwarding a contemporaneously dated May 22, 2003 letter, written in English and apparently signed by VCG, confirming that the 2001 HGP Option was valid (Exh. 38). Neither side produced a signed original of this letter. Although he admitted that the signature looks like his signature, VCG adamantly denied ever seeing or signing the May 22, 2003 letter. After receiving the photocopy from Flores, Scorsese agreed to settle the case on terms highly favorable to HGP. Among other things, Scorsese took over HGP's obligation to pay CGUSA the \$786,000 purchase price under the 2001 HGP Option, and agreed to pay HGP another \$1,000,000 in additional compensation (February 12, 2004 letter agreement, Exh. 264) ("Scorsese Settlement").

By suing Scorsese, Nunnari turned a \$5,000 “investment” (the option payment for CGUSA’s rights in *Silence*) into a return, after only two years, of \$1,000 based on Scorsese’s renewed commitment to direct *Silence*. CGP received nothing for the time that its employees worked on HGP’s behalf and CGUSA only managed to recoup \$786,000 – its out of pocket investment in the project (without interest).

When the time came by directing *Silence*, Scorsese decided to direct *The Departed* and *Shutter Island*, rather than *Silence*, next in order. As consideration for this breach of the Scorsese Settlement, Scorsese agreed to pay HGP/Nunnari millions more in compensation (Exh. 635) and to give Nunnari a gratuitous producer credit on *The Departed* and *Shutter Island*.

L. VCG Extends Nunnari’s Employment for Two More Years

Meanwhile, VCG continued to fall behind on basic obligations, including the semi-annual \$250,000 payments to Nunnari. Nunnari’s attorney, Lee Cotugno, sent demand letters for each missed payment which culminated in a negotiated payment schedule that VCG again failed to meet (Exhs. 44-46, 47-50, 52, 55).

CGG’s persistent financial problems explain why, when the 2003 Agreement came up for renewal, Cotugno proposed a reduction in Nunnari’s severance from \$2.5 million to \$1 million (April 18, 2005 letter, Exh. 56). However, VCG wanted no part of any severance obligation and fused to pay any amount in severance and rebuffed Nunnari’s request for a five year of employment term. The final agreement (the “2005 Agreement”) (Exhs. 59, 336), memorialized in VCG’s July 12, 2005 letter (countersigned by Nunnari) provides confirms a two-year extension, expiring on July 31, 2007, unless VCG agreed to a further extension, in writing, on or before that date.

VCG contends that the 2005 Agreement expired on July 31, 2007. There was no evidence, at trial, that he signed any writing extending the 2005 Agreement. VCG also vehemently denies Nunnari’s claim that VCG verbally agreed to an extension. VCG’s position is that, when he failed to execute any written extension on or before .

M. Nunnari Continues to Work for VCG and Negotiates for CGUSA and HGP on Everybody’s Fine.

Nunnari, on the other hand, testified that VCG agreed to extend the 2005 Agreement at a meeting in Rome, arranged by their mutual friend, Faruk Alatan. After leaving CGG in 2001, Alatan sometimes acted as a go between for communications between VCG and Nunnari. Nunnari testified that Alatan persuaded him to meet with VCG in Rome, and that VCG agreed, over dinner in September 2007, to a two year

extension of the 2005 employment agreement and reinstatement of the \$2.5 million in severance.

Alatan did not attend the meetings supposed rendition of events. testified that dinner VCG , “everything will be the same” and that the parties “agreed to extend through the end of the lease” (which was set to expire in July 2008). Alatan testified that meanwhile him dinner and later remarked, “Let’s see if he [VCG] is going to write something.”

Nunnari’s disappointment is consistent with VCG’s comments that Nunnari would continue with his employment until the lease expired. Nunnari’s anticipation that VCG might put something in writing is inconsistent with his own testimony that VCG adamantly refused to put anything in writing for reasons relating to CGP’s bankruptcy proceeding. If Nunnari had no reason to request or expect to receive anything in writing. VCG, on the other hand, testified that he did not and would never have extended Nunnari’s written contract because, among other things, he had growing concerns that Nunnari was using CGP’s Los Angeles office to operate his own company. From his point of view, Nunnari’s written contract had lapsed and Nunnari’s employment was at-will for as long as VCG continued to pay his salary. ’s testimony supports VCG’s recollection. According to Alatan, VCG told him after the meeting in Rome that .

VCG’s testimony with respect to the alleged oral agreement is more credible than Nunnari’s for several additional reasons. First, Nunnari’s claim that VCG reinstated the \$2.5 million severance – a term VCG omitted altogether from the 2005 Agreement – is inconsistent with his testimony that VCG agreed to a two year extension of *the existing contract*. Second, there is no evidence that VCG received any consideration for reinstating the severance payment. Third, it is not credible that, having rejected Cotugno’s 2005 request for reduced severance of \$1 million and signed a 2005 Agreement with no severance obligation whatsoever, VCG would have promised Nunnari \$2.5 million severance in 2007.

What is credible and substantiated by the parties’ conduct is that VCG told Nunnari he would continue to pay salaries and keep the Los Angeles office operating at least through the end of the lease. Nunnari’s conduct after the meeting is consistent with that. For example, without consulting with VCG or anyone else in Rome, Nunnari and Flores were actively trying to find and lease alternative offices. By early Spring 2008, they were negotiating to lease space for HGP on the Warner Bros. ldt. Although Nunnari testified that the space could be used for CGP/CGUSA and HGP, his failure to disclose the lease negotiations to VCG is evidence that he had no expectation that CGP would be paying the rent. Nunnari meanwhile also engaged CGP’s former Treasurer, Roland Lilibois, to retrieve HGP’s files in anticipation of moving. In his March 28, 2008 email, Nunnari explained that when he returned from Connecticut, he “would like to start fresh and new with just Hollywood Gang,” asking Lilibois to “take the papers” from CGP’s offices that Lilibois thought they would need (Exh. 422). There was no evidence, at trial, whether or to what extent Lilibois removed documents from CGP’s Los Angeles office.

After the 2005 Agreement lapsed, Nunnari conducted business as usual, negotiating with third parties as a dual agent for HGP and CGP. He made a deal with Miramax to produce a remake of a *Stanno Tutti Bene*, aka *Everybody’s Fine*, a

PentAmerica Project later assigned to CGUSA. Under an October 7, 2007 agreement, Nunnari (CGUSA) negotiated an option that gave Miramax the remake rights in exchange for immediate payment of \$5,000 to CGUSA against a total purchase price of \$1,013,590 (the amount of CGUSA's investment in the project to date) (Exh. 407). A few weeks later, Nunnari (HGP), agreed to provide development and production services to Miramax in exchange for immediate payment of a \$10,000 "development fee" to HGP, the promise of \$610,000 to HGP in producer fees, additional contingent compensation up to \$225,000 depending on the success of the motion picture, and credits for himself, as producer, and Craig Flores, as "executive producer" (October 30, 2007 Producer Loan Out Agreement, Exh. 408).

While *Everybody's Fine* was in the works, VCG was growing more suspicious of Nunnari's activities. In early November 2007, VCG approached Ambrosio, CGP's former General Counsel, for legal advice on how to straighten out the Los Angeles office. Meanwhile, Ludy Blasco was instructed to deal directly with Rome on financial matters -- without going through Nunnari or Flores (Exhs. 410, 35).

A few months later, VCG took action with respect to HGP's deal on *Everybody's Fine*, informing Miramax, on April 1 2008, that his company, CGUSA, owned the remake rights to *Everybody's Fine*, and that any agreement for production of the project had to be approved by him (Exh. 64). Although VCG retracted his position and Miramax released the film in theaters in 2009 (Exh. 66), VCG's claims against Nunnari/HGP unresolved. By April 2008, VCG was so concerned that he embarked on a plan to oust Nunnari as the signatory on CGP and CGUSA's bank accounts and close the office.

N. VCG Closes CGP's and CGUSA's Los Angeles Office.

On April 7, 2008, Nunnari and Flores were at the airport ready to board a flight to Connecticut when a co-worker called to report that VCG had dispatched attorney William Moore to the office with a security guard in tow, to terminate the employees and shutter the office. Flores rushed back the office to deal with the situation while Nunnari continued on to Connecticut.

Moore's testimony raised questions about the dearth of signed originals among the CGP and HGP documents and the reliability, in general, of Nunnari's evidence. When first arrived, was that Flores and the other employees were calm and so they seemed so cooperative that he allowed HGP's accountant, Benita Powell, to remove several boxes of documents. Moore left the office in late afternoon, trusting the employees to gather their personal possessions and leave. However, around 7:00 p.m., Blasco called him to report that no one was leaving and that Flores' wife, who is also an attorney, had come to the office as well. When Moore returned at 8:30 p.m., he found Flores and his wife busily working at the computers, and other employees still present in the office. Concerned that they might be removing documents, deleting files, or otherwise corrupting company records, he asked them all to leave the office and arranged to change the locks on the doors. the 2001 HGP Option on *Silence* and VCG's May 7, 2003 letter ostensibly ratifying that option.

Moore testified that he did not terminate Nunnari's employment. There was no evidence that VCG or anyone else communicated to Nunnari any formal termination. There was contrary evidence, including testimony relaying an April 7, 2008 message

from Nunnari that he was never coming back and Nunnari's March 2008 email to Lilibois to the same effect.

II. The Evidence Supports a Decision in Favor of Defendants on their Cross Complaint.

A. Nunnari Owed Several Discrete Fiduciary Duties to his Employers, CGP and CGUSA.

There is no dispute that, for all relevant time periods, Nunnari served as President of CGP and CGUSA, reporting directly to VCG as the beneficial owner of these companies. There was no evidence anyone other than VCG was Nunnari's superior in the CGG organization or had any authority to supervise his conduct. CGP and CGUSA were therefore Nunnari's employers with VCG appointed to speak and act for them. Unless VCG and Nunnari reached an agreement to the contrary, Nunnari owed a fiduciary duty to act loyally for their benefit on all matters connected with his employment. Restatement (Third) of Agency § 8.01. This means that Nunnari had to place his employers' interests first and subordinate his own interests to theirs. *Id.* § 8.01(b). Nunnari's overarching fiduciary duty, as an employee and officer of the company, included each of the following obligations:

(1) Nunnari had a duty not to acquire any material benefit from a third party in transactions he conducted on behalf of CGP and CGUSA, or otherwise through use of his positions at CGP and CGUSA. *Id.* § 8.02. Also, since Nunnari's duties included identifying, assessing, and pursuing opportunities to maintain, buy, sell, and develop film projects for CGP and CGUSA, he owed a duty not to take personal advantage of any opportunity that arose in the course of that work to or to give the opportunity to a third party, such as HGP. *Id.* Comment (d). He was prohibited from taking personal

advantage in the form of direct benefits, such as pecuniary gain, as well as indirect benefits that enhance reputation, such as on-screen “producer” titles. Id., Reporters’ Notes c.

(2) Nunnari had a duty not to deal with his employers as, or on behalf of, HGP (or any other adverse party) in transactions relating to his employment. Id. § 8.03. “When an [employee] deals with the [employer] on the [employee’s] own account, the [employee’s] own interests are irreconcilably in tension with the [employer’s] interests because the interest of each is furthered by action – negotiating a higher or lower price, for example -- that is incompatible with the interest of the other.” Id. Comment b.

(3) Nunnari had a duty to refrain from competing with VCG and his companies and from taking action on behalf of, or otherwise assisting, HGP or any other competitor. Id. § 8.04. It is not a defense that Nunnari honestly believed that his activity would not injure his employers. Id. Comment b.

(4) To the extent that Nunnari acted as a dual agent (both for HGP and CGP/CGUSA) in transactions between them or with third parties, he had an additional duty to:

- (a) deal with his employers in good faith; and
- (b) disclose to VCG that (i) he was also acting for HGP; (ii) all other facts that he knew or should have known would affect VCG’s judgment (unless VCG manifested that he knew or did not wish to know); and (iii) to deal fairly with VCG and his companies in such transactions. Id. § 8.06(2).

(5) Nunnari had a duty not to use CGP’s or CGUSA’s property (including their confidential information) for his own or HGP’s purposes. Id. § 8.05. As the employee

in possession of the Los Angeles Office, overseeing all and their employees, he had a duty to use the office and employees for his employers' benefit unless VCG agreed to a different arrangement.

B. Nunnari Breached his Employment Agreements, Breached Fiduciary Duties, and Engaged in Concealment and Constructive Fraud. Engaged in Concealment and Constructive Fraud.

Defendants proved, by a preponderance of the evidence, that Nunnari breached the fiduciary duties noted above. Nunnari failed to prove, by a preponderance of evidence, that he was acting in good faith or that VCG (or anyone else in the organization in a position to take action on the conflicts of interest) consented to the breaches. He also failed to prove that he made transaction-by-transaction disclosures to anyone else in the organization including Pietro Salussolia, Guia Loffredo and Faruk Alatan or to anyone else in a position to recognize and act on his conflicts of interest regarding CGP and/or CGUSA. Restatement (Third) Agency § 8.06, Comment c.

The same proof establishes that Nunnari engaged in constructive fraud, concealment, and breach of his employment agreements.

1. Nunnari's Work Developing and Producing Motion Pictures for HGP Violated Fiduciary Duties Owed to CGP and CGUSA.

VCG credibly testified that CGP was "absolutely" in the business of developing and producing motion pictures. Nunnari and other former CGP employees admitted during Nunnari's tenure as an officer of CGP/CGUSA, he worked with CGP employees

to develop motion picture projects for both CGP and HGP. There was ample documentary evidence that while Nunnari and other CGP employees were being paid to develop the PentAmerica Projects and other projects for CGP from 1996 through April 9, 2008, they performed the same functions, often on the same projects, for the benefit of HGP.

In an effort to persuade the court that HGP was engaged in business unrelated to his employment for CGP/CGUSA, Nunnari testified, at length, that after PentAmerica's demise, VCG was unwilling to finance CGP's production of motion pictures and later unable to do so because of financial difficulties. The court accepts, as true, that unlike PentAmerica, CGP was not in the business of financing the producing of its film projects.

There is no evidence, however, that Nunnari and HGP took up the "unrelated" business of In any case, advancing funds to finance motion picture production was not the business that Nunnari (HGP) pursued. To the contrary, whether acting for CGP or for HGP, Nunnari did the same work – the work of a "creative producer" -- obtaining rights, commissioning scripts, and attaching directing and/or acting talent to enhance their value in order to entice others to finance production. This placed him in a direct conflict of interest with his employers. It is no coincidence that when Nunnari simultaneously negotiated to sell rights to CGUSA projects and his producer services on a project, the agreements yielded more compensation to HGP (in production fees and other compensation) than to CGUSA (for sale of its rights in the development projects). Nunnari's public relations materials, apparently prepared to solicit individual investors to

finance HGP's film projects, provide further evidence that he did the same work for HGP as for CGP and CGUSA (Exhs. 638, p. 13; 639, p. 5, 16-17).

2. Nunnari's Burden and Proposed Transactions as a Dual Agent Was in Breach of His Fiduciary Duties.

As a fiduciary, Nunnari was obligated to place his employer's interests ahead of his own and to make sure that VCG knew everything that an employer would want to know about the business that he entrusted to Nunnari. For each producer fee that Nunnari negotiated to receive from a third party in connection with the production of any CGP or HGP project, it was Nunnari's burden to prove that he disclosed to VCG and received VCG's consent to: (1) his status as a dual agent; (2) the details of the proposed transaction; and (3) any and all material terms offered and/or rejected by each side during negotiations. Restatement (Third) of Agency § 8.06 Comment *b*. Nunnari failed to demonstrate disclosures to and consent from VCG or any other person in the organization who had to recognize the conflict of interest in his producer agreements and take action on it.s *b* and

Specifically, there was no evidence, at trial, that before or after negotiating HGP's producer deals on *Ferrari*, *Silence*, or *Everybody's Fine*, Nunnari disclosed his role as a dual agent, the proposed terms of his dual transactions, or any other information to VCG's ability to knowingly consent. To the contrary, there was persuasive testimony and other evidence that Nunnari affirmatively concealed these HGP transactions from VCG (see e.g., Exhs. 285, 286, 287, 290, 305, 352, and 359).

Nunnari's work developing and producing *300* likewise placed him in a conflict of interest with his employers. he idea to develop a motion picture based on Frank Miller's

graphic novel came to Nunnari's attention while he was President of CGP. Since he was already identifying potentially successful film projects for CGP, every opportunity that came to his attention belonged to CGP and any independent exploitation of opportunity was a breach of duty.

The court did not believe Nunnari's testimony that he sent VCG a copy of Miller's graphic novel, *300*, invited VCG to invest in the project, informed him that HGP obtained rights to shop the project etc. Even accepting Nunnari's testimony as true, these communications are not detailed enough for the court to find that VCG knowingly consented to Nunnari's independent development of the project. See, e.g., Ehlen v. Lewis, 984 F. Supp 5, 9 (D.D.C. 1997) (noting that "[w]here a fiduciary acts in his own interest in dereliction of his beneficiaries' interest, more than some 'by the way' notice is required").

The court further finds Nunnari failed to prove, by a preponderance of evidence, that he was free to act as a dual agent because VCG manifested that he already knew or did not wish to know about Nunnari's or HGP's film development business on *300* or any other project. Putting aside Nunnari's credibility as a witness, his testimony that VCG expressed no interest in buying the rights to Miller's graphic novel, *300*, and VCG's alleged statement wishing Nunnari "good luck" with respect to it,⁵ are not a sufficient manifestation of knowledge and disinterest to relieve Nunnari of his fiduciary duties. VCG's inaction, in the face of growing indications Nunnari was independently involved in *300*, is also insufficient to manifest his relinquishment of fiduciary obligations or give rise to any estoppel from later pursuing claims against Nunnari and HGP.

⁵ The inference that VCG was content to have Nunnari develop and produce *300* in competition with CGP is belied by Flores' testimony that VCG "grumbled" when *300* came up in conversation.

Nunnari also failed to prove that he acted in good faith in his role as a dual agent. The discrepancy in financial return to HGP versus CGUSA that Nunnari negotiated on production agreements for former PentAmerica projects provides strong evidence to the contrary. The persuasive evidence that Nunnari concealed his producer agreements -- credible testimony from Ambrosio and Blasco and corroborating rdocumentation -- also vitiates his contention that he acted in good faith. There is evidence, moreover, that a2002, Nunnari understood what the law requires from an employee/fiduciary. In a letter (cc'd to Nunnari), personal explained that "[b]ecause of Mr. Nunnari's position in [CGP], he likely owes fiduciary duties to the company which require, among other things, that he not take positions adverse to his employer" and asked CGP "to waive any conflicts of interest that exist or may exist . . . as a result of the fiduciary duties owed to [CGP] by Mr. Nunnari" (Exh. 218).

3. VCG's Agreement that Nunnari Could Work as a "Producer-for-Hire" Was Not a Waiver of Nunnari's Obligation to Place his Employers' Interests Ahead of his Own.

The fiduciary duties that employees owe to employers are duties imposed by laware also . Theyare enforceable whether or not the employee expressly promises, in an employment agreement or otherwise, to comply with them to secure

Nunnari nevertheless argues that, by signing employment agreements Nunnari work as a "non-exclusive" "producer for hire" and/or engage in "independent production," VCG releasedwaived or consented to Nunnari's breaches of loyalty.In interpreting the employment agreements, the court finds that the words "non-exclusive" and "producer for hire" do not refer to, let alone waive, any of the fiduciary duties that

Nunnari breached in this case. Moreover, fiduciary duties can only be avoided if the employer affirmatively agrees to release them on a transaction by transaction basis. Otherwise, there can be no knowing or intelligent waiver. Restatement (Third) of Agency, § 8.06 Comment *b*. Courts may not enforce provisions except in the language in Nunnari's employment agreements falls woefully short of these requirements.

4. The 2003 Employment Agreement Does Not Bar Defendants' Claims.

HGP was not a party to, and was not released under, the 2003 Agreement. Whereas Nunnari expressly released the parties to the agreement and their "affiliated companies," Defendants only released "Nunnari [and] his successors and assigns." The parties' decision to expressly distinguish between "successors and assigns" and "affiliated companies" is evidence that they purposely excluded HGP and any other company affiliated with Nunnari. Defendants proved that HGP materially assisted (aided and abetted) Nunnari's breach of fiduciary duties. *Kruss v. Booth* (2010) 185 Cal.App.4th 699, 729. Since HGP was the conduit for Nunnari's remuneration on competing projects, Defendants are entitled to recover damages, jointly and severally, from HGP and Nunnari. Therefore even if the waivers and releases in the 2003 Agreement were enforceable as to Nunnari, Defendants would be entitled to recover damages from HGP.

The court finds, however, that Nunnari cannot enforce the waivers and releases in the 2003 Agreement because they only cover the known and unknown claims that existed as of February 3, 2003. Since, in this case, Nunnari's breaches of fiduciary duties occurred after that date, the releases cannot bar Defendants' claims. For

example, HGP's May 2003 lawsuit against Scorsese was a breach that post-dated the effective date of the February 3, 2003 Agreement. Although Nunnari attempted to obtain an option on *Silence* under the 2001 HGP Option, he took no immediate action on it. His breaching conduct – using the 2001 HGP Option to advance an ownership interest in *Silence* -- occurred in 2003. Likewise, Nunnari's conduct developing and exploiting *300* and *Everybody's Fine*, post-dated the February 2003 release.

These breaches of duty excused Defendants' obligation to perform under the releases. Defendants also have grounds to rescind or cancel the 2003 Agreement based on Nunnari's longstanding concealment of his independent and competing business activities.

5. Nunnari Also Breached Duties by Using CGP and CGUSA Employees and Assets for His Own Benefit.

Defendants also proved, by a preponderance of evidence, that Nunnari used CGP's office and employees to work on film development projects that benefited Nunnari and HGP rather than CGP or CGUSA. These breaches of duty provide an independent basis for the court's award of damages in their favor.

C. Defendants Failed to Prove any Breach of Duty, Breach of Contract, or other Tortious Conduct with Respect to Immortals/War of Gods.

Immortals/War of Gods is post-termination. There is insufficient evidence for the court to find Nunnari liable to Defendants in connection with this project.
T over Ownership of Any Project other than Silence.

In their Tenth Cause of Action, Defendants seek a declaratory judgment confirming that CGUSA owns the intellectual property rights in a list of at least 115 projects that they contend were in development at CGP during Nunnari's tenure with the company.

The court has found that there is a present and adjudicable controversy with respect to Defendants' claim to ownership rights in *Silence*. The court finds and declares that Nunnari and HGP acquired no intellectual property rights in *Silence* under the 2001 HGP Option. Defendants proved, by a preponderance of the evidence, that Nunnari acted as a dual agent and executed the 2001 HGP Option without the

necessary disclosures to or consent from VCG.⁶ Plaintiffs failed to establish that Roland Lilibois, the CGUSA officer who signed the 2001 HGP Option, had the requisite authority to recognize or consent to Nunnari's conflict of interest. To the contrary, the evidence was that Lilibois was Nunnari's subordinate and acted at his direction. Defendants also proved that VCG did not sign the May 23, 2003 letter purporting to ratify HGP's rights under the 2001 HGP Option.

The 2001 HGP option is therefore void and/or subject to forfeiture of any and all benefits obtained under its provisions. To ensure that CGUSA reaps all past and future benefits flowing from its ownership rights in *Silence*, the court will impose a constructive trust on any and all proceeds flowing from Nunnari and/or HGP's exercise of ownership rights under the invalid 2001 HGP Option (with reimbursement to Nunnari and/or HGP for services provided and reasonable expenses fairly attributable to their exploitation of rights under the 2001 HGP Option such as payment of attorneys fees in connection with the Scorsese Settlement). On the remaining projects at issue in the Tenth Cause of Action, the court finds that there is no present controversy over ownership in the intellectual property rights warranting any current adjudication.

Craig Flores was the only witness who testified to the ownership of the projects under development at CGP and the described below confirmed and a ; (s). Flores HGP's but there was no testimony . 'is too vague and indefinite to regarding the rights to these projects.

III. Legal Analysis of Nunnari's Complaint

A. Nunnari Cannot Prevail on his Breach of Contract, Fraud, or Promissory Estoppel Claims because There Is No Credible Evidence that VCG Promised to Extend the 2005 Agreement or Pay Severance.

Nunnari failed to prove, by a preponderance of evidence, that VCG orally agreed or represented that he would extend the 2005 Agreement beyond its July 2007 expiration date and/or reinstated his promise to pay \$2.5 million in severance. Without a written employment agreement in place, Nunnari was an at-will employee who could

⁶ The April 30, 2001 and May 1, 2001 memoranda purporting to give CGP and CGUSA authority to enter into any necessary option agreement with HGP for *Silence* cannot operate as any waiver of Nunnari's fiduciary obligations of disclosure and consent. As noted above, agreements purporting to waive fiduciary duties on future transactions are not enforceable.

be terminated for any reason or no reason. Nunnari failed to prove, however, that his employment was ever terminated. In any case, VCG had good cause to terminate Nunnari because Nunnari had breached fiduciary duties. Even if VCG had agreed to pay severance upon termination, the obligation was excused by Nunnari's antecedent breaches of contract.

B. Nunnari's Interference with Economic Advantage Claim Fails.

Nunnari's interference claim rests on correspondence that VCG and his attorneys sent to Miramax with regard to *Everybody's Fine*. To succeed on this claim, Nunnari had to prove, among other things, that he had a prospective economic return and that Defendant's conduct was wrongful. However, as noted above, Nunnari failed to disclose to VCG that he was dealing with Miramax on his own account and on behalf of CGP/CGUSA. When VCG found out about the dual agency, he and his lawyers had every right to communicate with Miramax because Nunnari's conflict of interest gave CGUSA the right to rescind the transactions with Miramax. Restatement (Third) of Agency § 8.03 Comment *d*. Nunnari's interference claim therefore fails because there is no evidence of wrongful conduct.

It also fails because Nunnari and HGP have no lawful prospective advantage in *Everybody's Fine*. Having proved that Nunnari breached fiduciary duties, CGP is entitled to the compensation that HGP negotiated to receive in connection with the project.

C. Nunnari Failed to Prove Breach of Contract, Conversion, and Claim and Delivery; the Court Does Not Reach the Declaratory Relief Claims.

Nunnari also failed to present sufficient evidence to prove that CGP was obligated to reimburse the \$520,062 he paid to CGP shortly before the Los Angeles office closed. Defendant's expert accountant, Jan Goren, examined CGP's general ledger and identified detailed postings, as of December 31, 2005, confirming that Nunnari owed CGP \$520,062. After reviewing the source documents, he concluded that the sum represented CGP's accumulated advances for expenses incurred by HGP. Ludy Blasco corroborated Goren's testimony and there was no credible testimony from Nunnari or his expert to the contrary. Through Goren's and Blasco's persuasive testimony, Defendants proved that Nunnari paid this money to CGP to satisfy a valid obligation – an obligation owed since December 2005.

Having made determinations as a matter of contract and law, the court finds no reason for equity to provide declaratory relief.

Remedies

Defendants proved, by a preponderance of the evidence, that as of the time of trial, they suffered damages in the form of lost profits as follows: \$8,600,933 (on *300*), \$3,269,254 (on *Silence*), \$1,355,938 (on *Everybody's Fine*) Glndeed, requested

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relating to the Films GP Pany relating to the Films

GPPother any relating to the Filmsreimbursement of theirprospective such agreements(including)

evidence of

D. CGUSA Owns all Intellectual Property Rights in Silence Ostensibly Conveyed under the 2001 HGP Option Agreement.

2001 HGP Option

E. There Is No Present Claim or Controversy to Adjudicate with Respect to Ownership of other Film Projects

under Defendants' Tenth Cause of Action, they

Dated this day of January, 2011

Amy D. Hogue
Judge of the Superior Court

