

To be Argued by:
PHILLIP ALLEN LACOVARA

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New York Supreme Court
Appellate Division—First Department
— ◆ ● ◆ —

APPLE CORPS LIMITED, APPLE RECORDS, INC., KENNETH SIDNEY ROBERTS AND
NICOLAS EDMUND VALNER AS EXECUTORS OF THE ESTATE OF GEORGE
HARRISON, G.H. ESTATE LIMITED, YOKO ONO LENNON, SIR JAMES PAUL
MCCARTNEY, RICHARD STARKEY, AND MPL COMMUNICATIONS, INC.,

Plaintiffs-Respondents,

— against —

CAPITOL RECORDS, INC. AND EMI RECORDS LIMITED,

Defendants-Appellants.

BRIEF FOR DEFENDANTS-APPELLANTS

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TABLE OF CONTENTS

	Page
PRELIMINARY STATEMENT	1
QUESTIONS INVOLVED.....	3
STATEMENT	5
1. The Parties: The Beatles versus Recording Companies	5
2. Litigation in the 1970’s and 1980’s.....	10
3. The New Royalty Agreements and Subsequent Litigation	11
4. The Present Case.....	13
SUMMARY OF THE ARGUMENT	16
ARGUMENT	17
Standard of Review.....	17
I. Plaintiffs’ Own Allegations As Well As Commonly Known Facts Belie The Fiduciary Duty Claim.....	18
A. Fiduciary Duty is an Equitable Doctrine That Protects Weak and Dependent Persons.....	21
B. The Beatles Cannot Claim Either a “Formal” Fiduciary Relationship or an Informal Relationship Signifying Special Dependence and Trust.....	23
1. The Complaint Does Not Plead a Formal Fiduciary Relationship, Because the Relationship Between Performer and Publisher Is Purely Contractual	23
2. The Complaint Does Not Plead Essential Elements of an Informal Fiduciary Relationship	25
a. With the sole exception of <i>Apple I</i> , courts have consistently rejected claims of fiduciary relationships between artists and record companies.....	26
b. The Complaint actually denies that The Beatles trusted Capitol/EMI.....	27
c. The Complaint does not plead reliance	29

TABLE OF CONTENTS

(continued)

	Page
d. The Complaint does not plead (and could not honestly plead) disparity in position	32
3. There Is No Reason to Impose a Fiduciary Duty in This Case	34
C. <i>Apple I</i> Does Not Save The Current Claims	35
II. The Fraud Count is Bogus.....	38
A. The Fraudulent Inducement Claim is Barred by the Statute of Limitations.....	39
1. Any fraud claim arose more than six years ago	39
2. The discovery exception does not apply	39
B. The Fraudulent Inducement Claim Is Fatally Flawed	41
1. As a Matter of Law, The Alleged Omissions Do Not Constitute Fraud	42
a. There was no duty to disclose the potential for future contracts with third parties.....	42
b. The contracts show that The Beatles knew of possible third-party distributions and determined how they should be treated.....	43
c. There was no harm from the alleged omissions	43
2. The Complaint Does Not Identify a Single Misstatement.....	44
3. As a Matter of Law, Undisclosed Intent Not to Perform a Contract Is Not Fraud	45
4. The Alleged Injury Cannot Be the Basis of Any Fraud Claim	46
C. The Claim That Capitol/EMI Committed Fraud In Performing the Contract Is Legally Invalid	47

TABLE OF CONTENTS

(continued)

	Page
1. The Post-Contract Fraud Claim Merely Restates a Claim for Breach of Contract	48
a. The Complaint does not plead the breach of any non-contractual duty	48
b. The fraud and breach of contract claims allege identical facts	51
c. The Complaint does not plead tort damages	52
2. The Beatles Fail to Plead Reliance	53
III. The Demand for Punitive Damages Must Be Stricken	55
A. The Alleged Misconduct Does Not Evince a “High Degree of Moral Turpitude”	55
B. The Alleged Misconduct Was Not “Aimed at the Public Generally”	56
IV. The Demand for Partial Rescission Is Invalid	57
A. Partial Termination is Not a Legitimate Legal Remedy	57
B. Complete Termination Could Not Be Warranted	58
V. The Demand for Transfer of EMI’s Master Recordings Would Unjustifiably Confiscate EMI’s Independent Property Rights	59
CONCLUSION	62

TABLE OF AUTHORITIES

	Page
Cases:	
<i>767 Third Ave. LLC v. Greble & Finger, LLP</i> , 8 A.D.3d 75 (1st Dep't 2004)	48
<i>860 Fifth Ave. Corp. v. Superstructures-Eng'rs & Architects</i> , 15 A.D.3d 213 (1st Dep't 2005)	40
<i>Aaron Ferer & Sons, Ltd. v. Chase Manhattan Bank</i> , 731 F.2d 112 (2d Cir. 1984)	27
<i>Am. Broad. Cos., Inc. v. Wolf</i> , 76 A.D.2d 162 (1st Dep't 1980), <i>aff'd</i> , 52 N.Y.2d 394 (1981)	18
<i>Apple Records, Inc. v. Capitol Records, Inc.</i> , 137 A.D.2d 50 (1988)	<i>passim</i>
<i>Archie Comic Publics, Inc. v. DeCarlo</i> , 141 F. Supp. 2d 428 (S.D.N.Y. 2001)	25
<i>Arthur Guinness & Sons, PLC v. Sterling Public Co.</i> , 732 F.2d 1095 (2d Cir. 1984)	59
<i>Avalon LLC v. Coronet Properties Co.</i> , 306 A.D.2d 62 (1st Dep't 2003)	39
<i>Baldasano v. Bank of New York</i> , 174 A.D.2d 457 (1st Dep't 1991)	36
<i>Batas v. Prudential Insurance Co. of America</i> , 281 A.D.2d 260 (1st Dep't 2001)	27
<i>Best Payphones, Inc. v. Empire State Payphone Association</i> , 272 A.D.2d 139 (1st Dep't 2000)	56
<i>Birnbaum v. Birnbaum</i> , 73 N.Y.2d 461, 539 N.E.2d 574 (1989)	34
<i>Cafferty v. Scotti Brothers Records, Inc.</i> , 969 F. Supp. 193 (S.D.N.Y. 1997)	24

TABLE OF AUTHORITIES

(continued)

	Page
Cases (continued):	
<i>Campaign for Fiscal Equity, Inc. v. State</i> , 86 N.Y.2d 307, 655 N.E.2d 661 (1995).....	17
<i>Capitol Records, Inc. v. Naxos of America, Inc.</i> , 4 N.Y.3d 540, 830 N.E.2d 250 (2005).....	10, 60
<i>Carter v. Goodman Group Music Publishers</i> , 848 F. Supp. 438 (S.D.N.Y. 1994)	25
<i>Clark-Fitzpatrick, Inc. v. Long Island R.R. Co.</i> , 70 N.Y.2d 382, 516 N.E.2d 190 (1987).....	48, 50, 52
<i>Dayan Enterprises, Corp. v. Nautica Apparel, Inc.</i> , No. 03-Civ.-5706, 2003 WL 22832706 (S.D.N.Y. Nov. 26, 2003)	48, 49, 52
<i>Dembeck v. 220 Central Park S., LLC</i> , 33 A.D.491 (1st Dep’t 2006)	42
<i>Dress Shirt Sales, Inc. v. Hotel Martinique, Associates</i> , 12 N.Y.2d 339, 190 N.E.2d 10 (1963).....	46, 47
<i>Eastbrook Caribe, A.V.V. v. Fresh Del Monte Produce, Inc.</i> , 11 A.D.3d 296 (1st Dep’t 2004)	36, 54
<i>Eastman Kodak Co. v. Roopak Enterprises, Ltd.</i> , 202 A.D.2d 220 (1st Dep’t 1994)	45
<i>Edwil Indus.l, Inc. v. Stroba Instruments Corp.</i> , 131 A.D.2d 425 (2d Dep’t 1987).....	48
<i>Evans v. Jelly’s Jams LLC</i> , No. 601308/01 (N.Y. Co. 2002)	24
<i>First Bank of the Americas v. Motor Car Funding, Inc.</i> , 257 A.D.2d 287 (1st Dep’t 1999)	45

TABLE OF AUTHORITIES

(continued)

	Page
Cases (continued):	
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<i>Glenn Partition, Inc. v. Trustees of Columbia University</i> , 169 A.D.2d 488 (1st Dep't 1991)	42
<i>Gordon v. Bialystoker Ctr. & Bikur Cholim, Inc.</i> , 45 N.Y.2d 692, 385 N.E.2d 285 (1978).....	23, 30
<i>Gordy Co. v. Mary Jane Girls, Inc.</i> , Nos. 86 Civ. 6814, 87 Civ. 3438, 1989 WL 149290 (S.D.N.Y. Dec. 6, 1989)	58, 59
<i>HF Mgt. Services LLC v. Pistone</i> , 818 N.Y.S.2d 40 (1st Dep't 2006).....	22
<i>Hunter v. New York, Ontario & W. Railway Co.</i> , 116 N.Y. 615, 23 N.E. 9 (1889).....	18
<i>Jana L. v. W. 129th St. Realty Corp.</i> , 22 A.D.3d 274 (1st Dep't 2005)	42
<i>Jericho Group, Ltd. v. Midtown Development, L.P.</i> 32 A.D.3d 294 (1st Dep't 2006)	50
<i>Joseph v. David M. Schwarz/Arch. Services, P.C.</i> , 957 F. Supp. 1334 (S.D.N.Y. 1997)	48
<i>Krantz v. Chateau Stores of Canada Ltd.</i> , 256 A.D.2d 186 (1st Dep't 1998)	52
<i>Lama Holding Co. v. Smith Barney, Inc.</i> , 88 N.Y.2d 413, 668 N.E.2d 1370 (1996).....	47, 53
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TABLE OF AUTHORITIES

(continued)

	Page
Cases (continued):	
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<i>Maas v. Cornell University</i> , 94 N.Y.2d 87, 721 N.E.2d 966 (1999).....	18
<i>Megaris Furs, Inc. v. Gimbel Brothers, Inc.</i> , 172 A.D.2d 209 (1st Dep't 1991)	44
<i>Meinhard v. Salmon</i> , 249 N.Y. 458, 164 N.E. 545 (1928).....	22
<i>Mellencamp v. Riva Music, Ltd.</i> , 698 F.Supp. 1154 (S.D.N.Y. 1988)	25
<i>Merryman v. Gottlieb</i> , 99 A.D.2d 893 (3d Dep't 1984).....	57
<i>Metro. Trans. Auth. v. Triumph Adver. Prods.</i> , 116 A.D.2d 526 (1st Dep't 1986)	48, 51
<i>Mills v. Cottrell</i> , No. 04-Civ.-5562 (S.D.N.Y. Dec. 8, 2006).....	26
<i>Morsette v. "The Final Call"</i> , 309 A.D.2d 249 (1st Dep't 2003)	55
<i>New York University v. Cont'l Insurance Co.</i> , 87 N.Y.2d 308 (1995)	45, 55
<i>Nolan v. Williamson Music, Inc.</i> , 300 F. Supp. 1311 (S.D.N.Y. 1969), <i>aff'd</i> , 499 F.2d 1394 (2d Cir. 1974)	59
<i>Northeast. General Corp. v. Wellington Adver., Inc.</i> , 82 N.Y.2d 158, 624 N.E.2d 129 (1993).....	22

TABLE OF AUTHORITIES

(continued)

	Page
Cases (continued):	
<i>P.T. Bank Central Asia v. ABN AMRO Bank N.V.</i> , 301 A.D.2d 373 (1st Dep’t 2003)	44, 46
<i>Pan Am Corp. v. Delta Air Lines, Inc.</i> , 175 B.R. 438 (S.D.N.Y. 1994)	31
<i>Parsons & Whittemore, Inc. v. Abady Luttati Kaiser Saurborn & Mair, P.C.</i> , 309 A.D.2d 665 (1st Dep’t 2003)	45
<i>Rocanova v. Equitable Life Assurance Society of U.S.</i> , 83 N.Y.2d 603, 634 N.E.2d 940 (1994).....	57
<i>Rovello v. Orofino Realty Co., Inc.</i> , 40 N.Y.2d 633, 357 N.E.2d 970 (1976).....	18
<i>Sanshoe Trading Corp. v. Mitsubishi International Corp.</i> , 122 Misc. 2d 585 (N.Y. Co. 1984), <i>aff’d</i> , 104 A.D.2d 337 (1st Dep’t 1984)	25
<i>Savage Records Group N.V. v. Jones</i> , No. 600814/79 (N.Y. Co. July 17, 1997), <i>aff’d</i> , 247 A.D.2d 274 (1st Dep’t 1998)	26
<i>Scheinberg v. Samuels</i> , 171 A.D.2d 857 (2d Dep’t 1991).....	46
<i>Scotto Princeton LLC v. Felsen Assocs., Inc.</i> , 11 Misc.3d 378 (Nassau Co. 2005)	28
<i>Shea v. Hambros PLC</i> , 244 A.D.2d 39 (1st Dep’t 1998)	18, 54
<i>Siler v. Lutheran Soc. Servs.</i> , 10 A.D.3d 646 (2d Dep’t 2004).....	40
<i>Silvester v. Time-Warner, Inc.</i> , 1 Misc.3d 250 (N.Y. Co. 2003)	24

TABLE OF AUTHORITIES

(continued)

	Page
Cases (continued):	
<i>Simmons v. Crowley</i> , 112 N.Y.S.2d 851 (N.Y. Co. 1952)	58
<i>Slater v. Slater</i> , 208 A.D. 567 (1st Dep't 1924)	57
<i>Slavenburg Corp. v. Baby Doll Infants Wear Co.</i> , 181 A.D.2d 555 (1st Dep't 1992)	49
<i>Small v. Lorillard Tobacco Co., Inc.</i> , 94 N.Y.2d 43, 720 N.E.2d 892 (1999).....	38
<i>SNS Bank, N.V. v. Citibank, N.A.</i> , 7 A.D.3d 352, (1st Dep't 2004)	22, 29
<i>Societe Nationale D'Exploitation Industrielle Des Tabacs Et Allumettes v. Salomon Brothers International Ltd.</i> , 251 A.D.2d 137 (1st Dep't 1998)	29
<i>Sommer v. Federal Signal Corp.</i> , 79 N.Y.2d 540, N.E.2d 1365 (1992).....	48, 52
<i>Sony Music Entm't, Inc. v. Robison</i> , No. 01-Civ.-6415(LMM), 2002 WL 272406 (S.D.N.Y. Feb. 26, 2002).....	28
<i>State Farm v. Campbell</i> , 538 U.S. 408 (2003).....	55, 56
<i>Stuart Silver Associates, Inc. v. Baco Development Corp.</i> , 245 A.D.2d 96 (1st Dep't 2006)	38
<i>Surge Licensing Inc. v. Copyright Promotions Ltd.</i> , 258 A.D.2d 257 (1st Dep't 1999)	26
<i>The Hawthorne Group, LLC v. RRE Ventures</i> , 7 A.D.3d 320 (1st Dep't 2004)	42

TABLE OF AUTHORITIES

(continued)

	Page
Cases (continued):	
<i>Tradewinds Fin. Corp. v. Refco Secs., Inc.</i> , 5 A.D.3d 229 (1st Dep’t 2004)	23
<i>Van Valkenburgh, Nooger & Neville, Inc. v. Hayden Publ’g Co.</i> , 33 A.D.2d 766 (1st Dep’t 1969), <i>aff’d</i> , 30 N.Y.2d 34, 281 N.E.2d 142 (1972)	24
<i>Walker v. Sheldon</i> , 10 N.Y.2d 401, 404-05 (1961)	57
<i>Zanett Lombardier, Ltd. v. Maslow</i> , 29 A.D.3d 495, (1st Dep’t 2006)	54
Statutes:	
C.P.L.R. §203(g)	39
C.P.L.R. §213(8)	39
C.P.L.R. §3016(b)	44, 48
C.P.L.R. §3211(a)(7)	17
Other Authorities:	
Academy of Motion Picture Arts and Sciences, <i>Academy Awards® Database</i>	6
allmusic.com, <i>The Beatles: Biography</i>	6
BBC News, <i>Beatles to sue over royalty claim</i> (Aug. 30, 2006)	60
<i>Beatle McCartney knighted Sir Paul by queen</i> , CNN NEWS (March 11, 1997)	7
<i>Best-Selling Group of All Time</i> , 2003 GUINNESS BOOK OF WORLD RECORDS	6
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TABLE OF AUTHORITIES

(continued)

	Page
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Harper, Jennifer, <i>Death can't stop celebrities from making millions</i> , WASH. TIMES (Oct. 25, 2006)	8
<i>Horses sideline Broderick, Bach</i> , CHICAGO SUN-TIMES, Aug. 29, 2006,	9
MINOR PLANET CIRCULAR.....	7
<i>Money can book you Paul McCartney . . . at £500,000 an hour</i> , LONDON EVENING NEWS (May 21, 2005).....	7
National Trust – 20 Forthlin Road (website)	8
National Trust – Mendips (website)	8
Nelson, William E., THE LAW OF FIDUCIARY DUTY IN NEW YORK, 1920- 1980, 53 S.M.U. L. Rev. 285, (2000)	22
<i>Recording Industry Association of America</i> (website)	6
<i>Rock and Roll Hall of Fame, Full Inductee List</i> (website)	7
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Rosen, Craig, <i>Ringo Does Schwab; McCartney Gets Classy</i> , YAHOO! MUSIC, Jan. 27, 2000	9
Sapsted, David & Dawar, Anil, <i>Battle looms over Beatle's £800m fortune</i> , LONDON TELEGRAPH (May 18, 2006)	8
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TABLE OF AUTHORITIES

(continued)

	Page
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Smith, D. Gordon, THE CRITICAL RESOURCE THEORY OF FIDUCIARY DUTY, 55 Vand. L. Rev. 1399	21
Spiegel, Rob, <i>One Year Ago: Internet Gives McCartney All-Time Largest Album Promo</i> , E-COMMERCE TIMES (Dec. 14, 2000).....	8
The Official Charts Co., <i>Official UK Album Charts: 1967-1969</i> (website).....	33
Wikipedia, <i>Friar Park</i> (website).....	9
Wikipedia, List of musicians signed to EMI (website)	10

PRELIMINARY STATEMENT

This is the latest chapter in the repeated rounds of litigation between the former members of The Beatles and Capitol/EMI, the record company that originally commissioned the recordings of Beatles performances, owns the Master Records, and for more than forty years has sold Beatles albums and paid astronomical amounts of royalties to the group. The relationship began in 1962 when The Beatles were an unknown British band. It continued after they became one of the most financially successful groups in the music world and branched out into other musical and financial ventures. For over 30 years, however, the parties have been at odds over royalty calculations and payments, have engaged in litigation against each other, and have negotiated a series of lengthy contracts and settlements.

In their latest salvo, The Beatles insist that the recording company owes them a “fiduciary duty” of an unspecified nature. Despite the decades of purported misconduct at their alleged expense, which The Beatles contested in bitter litigation more than 25 years ago, they assert that they meekly relied on Capitol/EMI and reposed the most innocent trust in Capitol/EMI when, to settle the earlier litigation, they and their battery of lawyers and financial advisors negotiated new contracts and extracted from Capitol/EMI a raft of new substantive concessions and procedural protections. Despite The Beatles’ enormous wealth

and their use of the most sophisticated lawyers and advisors to assist them in structuring those contracts, they contend in this latest suit that the law must view Capitol/EMI as, in essence, their selfless guardian while The Beatles are the record company's helpless wards.

The court below did not even consider the absurdity of these claims, belied by the parties' checkered history and The Beatles' fabulous wealth and commercial sophistication. Instead, the court relied on this Court's decision in *Apple Records, Inc. v. Capitol Records, Inc.*, 137 A.D.2d 50 (1988) ("*Apple I*"), which had concluded that The Beatles' 1979 lawsuit had artfully stated "colorable" claims for "fraud" and "breach of fiduciary duty" based on the parties' *original* relationship *in the 1960's*, when the young and unlettered group first contracted with EMI at the beginning of their career. The present suit, however, focuses on transactions following the 1989 contracts, when the relationship, according to the Complaint, had undergone a dramatic transformation. According to The Beatles' own allegations, new contracts had erected a fortress of "stringent reporting and audit requirements in an effort to avoid similar malfeasance by Capitol/EMIR in the future." R.31. When the claims are considered in light of the relevant, contemporary facts as alleged, neither the "fiduciary duty" count nor the related "fraud" count is legally valid. Nor is the demand that the courts strip EMI of its

ownership of the Master Recordings of the songs it commissioned The Beatles to record and for which it owns the U.K. and U.S. copyrights.

QUESTIONS INVOLVED

1. Does the equitable doctrine of “fiduciary duty” create an obligation for a recording company to assume a guardian-ward relationship when it enters into commercial contracts with the independently-counseled, wealthiest, and most popular music group in history, and when the music group itself concedes that the parties negotiated a detailed contract, replete with audit provisions, specifically because the group distrusted the recording company?

Answer below: Yes.

2. Does a complaint state actionable claims for fraud, when
- (a) the claim rests on an allegedly undisclosed intent not to perform the contract, inferred only from alleged non-performance, or
 - (b) the complaint merely alleges that defendants “intentionally” breached a royalty agreement by “fraudulently” underpaying amounts due, without any allegation that plaintiffs relied on the supposed fraud, or
 - (c) the complaint does not identify any explicit misrepresentation made to induce the plaintiff to enter into the contract, or
 - (d) the allegedly fraudulent non-disclosure is the failure to disclose the defendant’s potential entry into future business relationships with third parties, or

(e) the plaintiff reaped millions of dollars in benefits under the contract and alleges no loss not otherwise recoverable under parallel claims for breach of contract?

Answer below: Yes as to each.

3. Does the statute of limitations allow a claim for “fraudulent inducement” filed sixteen years after the contract was signed and at least ten years after the Complaint alleges that the plaintiffs discovered the supposed fraud?

Answer below: Yes.

4. Are punitive damages available for the alleged under-payment of royalties pursuant to a purely private commercial contract between sophisticated parties?

Answer below: Yes.

5. May a court entertain a demand to terminate one party’s contractual rights, but not those of the other party, thus allowing “partial rescission” of the contract?

Answer below: Yes.

6. May a court order the transfer to a plaintiff of the defendant’s intellectual property as a remedy for breach of a separate royalty contract, when

(a) the defendant's ownership of the intellectual property derives from an earlier, independent contract and does not depend on the contract allegedly breached, and

(b) the plaintiff does not seek (and has no grounds to seek) rescission of the earlier, independent contract under which the property right was created?

Answer below: Yes.

STATEMENT

1. The Parties: The Beatles versus Recording Companies.

Plaintiffs. The principal plaintiffs are the former members of the renowned musical group The Beatles (or their estates). They are among the richest and best-known musicians in the world. Other plaintiffs are various corporate entities that the band members established to manage the millions of dollars in royalty and other income they receive *each year* from the defendants.

To assess the legal sufficiency of The Beatles' claim that Capitol/EMI owed them *fiduciary duties* akin to those owed by a guardian to a helpless ward when the two sides entered into commercial contracts in 1989 and 1995 – the contracts now at issue – their allegations must be read in the context of commonly known facts, which The Beatles cannot deny.

The Beatles are too modest in describing themselves as “a group of popular musicians.” R.25. They have been called “most influential act of the rock era,”¹ and have sold over one billion recordings. *Best-Selling Group of All Time*, 2003 GUINNESS BOOK OF WORLD RECORDS 188. In one week in 1964 alone,

“the Beatles had the Top Five best-selling singles in the U.S.; they also had the first two slots on the album charts, as well as other entries throughout the Billboard Top 100. No one had ever dominated the market for popular music so heavily; it’s doubtful that anyone ever will again. The Beatles themselves would continue to reach number one with most of their singles and albums until their 1970 breakup.” allmusic.com, *The Beatles: Biography*.

In addition to their immense wealth and popularity, The Beatles have received a slew of awards and honors. As a group, they recorded 43 Gold, 38 Platinum, and 24 Multi-Platinum albums; individual Beatles received still more in solo careers and with other groups.² The group was awarded an Oscar in 1970, and Paul McCartney has been nominated individually on two other occasions.³ The Queen of England made each group member a Member of The Most Excellent Order of the British Empire (“M.B.E.”). Plaintiff Sir James Paul McCartney, K.B.E., is also a Knight Bachelor knighted by the Queen, although, as one of his

¹ allmusic.com, *The Beatles: Biography*, available at <http://www.allmusic.com/cg/amg.dll?p=amg&sql=11:67d2vwnva9ik~T1>).

² Recording Industry Association of America, available at <http://www.riaa.com/gp/bestsellers/artist.asp>.

³ Academy of Motion Picture Arts and Sciences, *Academy Awards® Database*, available at http://awardsdatabase.oscars.org/ampas_awards/DisplayMain.jsp?curTime=1164747763104.

aides commented, he has “always been a modest chap and he won’t be getting us all bowing and scraping.”⁴

The group was inducted into the Rock and Roll Hall of Fame in 1988, and most also have been inducted as individual performers.⁵ The International Astronomical Union officially named a minor planet in our solar system for the group and each member.⁶

Sir Paul McCartney reportedly charges £500,000 (\$955,700) per hour for private musical performances. An employee at his talent agency explained: “Even for offers he might consider taking up – those in excess of the £1 million mark – he takes a couple of days to get back to us. So to say that Sir Paul won’t get out of bed for less than a million pounds is a very good way of putting it.”⁷ He earned £48.5 million (\$92.7 million) in 2005, and his net worth was estimated at £760

⁴ *Beatle McCartney knighted Sir Paul by queen*, CNN News (March 11, 1997), available at <http://www.cnn.com/SHOWBIZ/9703/11/mccartney/>.

⁵ Rock and Roll Hall of Fame, Full Inductee List, available at <http://www.rockhall.com/hof/allinductees.asp> (listing The Beatles (inducted in 1988), Lennon (1994), McCartney (1999), and Harrison (2004)).

⁶ MINOR PLANET CIRCULAR 43042 (July 5, 2001) ((8749) Beatles), available at <http://cfa-www.harvard.edu/cfa/ps/special/rocknroll/0008749.html>; *id.* 16247 (April 10, 1990), available at <http://cfa-www.harvard.edu/cfa/ps/special/rocknroll/0004147.html> ((4147) Lennon); *id.* 16248 (Apr. 10, 1990), available at <http://cfa-www.harvard.edu/cfa/ps/special/rocknroll/0004148.html> ((4148) McCartney); *id.* 16248 (Apr. 10, 1990), available at <http://cfa-www.harvard.edu/cfa/ps/special/rocknroll/0004149.html> ((4149) Harrison); *id.* 16248 (Apr. 10, 1990), available at <http://cfa-www.harvard.edu/cfa/ps/special/rocknroll/0004150.html> ((4150) Starr).

⁷ *Money can book you Paul McCartney . . . at £500,000 an hour*, London EVENING NEWS (May 21, 2005), available at <http://news.scotsman.com/topics.cfm?tid=371&id=557902005>.

million (\$1.45 billion).⁸ The record for the largest stadium audience in history was set in 1990, when 184,000 people paid to see McCartney in Rio de Janeiro.⁹

Another Beatle, the late John Lennon, although deceased since 1980, earns \$24 million per year, putting him fourth on Forbes Magazine's list of "Top-Earning Dead Celebrities."¹⁰ The Strawberry Fields Memorial in Central Park is dedicated to him, as are Liverpool John Lennon Airport in the United Kingdom and John Lennon Park in Havana, Cuba. The National Trust for Places of Historic Interest or Natural Beauty maintains Lennon's and McCartney's childhood homes as tourist attractions.¹¹

The late George Harrison had a successful career after the breakup of The Beatles. From 1970 until his death, he resided in Friar Park, a 120-room "landmark estate built years ago as a sort of Disneyland Castle" by Sir Frank Crisp,

⁸ See David Sapsted & Anil Dawar, *Battle looms over Beatle's £800m fortune*, London TELEGRAPH (May 18, 2006), available at <http://www.telegraph.co.uk/news/main.jhtml?xml=/-news/2006/05/18/nmacca18.xml>; Meera Dattani, *Sir Paul McCartney*, available at <http://www.virgin.net/money/moneymakers/mccartney.html>.

⁹ Rob Spiegel, *One Year Ago: Internet Gives McCartney All-Time Largest Album Promo*, E-COMMERCE TIMES (Dec. 14, 2000), available at <http://www.ecommercetimes.com/story-/6078.html>.

¹⁰ Jennifer Harper, *Death can't stop celebrities from making millions*, WASH. TIMES (Oct. 25, 2006), available at <http://www.washtimes.com/national/20061024-105816-8997r.htm>.

¹¹ National Trust – Mendips, available at <http://www.nationaltrust.org.uk/main/w-vh/w-visits/w-findaplace/w-mendips/w-mendips-seeanddo.htm>; National Trust – 20 Forthlin Road, available at <http://www.nationaltrust.org.uk/main/w-vh/w-visits/w-findaplace/w-20forthlinroad-allerton/w-20forthlinroadallerton-seeanddo.htm>.

1st Baronet.¹² He was the founder of Handmade Films, which produced 14 feature films.¹³ He is twelfth on Forbes's "Top Earning Dead Celebrities" list.¹⁴

Richard Starkey, a.k.a. "Ringo Starr," resides in Monte Carlo. R.25. He is married to "Bond Girl" Barbara Bach.¹⁵ Starr owns his own record label, Ring O' Records, which has produced albums by Starr himself and 16 other musicians. In 2000, he appeared in a series of "Smart Investor" television commercials for Charles Schwab Brokerage, in which he advised a group of young songwriters on potential rhymes for "elation."¹⁶ His suggestions were "dividend reinvestment participation," "market capitalization," "European market fluctuation," and "asset allocation."

Defendants. Capitol Records, Inc. and EMI Records Limited (collectively "Capitol/EMI") are affiliates. EMI is a U.K.-based company; Capitol is its U.S.-subsidiary. They are among the largest record companies in the world. The list of well-known musicians affiliated with EMI is long and includes not only popular

¹² See R.212 ¶21.2(v); *Close encounters behind the scenes*, NEWARK STAR LEDGER, Oct. 24, 2004, at 10; Wikipedia, *Friar Park*.

¹³ *HandMade plc*, HOOVERS COMPANY IN-DEPTH RECORDS, 2006 WLNR 18939087 (Nov. 1, 2006).

¹⁴ Rose, Lacey, Louis Hau, Amanda Schupak, *Top-Earning Dead Celebrities*, Forbes.com (Oct. 26, 2004).

¹⁵ *Horses sideline Broderick, Bach*, CHICAGO SUN-TIMES, Aug. 29, 2006, at 30.

¹⁶ Craig Rosen, *Ringo Does Schwab; McCartney Gets Classy*, YAHOO! MUSIC, Jan. 27, 2000, available at <http://music.yahoo.com/read/news/12058268>.

acts such as Frank Sinatra, Nat King Cole, and Pink Floyd, but also renowned classical musicians such as Herbert von Karajan and Maria Callas.¹⁷

EMI produced The Beatles' albums and owns the Master Recordings of those albums. Under United Kingdom law, New York common law, and/or federal law, Capitol/EMI owns the rights in the recorded performances. See, *e.g.*, *Capitol Records, Inc. v. Naxos of Am., Inc.*, 4 N.Y.3d 540, 830 N.E.2d 250 (2005) (recognizing Capitol/EMI's common-law copyright over musical performances it commissioned and recorded). See also 1989 NA [North America] Agreement (R.125) ("The copyright in all the sound recordings . . . is owned by EMIR."). Under a series of royalty contracts, Capitol/EMI manufactures and distributes Beatles recordings and pays royalties to the group members and various trusts and corporate entities they designate.

2. Litigation in the 1970's and 1980's.

As the Complaint alleges, "The Beatles' relationship with Capitol/EMIR is in its fifth decade," but almost uninterrupted litigation has characterized four of those decades. R.27, R.29, R.31, R.32, R.37.

As this Court described in *Apple I*, the parties contracted in 1973 to resolve The Beatles' early, disputed claim to escalated royalties on certain recordings. 137 A.D.2d at 52. After several years of reviewing EMI's royalty payments (R.29),

¹⁷ Wikipedia, *List of musicians signed to EMI*.

The Beatles filed suit in New York County Supreme Court in 1979, alleging nine causes of action, including breach of contract, fraud, and breach of fiduciary duty.

“Specifically, it [was] alleged that defendants, who claimed to have ‘scrapped’, that is, destroyed as damaged or as not selling, over 19,000,000 Beatles’ recordings, in fact sold millions of such recordings in secret transactions and pocketed the proceeds.” *Apple I*, 137 A.D.2d at 56.

That suit led to the Trial Part’s opinion in *Apple I* holding, among other things, that facts alleged about the *original* relationship between The Beatles and Capitol/EMI in the 1960’s “were sufficient to raise ‘a colorable issue that an informal fiduciary relationship exists’ between the parties.” 137 A.D.2d at 54. Although The Beatles appealed the dismissal of other claims, Capitol/EMI did not appeal that tentative ruling on the “fiduciary duty” claim. *Id.* at 55. As this Court emphasized, that barely “colorable” claim rested on the “business dealings between Capitol Records and the Beatles dat[ing] back to 1962, when the still unacclaimed Beatles entrusted their musical talents to defendant Capitol Records.” *Id.* at 57.

3. The New Royalty Agreements and Subsequent Litigation.

As the Complaint alleges (R.31), “in light of” *Apple I* “and other related litigations,” The Beatles and Capitol/EMI in 1989 entered a global settlement agreement and a set of new royalty agreements, superseding their 1969 agreement. These new agreements changed some of the features on which this Court had relied in *Apple I* to reinstate two of The Beatles’ other claims (conversion and fraud),

particularly the earlier provisions establishing that The Beatles owned the records until Capitol/EMI sold them or properly accounted for their destruction. 137 A.D.2d at 57-59. Significantly for the present case, the 1989 agreements reacted to the breakdown in the parties' earlier relationships by adding what The Beatles describe as new "stringent reporting and audit requirements." According to the Complaint:

"[I]n light of the revelations that Capitol/EMIR had participated in the secret sales of purportedly scrapped Beatles recordings, the parties entered into . . . the '1989 Agreements.' In negotiating these agreements the Apple Parties effectively traded amounts owed to them by Capitol/EMIR in exchange for increased royalty rates and stringent reporting and audit requirements *in an effort to avoid similar malfeasance by Capitol/EMIR in the future.*" (emphasis added). R.31.

Shortly after the 1989 settlement, The Beatles sued Capitol/EMI again, in England, challenging Capitol/EMI's release of compilation albums on compact disc, a new format not specifically mentioned in the 1989 agreements. R.34. That litigation resulted in another settlement, the "Red and Blue Amendments" to the 1989 agreements. *Id.*

Exercising their newly-obtained "stringent reporting and audit rights," The Beatles "discovered, in the early 1990s, that Capitol/EMIR [allegedly] had secretly continued their practice of egregious underreporting of royalties, resulting in yet another round of settlements" in 1995. R.23. "This 'second round' of gross underreporting by Capitol/EMIR . . . led the parties to enter into the '1995 Heads

[of Agreement].” R.32. During the negotiations formulating the 1989 and 1995 contracts that are now at issue, The Beatles were represented by the same able counsel who had represented them throughout the earlier litigation and appears for them now.

4. The Present Case.

This latest litigation arises out of the 1989 and 1995 contracts, formed after many years of contentious litigation and the involvement of platoons of lawyers and financial advisors on both sides. Nevertheless, the latest complaint invokes the same theory of “fiduciary duty” that had been at issue in *Apple I*, which arose from the parties’ initial relationships developed in the 1960’s. R.37.

The Complaint’s description of The Beatles’ legions of lawyers and accountants battling Capitol/EMI, in and out of court, virtually non-stop throughout the last three decades is irreconcilable with any notion that they *relied* on Capitol/EMI as their guardian during that period. The Complaint describes the parties’ acrimonious relationship throughout the 1970’s and 1980’s. It admits that, throughout the period leading up to the new agreements that supposedly rested on a fiduciary relationship of trust and confidence, The Beatles were battling Capitol/EMI in court on several fronts, charging Capitol/EMI with breaching prior contractual and “fiduciary” duties. See R.29-35. It also acknowledges that, rather than relying on any special duty on the part of Capitol/EMI to guard their future

interests, The Beatles' lawyers successfully negotiated "absolutely unique" contractual provisions to have their auditors police Capitol/EMI. See R.29-30, R.32, R.37.

The core of the current grievance is, as it was in the earlier litigation leading to *Apple I*, the claim that Capitol/EMI did not properly account for millions of records that it certified as "scrapped" rather than sold. As in *Apple I*, The Beatles allege that Capitol/EMI failed to document scrapped records properly, improperly distributed non-royalty-bearing promotional merchandise, and entered into side agreements licensing third parties to use Beatles music videos and trademarks. The Complaint links each of these claims to a specific contract provision, giving rise to a claim for breach of contract. Several paragraphs of the 1989 NA Agreement deal with promotional merchandise. See R.23-24. Paragraph 3.8.4, for example, states:

"Except as provided in Clause 3.8.1. and Clause 3.8.3, any Records distributed for free or on a no charge basis, regardless of the purpose of such distribution, shall be royalty bearing and attract the applicable royalty under Clause 2 hereof." R.159.

The 1995 Heads also has several paragraphs addressing third-party distribution. See R.47, R.49-50. Each contract provision allegedly breached is also the basis of a claim for "fraud" in performance and/or breach of "fiduciary duty." As a result of the alleged breaches, The Beatles seek contract damages as well as extraordinary relief in the form of punitive damages and partial rescission

of the parties' contracts. Although the Complaint does not spell out a legal theory for such relief, they also want the court to "transfer" to The Beatles Capitol/EMI's ownership of the Master Recordings that EMI commissioned forty years ago and for which it owns the copyrights.

Capitol/EMI moved below to strike the First and Third Causes of Action, which allege fraud and fiduciary duty, respectively, and the demands for punitive damages, partial rescission, and "transfer" of EMI's ownership of the Masters. The court below denied that motion, relying on this Court's decision 18 years ago in *Apple I*, as if nothing had changed in the parties' relationship from the early 1960's through the mid-1990's. The court declined to dismiss the fraudulent inducement claim as barred by the statute of limitations, even though it arose out of events that occurred 17 years ago, and the Complaint itself alleges that The Beatles discovered the alleged misrepresentation at least ten years ago. This timely appeal followed.

Capitol/EMI has answered, denying the allegations, making various affirmative defenses, and counter-claiming for over \$2 million of royalties improperly retained by The Beatles. There is no stay pending appeal, and the parties are engaged in continuing discovery.

SUMMARY OF THE ARGUMENT

In preserving the claim for breach of fiduciary duty, the court below ruled that The Beatles are, in effect, the wards of Capitol/EMI entitled to equitable protection beyond that provided by their meticulously drawn contracts. That holding flouts numerous precedents and is belied by the allegations in the Complaint as well as common sense. The court relied wholly on *Apple I*, which was based on the parties' relationship 20 to 40 years ago, not the period relevant to this litigation.

The court also erred in refusing to dismiss the fraud count, which merely appends amorphous statements of "intent" to the breach-of-contract claim and depends entirely on alleged breaches of specific contractual provisions. The Beatles do not claim special damages or allege the breach of any non-contractual duty. In addition, The Beatles do not allege *reliance* on any post-contract misstatement or omission. Likewise, the fraudulent inducement claim depends on (a) the alleged failure to disclose Capitol/EMI's plans for transactions with third parties, even though Capitol/EMI had no duty to disclose such plans, (b) alleged misstatements, even though the Complaint does not describe any, and (c) an alleged preconceived intent not to perform, even though such an intent cannot convert a contract claim into a fraud claim.

The court also refused to dismiss the fraudulent inducement claim as time-barred, even though it arises out of events that took place 17 years ago, and the only facts plaintiffs pled that are relevant to the discovery rule show that they discovered the alleged fraud at least ten years ago.

The demand for punitive damages must fail, because plaintiffs do not allege highly immoral conduct bordering on crime, but mere breach of a private contract between sophisticated commercial counterparties, nor do they allege conduct aimed at the general public. This Court also should strike the demands for partial rescission of the contracts and transfer of Capitol/EMI's property, because they are legally incoherent and exist only as fodder for press releases.

ARGUMENT

Standard of Review

In reviewing a motion to dismiss under C.P.L.R. §3211(a)(7), the court must presume the truth of the *facts* pleaded and determine whether, as a matter of law, the plaintiff can succeed “upon any reasonable view of the facts stated.” *Campaign for Fiscal Equity, Inc. v. State*, 86 N.Y.2d 307, 318, 655 N.E.2d 661, 667 (1995). Thus, only a “*reasonable*” view of the facts alleged can save a complaint. Moreover, “allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled” to any

deference. *Maas v. Cornell Univ.*, 94 N.Y.2d 87, 91, 721 N.E.2d 966, 968 (1999) (internal quotation omitted).

“[I]f sufficient factual allegations of even a single element [of a cause of action] are lacking, then the cause of action must be dismissed.” *Shea v. Hambros PLC*, 244 A.D.2d 39, 46 (1st Dep’t 1998). In addition, dismissal is required where the plaintiff’s own allegations belie the legal predicate for his claim and the “submission by plaintiff will conclusively establish that he has no cause of action.” *Rovello v. Orofino Realty Co., Inc.*, 40 N.Y.2d 633, 636, 357 N.E.2d 970, 972 (1976).

Finally, a court “may take judicial notice of facts which are part of the general knowledge of the public.” *Am. Broad. Cos., Inc. v. Wolf*, 76 A.D.2d 162, 169 n.2 (1st Dep’t 1980) (noticing sportscaster Warner Wolf’s move from WABC to WCBS), *aff’d*, 52 N.Y.2d 394 (1981). Judicial notice “is of practical value in the law of appeal,” and the appellate court may notice “facts which are a part of the general knowledge of the country, and which are generally known, and have been duly authenticated in repositories of facts, open to all.” *Hunter v. New York, Ontario & W. Ry. Co.*, 116 N.Y. 615, 621, 23 N.E. 9, 10 (1889).

I. PLAINTIFFS’ OWN ALLEGATIONS AS WELL AS COMMONLY KNOWN FACTS BELIE THE FIDUCIARY DUTY CLAIM.

The trial court’s decision to uphold the fiduciary duty claim is remarkable. First, it means that an arm’s-length business transaction can, in essence, create a

guardian-ward relationship, even where the purported “ward” is extremely wealthy, commercially experienced, sophisticated, and well-advised. Second, it allows plaintiffs simultaneously to plead a fiduciary duty and to deny every element of a fiduciary relationship, alleging that they did not trust and did not rely on the defendant and that their bargaining position was at least equal to the defendant’s.

The court below allowed the fiduciary duty count to stand based solely on this Court’s ruling in *Apple I*, almost twenty years ago. It applied the fact-bound, equitable doctrine of fiduciary duty without any regard to the facts presently alleged or commonly known, simply because the same parties were involved, even though the facts and circumstances are dramatically different. *Apple I*, commenced 27 years ago in 1979, sought relief for alleged breaches of fiduciary duty beginning in the 1960’s, during the early years of The Beatles’ careers. The defendants did not appeal the Trial Part’s decision not to dismiss the fiduciary duty count. 137 A.D.2d at 54. While discussing the fraud count, this Court noted the trial court’s conclusion that The Beatles had stated a potential claim for breach of fiduciary duty based on factors specific to the parties’ relationship in the 1960’s as well as the unusual 1969 royalty agreement that purportedly gave The Beatles ownership of the records until sold or properly scrapped. *Id.* at 57, 58 (discussing “the still

unacclaimed Beatles” of the 1960’s and defendants’ alleged “duty as bailees of the Beatles’ recordings” under the 1969 agreement).

The present suit, in stark contrast, arises from contracts negotiated from the late 1980’s through the 1990’s, decades after The Beatles became one of the richest and most influential music groups in history and after they embarked on a decades-long campaign of suing Capitol/EMI for allegedly not protecting their interests. Specifically, this case relates to events that took place after (a) The Beatles discovered what they alleged to be “fraudulent” underpayment of royalties during the 1970’s, (b) the parties fought with Capitol/EMI in court for a decade over the alleged mishandling of their contractual rights, and (c) the parties completely rewrote the contracts governing their relationship and dropped the provision allegedly granting The Beatles ownership interests in records being distributed.

Unlike the 1960’s contracts at issue in *Apple I*, the new contracts describe Capitol/EMI’s duties in painstaking detail and establish “stringent reporting and audit requirements in an effort to avoid similar malfeasance by Capitol/EMIR in the future.” R.31. Twenty-eight pages of the 98-page 1989 NA Agreement address accounting and auditing procedures. The agreement allows The Beatles to “appoint accountants to examine” all Capitol/EMI “books of account,” inventory, and manufacturing records (R. 177 ¶9.1) as well as those of third parties licensed

by Capitol/EMI in respect of “Third Party Usage.” R.183 ¶10.1. The extremely detailed contract specifies, for example, the format of the magnetic tape on which Capitol/EMI is to provide royalty statements. R.174-75 ¶8.18 (“9 tracks, 1600 BPI and using EBCDIC code”).

The Beatles initiated that renegotiation “specifically because they distrusted EMI.” R.548 (plaintiffs’ counsel at argument). The Complaint asserts:

“During [*Apple I*], Apple [The Beatles’ royalty company] detailed the elaborate means employed by Capitol/EMIR designed to take advantage of The Beatles and cheat Apple out of royalties. Those schemes, which went far beyond simple contractual breaches, have been resurrected once again and provide the basis for the present action.” R.29.

These crucial factual differences between *Apple I* and the present case render *Apple I* inapposite. As a matter of law, the facts of the present relationship, as alleged in the Complaint and as commonly known, cannot support a fiduciary obligation during the relevant period.

A. Fiduciary Duty is an Equitable Doctrine That Protects Weak and Dependent Persons.

The doctrine of fiduciary duty arose in equity to regulate relationships in which one party’s overbearing influence and the other’s helplessness and dependence threaten an abuse of trust. See D. Gordon Smith, *The Critical Resource Theory of Fiduciary Duty*, 55 VAND. L. REV. 1399, 1407 & n.27 & sources cited (2002); L.S. Sealy, *Fiduciary Relationships*, 1962 CAMBRIDGE L.J.

69, 78-79 (1962). Common examples are the relationships between guardian and ward, trustee and beneficiary, and innkeeper and guest. *Apple I*, 137 A.D.2d at 55.

In Chief Judge Cardozo's well-known formulation, a fiduciary is held to "something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior."

Meinhard v. Salmon, 249 N.Y. 458, 464, 164 N.E. 545, 546 (1928).

The Court of Appeals, however, has cautioned:

"If the parties find themselves or place themselves in the milieu of the 'workaday' mundane marketplace, and if they do not create their own relationship of higher trust, the courts should not ordinarily transport them to the higher realm of relationship and fashion the stricter duty for them." *Northeast. Gen. Corp. v. Wellington Adver., Inc.*, 82 N.Y.2d 158, 162, 624 N.E.2d 129, 131 (1993) (rejecting claim that finder-seller contract imposed fiduciary duties).

Although contracting parties routinely try to fabricate "fiduciary" relationships, the Court of Appeals explained that indulging those efforts (by persons such as The Beatles) "would inappropriately propel the courts into reformation" of contracts "between commercially knowledgeable parties." *Id.*; see also William E. Nelson, *The Law of Fiduciary Duty in New York, 1920-1980*, 53 S.M.U. L. REV. 285, 286-87 (2000). This Court, therefore, consistently has held that "generally no such relationship exists between those involved in arm's-length business transactions." *HF Mgt. Servs. LLC v. Pistone*, 818 N.Y.S.2d 40, 42 (1st Dep't 2006); see also *SNS Bank, N.V. v. Citibank, N.A.*, 7 A.D.3d 352, 355 (1st

Dep't 2004); *Tradewinds Fin. Corp. v. Refco Secs., Inc.*, 5 A.D.3d 229, 230 (1st Dep't 2004).

B. The Beatles Cannot Claim Either a “Formal” Fiduciary Relationship or an Informal Relationship Signifying Special Dependence and Trust.

New York law recognizes two broad types of fiduciary duty, neither of which applies here. “Formal” fiduciary relationships are fiduciary as a matter of law, while other, “confidential” relationships may imply fiduciary duties, if the alleged fiduciary “has gained the confidence of the other and purports to act or advise with the other’s interest in mind.” I SCOTT ON TRUSTS §2.5 at 43 (4th ed. 1987); *Gordon v. Bialystoker Ctr. & Bikur Cholim, Inc.*, 45 N.Y.2d 692, 698, 385 N.E.2d 285, 288 (1978).

1. The Complaint Does Not Plead a Formal Fiduciary Relationship, Because the Relationship Between Performer and Publisher Is Purely Contractual.

Only a few well-established relationships are fiduciary as a matter of law, such as “bailor and bailee, lawyer and client, principal and agent, public carrier and passenger or innkeeper and guest.” *Apple I*, 137 A.D.2d at 55. The Beatles do not allege that they had any such relationship with Capitol/EMI. In fact, the trial court in *Apple I* found that even the parties’ 1969 “contract did not establish a formal fiduciary relationship.” 137 A.D.2d at 57.

Indeed, no New York court ever has recognized a formal fiduciary duty between performers and record companies, and this and other courts have repeatedly rejected such a duty. See *Lane v. Mercury Record Corp.*, 21 A.D.2d 602, 603 (1st Dep't 1964), *aff'd*, 18 N.Y.2d 889 (1966); *Van Valkenburgh, Nooger & Neville, Inc. v. Hayden Publ'g Co.*, 33 A.D.2d 766 (1st Dep't 1969), *aff'd*, 30 N.Y.2d 34, 281 N.E.2d 142 (1972) (no fiduciary duty between author and publisher); *Silvester v. Time-Warner, Inc.*, 1 Misc.3d 250, 257 (N.Y. Co. 2003) (dismissing claims by recording artists, holding that, "under New York law, an artist's assignment of rights to a record company in exchange for royalties is contractual and does not create a fiduciary relationship or duty"), *aff'd*, 14 A.D.3d 430 (1st Dep't 2005) (the relationship between the artist and record company simply involves "arm's-length contracts"); *Evans v. Jelly's Jams LLC*, No. 601308/01, at *8-9 (N.Y. Co. 2002) (granting record company's motion to dismiss artists' breach of fiduciary duty claim, holding that "a contract for the collection and payment of royalties on music, does not, by itself, give rise to a fiduciary relationship"); *Cafferty v. Scotti Bros. Records, Inc.*, 969 F.Supp. 193, 205 (S.D.N.Y. 1997) ("In the absence of special circumstances, no fiduciary relationship exists between a music publisher and composers as a matter of law." (internal quotation omitted)).¹⁸

¹⁸ Federal courts applying New York law have come to the same conclusion. See *Archie*

The seller-sales agent relationship is also not fiduciary. See *Sanshoe Trading Corp. v. Mitsubishi Int'l Corp.*, 122 Misc.2d 585 (N.Y. Co. 1984), *aff'd*, 104 A.D.2d 337 (1st Dep't 1984). Nor is the licensor-licensee relationship. See *Mellencamp*, 698 F. Supp. at 1157 (“critical point” is that the licensor-licensee relationship “is one founded in contract rather than on trust principles”). In short, there is no plausible way to characterize the parties’ relationship here as a true fiduciary relationship.

2. The Complaint Does Not Plead Essential Elements of an Informal Fiduciary Relationship.

There are four elements to an informal or implied fiduciary relationship, none of which The Beatles have pleaded (or plausibly could plead without exposing themselves to sanctions):

“1) The vulnerability of one party to the other which 2) results in the empowerment of the stronger party by the weaker which 3) empowerment has been solicited or accepted by the stronger party and 4) prevents the weaker party from effectively protecting itself.” *Langford v. Roman Catholic Diocese of Brooklyn*, 177 Misc.2d 897, 900 (Kings Co. 1998), *aff'd*, 271 A.D.2d 494 (2d Dep't 2000).

Comic Pubs., Inc. v. DeCarlo, 141 F.Supp.2d 428, 433 (S.D.N.Y. 2001) (dismissing fiduciary duty claim by cartoonist against publisher, noting that *Van Valkenburgh* “specifically upheld the Appellate Division's finding that there was no fiduciary relationship between author and publisher”); *Carter v. Goodman Group Music Publishers*, 848 F. Supp. 438, 445 (S.D.N.Y. 1994); *Mellencamp v. Riva Music, Ltd.*, 698 F.Supp. 1154, 1159-60 (S.D.N.Y. 1988) (“The express and implied obligations assumed by a publisher in an exclusive licensing contract are not, as a matter of law, fiduciary duties.”).

These are, of course, the standard ingredients in the guardian-ward relationship, which seems to be the kind of relationship that The Beatles fancifully want the Court to superimpose on their commercial dealings with Capitol/EMI.

a. With the sole exception of Apple I, courts have consistently rejected claims of fiduciary relationships between artists and record companies.

Except for *Apple I*, New York courts have consistently held that relationships between musicians and record companies do not rise to the level of fiduciary dependence. See *Surge Licensing Inc. v. Copyright Promotions Ltd.*, 258 A.D.2d 257 (1st Dep't 1999); *Savage Records Group N.V. v. Jones*, No. 600814/79, at *6-8 (N.Y. Co. July 17, 1997) (rejecting on the pleadings claim of “special relationship” or joint venture based on royalty contract; courts “have repeatedly rejected the existence of a fiduciary relationship between recording artists and their record label.”), *aff'd*, 247 A.D.2d 274 (1st Dep't 1998) (“plaintiffs fail to state a cause of action for a breach of fiduciary duty”). See also GEORGE G. BOGERT, TRUSTS & TRUSTEES §482, at 322-30 (2d ed. rev. 1978) (“Illustrations of the refusal to find a confidential relation are found in the cases of . . . publishers and owners of a copyright.” (citing numerous cases)); *Mills v. Cottrell*, No. 04-Civ.-5562, slip op. at 8-10 (S.D.N.Y. Dec. 8, 2006).

As discussed *infra* in Section I.C, the anomalous holding in *Apple I* depended on the “unique” provision in the Beatles-Capitol/EMI 1969 contract,

which the Court treated as a “bailment” and “which differed markedly from standard royalty contracts common in the music industry” (R.28). The decision also rested on allegations going back to the very beginning of the parties’ relationship in 1962, before The Beatles’ extraordinary success. But the 1989 and 1995 contracts now at issue superseded that contract. These later contracts reflect (as the pattern of litigation showed) that The Beatles no longer “trusted” Capitol/EMI. They cannot plausibly claim that, after all the tumultuous confrontations, they continued to repose “confidence” that Capitol/EMI would selflessly promote The Beatles’ financial interests.

b. The Complaint actually denies that The Beatles trusted Capitol/EMI.

The most crucial element of a fiduciary relationship is trust. As this Court noted in *Apple I*:

“A fiduciary relationship, whether formal or informal, ‘ . . . is one founded upon trust or confidence reposed by one person in the integrity and fidelity of another’” 137 A.D.2d at 57.

See also *Batas v. Prudential Ins. Co. of Am.*, 281 A.D.2d 260, 264-65 (1st Dep’t 2001) (dismissing claim where “the alleged reliance and trust necessary for a finding of a fiduciary or confidential relationship to support such a cause of action were stated in conclusory fashion”). In the absence of trust, a longstanding business relationship or even close friendship cannot establish a fiduciary relationship. See *Aaron Ferer & Sons, Ltd. v. Chase Manhattan Bank*, 731 F.2d

112, 123 (2d Cir. 1984); *Scotto Princeton LLC v. Felsen Assocs., Inc.*, 11 Misc.3d 378, 382 (Nassau Co. 2005) (dismissing fiduciary duty claim where parties had “40 year business relationship”). Specifically, artists’ “assertions that they placed ‘trust and confidence’ in [their record company] . . . are not sufficient to create fiduciary duties in the absence of a special relationship.” *Sony Music Entm’t, Inc. v. Robison*, No. 01-Civ.-6415(LMM), 2002 WL 272406 at *3 (S.D.N.Y. Feb. 26, 2002) (granting judgment on the pleadings).

The Complaint actually pleads the total *absence* of this necessary element. It recounts the long history of litigation since the period at issue in *Apple I* and the signing of hefty contracts with detailed reporting and audit provisions, all “designed to guard against Capitol/EMIR’s malfeasance.” R.23.

The only plausibly-favorable *fact* the Complaint mentions is a 36-year-old letter from a former Capitol executive, expressing dismay at The Beatles’ breakup. R.28-29. A single, stale letter cannot satisfy the standard for pleading the existence of a fiduciary relationship decades later. In any event, the letter shows only that The Beatles were financially important *to* Capitol/EMI; it says nothing at all about the level of The Beatles’ current trust in and dependence *on* Capitol/EMI.

Indeed, The Beatles’ counsel expressly disclaimed trust:

“The point, though, with respect to fiduciary duty is that they entered into these contracts and put provisions in these contracts *specifically because they distrusted EMI.*” R.548 (emphasis added).

That admission is fatal. The Beatles cannot simultaneously argue that they “distrusted EMI,” to bolster their breach of contract claim, and also allege that Capitol/EMI breached a fiduciary duty that arose out of The Beatles’ unquestioning dependence.

The trial court acknowledged that the parties’ relationship has been bereft of trust at least since *Apple I*. The court nonetheless concluded:

“Whether or not *the level of contentiousness and distrust was so great as to destroy the fiduciary relationship the parties had is an issue that must await development of the factual record.*” R.12 (emphasis added).

The presence of *any* level of “contentiousness and distrust,” however, nullifies a fiduciary relationship as a matter of law. A plaintiff must affirmatively plead an exceptionally intense trust and dependence, far beyond a mere commercial contract. If, as the court below acknowledged, the only question that remains is *how* contentious and distrustful the relationship was, further development of the record is pointless.

c. The Complaint does not plead reliance.

The law also requires an affirmative and objective showing that the plaintiff *relied* on the purported fiduciary. A “plaintiff’s subjective claims of reliance on defendants’ expertise [do] not give rise to a ‘confidential relationship.’” *SNS Bank*, 7 A.D.3d at 355 (internal quotation omitted); see also *Societe Nationale D’Exploitation Industrielle Des Tabacs Et Allumettes v. Salomon Bros. Int’l Ltd.*,

251 A.D.2d 137, 138 (1st Dep't 1998) (noting "requisite high degree of dominance and reliance"). Thus, the absence of any factual allegations relating to *reliance* is sufficient reason to dismiss the count.

The Complaint makes abundantly clear that The Beatles *never* relied on Capitol/EMI to act in The Beatles' best interests during the relevant period. Instead, they relied on what they termed their "unique" contractual right to audit the royalty reports, a right for which they successfully bargained. Given the acrimonious and litigious history the Complaint describes, it is inconceivable that any reasonable person in The Beatles' position would have believed that Capitol/EMI was acting exclusively for the benefit of The Beatles, rather than engaging in an arm's-length relationship with sophisticated and well-represented counterparties. *Gordon*, 45 N.Y.2d at 698.

The Complaint contains nothing more than one conclusory allegation dealing with reliance:

"Over 40 years ago, when The Beatles were undiscovered and unknown musicians from Liverpool, they placed their budding artistic and professional careers in EMIR's care, relying on EMIR's ability, expertise and experience in the music and record industry." R.27-28 (emphasis added).

This resort to ancient history hardly satisfies the burden of pleading that such innocent reliance by the waifs from Liverpool persisted for decades *after* they became fabulously wealthy and hired their own lawyers and advisers to battle

Capitol/EMI over future allocations of royalties and to enter into *new* contracts. The relative position of the parties has changed in the past 40 years, as The Beatles went from “undiscovered and unknown musicians from Liverpool” to “most influential act of the rock era.” Thus, even if that lone allegation were true, it would be inadequate to support a claim that Capitol/EMI assumed fiduciary duties when it bargained with The Beatles in the 1989 and 1995 agreements and performed (or failed to perform) those contracts.

The Complaint further explains that far from “relying” on Capitol/EMI to protect their interests, The Beatles relied on their lawyers, who successfully bargained for “absolutely unique” contractual protections (R.546) in the *seven* new contracts, including “stringent reporting and audit requirements *in an effort to avoid similar malfeasance* by Capitol/EMIR in the future.” R.31 (emphasis added); see generally R.29-36. A “fiduciary relationship generally cannot be implied between parties to a commercial transaction when each party is represented by counsel and other professional advisors who have been retained to protect their best interests.” *Pan Am Corp. v. Delta Air Lines, Inc.*, 175 B.R. 438, 512 (S.D.N.Y. 1994).

The Beatles also relied on their auditors to police Capitol/EMI. See R.29-33 (audits covering 1969-79); R.32 (1989 audit); R.37 (1990’s audits).

The Beatles have relied heavily on the courts. See R.29-31 (*Apple I*); *id.* R.32 (threatened litigation in early 1990's); *id.* R.34 (*Red and Blue* litigation). The Complaint's description of The Beatles' legions of lawyers and accountants battling Capitol/EMI, in and out of court, virtually non-stop throughout the last three decades is irreconcilable with any notion that they relied on Capitol/EMI during that period.

Finally, *Apple I* forecloses any claim of reliance extending into the period at issue now. This Court noted that The Beatles had pled a relationship of "trust and confidence . . . which plaintiffs argue *was betrayed* by fraud." 137 A.D.2d at 57. No party to a new contract can plausibly claim reliance after alleging that the other party already has "betrayed" its fiduciary duties. The current Complaint reinforces that point.

"During the course of the *Apple v. Capitol One* litigation, Apple detailed the elaborate means employed by Capitol/EMIR designed to take advantage of The Beatles and cheat Apple out of royalties."
R.29.

Both *Apple I* and The Beatles' complaint in that case, therefore, preclude any continued reliance on any alleged fiduciary relationship today.

d. The Complaint does not plead (and could not honestly plead) disparity in position.

The third requirement for a confidential relationship is disparity in position and dominance of the ward by the fiduciary guardian. This element highlights the doctrine's historical and logical basis in protecting widows and orphans, not the

rich and famous. See I SCOTT ON TRUSTS §2.5, at 39; BOGERT, TRUSTS & TRUSTEES §482, at 288-89 (“this disparity is treated as highly important or as absolutely essential”).

The Beatles do not even assert that Capitol/EMI *dominated* them during the late 1980’s and 1990’s. Indeed, as with the other elements of fiduciary duty, the Complaint actually negates the essential elements of disparity of position and dominance. The Complaint explains that by 1969, it was *The Beatles*, who had two number-one albums that year alone,¹⁹ who wielded such tremendous bargaining power that they obtained contract terms from Capitol/EMI that “differed markedly from standard royalty contracts common in the music industry.” R.28; see also R.546-47 (plaintiff’s counsel explaining that contract provisions *favoring* The Beatles are “absolutely unique”). The Complaint also states that The Beatles “fought hard to obtain” various advantages in the 1989 negotiations. See R.32; R.39-40 (describing “hard won point” by The Beatles). Thus, as with reliance, the Complaint affirmatively proves that Capitol/EMI did not *dominate* The Beatles.

¹⁹ The Official Charts Co., *Official UK Album Charts: 1967-1969*, available at http://www.amazon.co.uk/exec/obidos/tg/feature/-/1528301/ref=amb_link_33721865_32/203-4442701-3148757.

3. There Is No Reason to Impose a Fiduciary Duty in This Case.

The Beatles' inability to describe any recognizable kind of fiduciary relationship is not a mere failure of pleading. It reflects the fact that the heightened standard of behavior imposed by the law of fiduciary duty would serve no purpose here. The parties' *contracts* include numerous provisions expressly designed to avoid or detect precisely the conduct of which The Beatles now complain. The Beatles are among the wealthiest and most successful musicians in history. They have no shortage of lawyers, accountants, agents, marketers, and business advisors working on their behalf. They are not the type of people who need additional solicitude from the New York courts because they are unable to protect themselves.

Moreover, turning recording companies into fiduciaries would create an unworkable system. Fiduciaries are saddled with a "duty of undivided and undiluted loyalty." *Birnbaum v. Birnbaum*, 73 N.Y.2d 461, 466, 539 N.E.2d 574, 576 (1989). In the case of a record company that deals with hundreds of performers, such a duty would be inherently unworkable: The company would owe "undivided and undiluted loyalty" to *each* musician.

In this case, The Beatles claim that Capitol/EMI distributed their recordings as promotional items to "better position[] placement of Capitol/EMIR's product pertaining to its other artists." R.28. That claim perfectly illustrates the inherent

conflict among the interests of various musicians affiliated with the same record company and the impossibility of consistently enforcing a fiduciary duty in these circumstances.

The Beatles try to avoid this problem by claiming that they have a privileged status among Capitol/EMI-affiliated musicians, because they have had a longer relationship with the company and generated a large fraction of Capitol/EMI profits. R.28-29. Even if those contentions were true, the notion that that a fiduciary duty is owed to only the wealthiest and most influential musicians, to the detriment of all others, would make a mockery of a doctrine designed to protect the poor and weak.

C. *Apple I* Does Not Save The Current Claims.

The court below acted as if this case and *Apple I* presented identical facts and, therefore, that *Apple I* required denial of the motion to dismiss the fiduciary duty claim. Even putting to one side that *Apple I* itself stands as an anomaly – no prior case had found a fiduciary duty between a musician and a recording company, and no subsequent case has followed *Apple I* – two significant changes in the underlying facts render that case inapposite.

First, the parties' contractual relationship changed after *Apple I*. That case arose out of what the Court termed the "unique" 1969 contract. After *Apple I*, the parties rewrote from scratch all of the voluminous contracts that govern their

relationship, “specifically because [The Beatles] distrusted EMI.” R.548. The present case arises out of those *new* contracts. Those contracts are unique in ways that belie any fiduciary relationship, creating a comprehensive system of reporting and auditing that The Beatles successfully negotiated to protect their interests.

Second, the decade of litigation that followed the 1979 *Apple I* complaint also renders that ruling wholly irrelevant. This Court recently affirmed the dismissal of a fiduciary duty claim on the pleadings, explaining: “any fiduciary relationship between the parties had . . . , *ceased*, the parties having become *adversaries in litigation.*” *Eastbrook Caribe, A.V.V. v. Fresh Del Monte Produce, Inc.*, 11 A.D.3d 296, 297 (1st Dep’t 2004) (emphasis added); see also *Baldasano v. Bank of New York*, 174 A.D.2d 457, 459 (1st Dep’t 1991) (holding that fiduciary duty of general partner ceased when limited partners began litigation).

The prior litigation, actual and threatened, between the present parties is especially relevant, because, according to the Complaint, it involved exactly the same alleged breaches that are at issue here. See R.23 (“Defendants . . . *revived* their fraudulent schemes hatched years ago”); R.30 (“Those schemes . . . have been *resurrected* once again and *provide the basis for the present action.*”) (emphases added). Nonetheless, the trial court ruled as if *Apple I* gave plaintiffs a lifetime ticket to court, no matter what the status of the present relationship.

Apple I did no such thing. In addressing the fiduciary duty issue, the Court highlighted four aspects of the old relationship, none of which are present today. First, the Court noted that the claims at issue “date[d] back to 1962, when the still unacclaimed Beatles entrusted their musical talents to defendant Capitol Records.” *Apple I*, 137 A.D.2d at 57. The present suit, by contrast, deals only with events after 1989. Long before that, the fabulously successful Beatles had ceased to depend on Capitol/EMI for anything other than recording and marketing services and royalty payments.

Second, the Court noted that The Beatles had “alleged that this relationship proved so profitable to defendant that at one point the Beatles constituted 25 to 30% of its business.” *Id.* It is not clear why a record company’s alleged financial dependence *on* The Beatles should have made the company a fiduciary *to* The Beatles – rather than the other way around. In any event, they do not allege that they contribute anywhere near that level of Capitol/EMI’s profit today.

Third, the *Apple I* opinion noted that “the Beatles . . . continued to rely on Capitol Records for the manufacture and distributing of their recordings.” *Id.* at 57. The Court did not find, however, nor could it, that a mere manufacturing contract is sufficient to create a fiduciary relationship, and plaintiffs do not allege that it does.

Fourth, the Court relied on an alleged “bailment” duty, which arose out of an unusual provision in the 1969 contract providing that The Beatles held title to recordings from the time of their manufacture until Capitol/EMI paid royalties. The 1989 Royalty Agreements, however, specifically “terminated” the 1969 contracts and returned the parties to a more standard arrangement, whereby Capitol/EMI holds title to recordings that it manufactures. See R.210 ¶20.3. Despite a sly reference to a historical “bailment relationship with Capitol/EMIR” (R.38), plaintiffs do not allege that such a relationship exists today.

By its own terms, therefore, *Apple I* rested on specific and historically unique facts, which are no longer present.

II. THE FRAUD COUNT IS BOGUS.

“To make out a prima facie case of fraud, the complaint must contain allegations of a representation of material fact, falsity, scienter, reliance and injury.” *Small v. Lorillard Tobacco Co., Inc.*, 94 N.Y.2d 43, 57, 720 N.E.2d 892, 898 (1999). In addition, plaintiff “must show not only that he actually relied on the misrepresentations, but also that such reliance was reasonable.” *Stuart Silver Assocs., Inc. v. Baco Dev. Corp.*, 245 A.D.2d 96, 98-99 (1st Dep’t 2006).

The undifferentiated fraud count appears to subsume a number of distinct legal theories, each of which is flawed. First, The Beatles allege that the Royalty Agreement was fraudulently induced because of what they alternately refer to as

“misrepresentations” and “omissions” regarding the potential for promotional distribution of Beatles recordings, as well as Capitol/EMI’s alleged failure to disclose its intent not to perform. R.62-63. Second, The Beatles allege that Capitol/EMI committed fraud through “wanton disregard of their obligations under the Royalty Agreements.” R.61. Each theory is invalid.

A. The Fraudulent Inducement Claim is Barred by the Statute of Limitations.

The fraudulent inducement claim must be dismissed because the Complaint demonstrates that it was filed after the limitations period had expired.

1. Any fraud claim arose more than six years ago.

The limitations period for fraud is six years from the date of the wrong, or two years from the date the fraud could reasonably have been discovered, whichever is later. *Avalon LLC v. Coronet Props. Co.*, 306 A.D.2d 62, 63 (1st Dep’t 2003); C.P.L.R. §§213(8), 203(g). The “wrong” alleged in the *fraudulent inducement* claim took place no later than November 7, 1989, when the contract was signed. The Complaint was filed December 15, 2005, more than sixteen years later. Thus, the applicable limitations period expired long before The Beatles filed the Complaint.

2. The discovery exception does not apply.

The statute of limitations contains an exception for claims discovered less than two years before filing. But the burden of pleading “that the fraud could not

have been discovered during the two-year period before the commencement of the action rests on the plaintiffs, who seek the benefit of the discovery exception to the six-year statute of limitations.” *Siler v. Lutheran Soc. Servs.*, 10 A.D.3d 646, 648 (2d Dep’t 2004); see also *860 Fifth Ave. Corp. v. Superstructures-Eng’rs & Architects*, 15 A.D.3d 213, 213-14 (1st Dep’t 2005) (“plaintiff had the burden of demonstrating” exception to limitations period).

The Complaint does not allege that plaintiffs recently discovered the alleged fraudulent inducement. The trial court acknowledged that plaintiffs failed in their burden of pleading. The court noted that “it is *unclear when plaintiffs discovered the alleged fraud*” but, bizarrely, employed that as the sole reason to *deny* the limitations defense. R.13 (emphasis added). That ruling improperly shifted the burden onto defendants. Where the date of discovery is “unclear,” the usual six-year statute of limitations must apply.

Moreover, the Complaint expressly avers that the alleged fraud was discovered *far more than two years* before commencement of this action.

“The Apple Parties entered into the 1989 global settlement and 1989 Agreements only to *find*, through an audit examination conducted *during the early 1990s*, that Capitol/EMIR again failed to properly document purportedly scrapped units and underreported approximately \$30 million in royalties dating back to 1986” R.32 (emphasis added).

See also R.32 (section heading “The 1990s Audit and the *Discovery* of Continued Abuses and Underreporting”) (emphasis added). The Complaint goes on to say

that this action was filed “25 years after it first came to light that Capitol/EMIR perpetrated their fraudulent scrapping scheme, and some *10 years after the [plaintiffs] caught Capitol/EMIR in continued underreporting.*” R.37 (emphasis added).

The “fraudulent inducement” claim focuses on the *1989* agreements, which The Beatles allege Capitol/EMI gulled them into signing despite an undisclosed intent to violate the agreements. They allege that the *1995* Heads agreement was motivated by their discovery of “[t]his ‘second round’ of gross underreporting by Capitol/EMIR.” R.32. By 1995, therefore, The Beatles had negotiated and signed a contract intended to address that alleged fraud. The 1995 agreement was formalized on November 17, 1995. The limitations period expired no later than November 1997, more than eight years before they filed the Complaint.

B. The Fraudulent Inducement Claim Is Fatally Flawed.

Even if the fraudulent inducement claim were timely, none of the three grounds for this count would be legally sufficient. First, The Beatles claim that Capitol/EMI “hid lucrative side deals with third parties” (R.61) and “fraudulently and intentionally failed to disclose various collateral benefits.” R.62. Second, they allege “misrepresentations regarding these extraneous third party deals [that] were fraudulent, false and deliberately misleading.” R.62. Third, The Beatles allege non-disclosure of Capitol/EMI’s “preconceived and undisclosed intention of not

performing.” R.61; R.61-62 (Capitol/EMI “never possessed a good faith intention of fully performing under the Royalty Agreements”).

1. As a Matter of Law, The Alleged Omissions Do Not Constitute Fraud.

a. *There was no duty to disclose the potential for future contracts with third parties.*

Although “a cause of action for fraud may be predicated on acts of concealment, there must first be proven a duty to disclose material information.” See *Dembeck v. 220 Cent. Park S., LLC*, 33 A.D. 491, 492 (1st Dep’t 2006); *Jana L. v. W. 129th St. Realty Corp.*, 22 A.D.3d 274, 277 (1st Dep’t 2005). The Beatles, however, do not identify any duty to disclose.

There is no duty to disclose agreements with third-parties. See *George Cohen Agency, Inc. v. Donald S. Perlman Agency, Inc.*, 114 A.D.2d 930 (2d Dep’t 1985). Nor is there a duty to disclose *future* plans of any sort. This Court has held that “the alleged misrepresentation should be one of then-present fact,” not mere expectation or intent for the future. See *The Hawthorne Group, LLC v. RRE Ventures*, 7 A.D.3d 320, 323 (1st Dep’t 2004); *Glenn Partition, Inc. v. Trustees of Columbia Univ.*, 169 A.D.2d 488, 489 (1st Dep’t 1991) (“the proposed fraud claims were legally deficient because they relied upon alleged misrepresentations of future intent”). The Beatles also, of course, do not contend that they owed Capitol/EMI any duty to disclose *their own* business plans, nor do they mention any such disclosure taking place.

b. The contracts show that The Beatles knew of possible third-party distributions and determined how they should be treated.

Even if the potential for future third-party deals were the type of information that could be the subject of a duty to disclose, there would be no duty in this case, because The Beatles knew of Capitol/EMI's third-party distribution opportunities. In their 1979 lawsuit, The Beatles complained about third-party distributions of their records. See *Apple I*, 137 A.D. at 56-57. It is obviously implausible that it did not occur to The Beatles or any of their advisors in 1989 that their recordings could be valuable promotional tools. Not surprisingly, the parties specifically anticipated them, and the 1989 Royalty Agreements expressly covered promotional distributions. See R.161 ("Royalties in respect of Third Party Usage"); R.141-42 ¶1.1 at p. 18 (page-long definition of "Third Party Usage").²⁰ If The Beatles had no idea that "third party usage" was even possible, it is difficult to explain how the contracts ended up being so specific about these distributions.

c. There was no harm from the alleged omissions.

In addition, even if Capitol/EMI did have a duty to disclose, and even if The Beatles were actually ignorant of the potential for third-party distribution, that

²⁰ See R.47 (describing music video deals "in violation of [Capitol/EMI's] express contractual obligations pursuant to paragraph 15.1 of the NA Agreement"); R.49-50 (describing distribution of recordings through side deals in violation of "paragraph 2.2 of the 1995 Heads," "paragraph 3.11 of the 1995 Heads," "paragraphs 13.1 and 13.2 of the 1995 Heads," "and in particular, paragraph 15.1 of the NA Agreement"); R.51 ("Paragraph 5 of the NA Agreement states that Capitol/EMIR shall pay to the Apple Parties 50% of Capitol/EMIR's receipts from third party usage.").

information would have been immaterial. The contracts already provided The Beatles with a royalty on each recording, including – according to the Complaint – the very promotional distributions that they claim not to have known about. R.44. The side deals simply increased the number subject to royalties. The Royalty Agreements, therefore, already protect plaintiffs’ interest in the third-party distributions, and there is no reason to believe that specific disclosure of the potential for those deals would have led to any change in the contract.

2. The Complaint Does Not Identify a Single Misstatement.

C.P.L.R. §3016(b) imposes a heightened pleading standard on fraud claims. Fraud must “be set forth in sufficient detail to clearly inform a defendant with respect to the incidents complained of.” *P.T. Bank Cent. Asia v. ABN AMRO Bank N.V.*, 301 A.D.2d 373, 377 (1st Dep’t 2003). The plaintiff must identify particular incidents by identifying the speaker, time, and place of the alleged misstatement or omission. See *Megarix Furs, Inc. v. Gimbel Bros., Inc.*, 172 A.D.2d 209, 210 (1st Dep’t 1991).

Although the Complaint alludes to “misrepresentations,” the fraudulent inducement claim does not identify a single false statement, let alone a speaker, time, or place. See, *e.g.*, R.62.

The trial court disregarded C.P.L.R. §3016(b), ruling that plaintiffs did not need to plead with particularity, because “EMI/Capitol is likely to have exclusive

knowledge of the operative facts” (R.13), citing *Parsons & Whittemore, Inc. v. Abady Luttati Kaiser Saurborn & Mair, P.C.*, 309 A.D.2d 665 (1st Dep’t 2003). There, plaintiffs alleged a fraudulent conveyance. This Court held that, while the plaintiffs ultimately had to prove that the conveyance was intended to avoid creditors’ claims, they did not need to *plead* specific facts relating to defendants’ *intent*. Here, by contrast, plaintiffs allege that they detrimentally relied on the alleged misstatements. To claim reliance, they would have to know and be able to allege what the misstatements were, even if they cannot pinpoint the defendants’ *intent* in making them. *Eastman Kodak Co. v. Roopak Enters., Ltd.*, 202 A.D.2d 220, 222 (1st Dep’t 1994).

3. As a Matter of Law, Undisclosed Intent Not to Perform a Contract Is Not Fraud.

Finally, the claim that Capitol/EMI harbored a “preconceived and undisclosed intention of not performing” its contractual duties (R.61) sounds in contract, not fraud. “General allegations that defendant entered into a contract while lacking the intent to perform it are insufficient to support the claim.” *New York Univ. v. Cont’l Ins. Co.*, 87 N.Y.2d 308, 318, 662 N.E.2d 763 (1995).

“A fraud claim should be dismissed as redundant when it merely restates a breach of contract claim, i.e., when the only fraud alleged is that the defendant was not sincere when it promised to perform under the contract.” *First Bank of the Ams. v. Motor Car Funding, Inc.*, 257 A.D.2d 287, 291 (1st Dep’t 1999) (citations omitted).

Furthermore, a claim of fraudulent inducement must rest on misstatements collateral to the contract; the breach of a contract provision can never constitute fraud. See *Scheinberg v. Samuels*, 171 A.D.2d 857, 858 (2d Dep't 1991) (dismissing fraud claim where "defendants' alleged representation[] . . . was not simply an inducement to the contract; it was one of the express terms of the contract"). As in *Scheinberg*, the present Complaint depends directly on "Capitol/EMIR's representations and assurances *contained in the Royalty Agreements.*" R.62 (emphasis added). Where the misrepresentation is a *term* of the contract, not merely an *inducement*, the action lies only in contract.

4. The Alleged Injury Cannot Be the Basis of Any Fraud Claim.

Another essential element of a fraud claim is legally cognizable damage arising out of the plaintiff's reliance. See *P.T. Bank Cent. Asia*, 301 A.D.2d at 376 (1st Dep't 2003). The failure to plead damage flowing from a fraud mandates dismissal. See *Dress Shirt Sales, Inc. v. Hotel Martinique Assocs.*, 12 N.Y.2d 339, 343-44, 190 N.E.2d 10, 12-13 (1963).

The Beatles assert that, if not for the alleged non-disclosure of the potential for third-party deals, they "would not have entered" into the Royalty Agreements. R.63. The side deals, however, made the arrangement *more* profitable, because The Beatles are entitled to royalties on the distributions; it is inconceivable that disclosure of the details of these arrangements would have caused The Beatles to

walk away. Because Capitol/EMI owns the Masters, The Beatles have no way of earning royalty income other than by contracting with Capitol/EMI. They could not simply go to another record company.

Alternatively, they allege that, if not for the alleged fraud, they would have entered into the Royalty Agreements only on “substantially different and more advantageous terms.” R.63. But “the loss of an alternative contractual bargain . . . cannot serve as a basis for fraud or misrepresentation damages because the loss of the bargain was ‘undeterminable and speculative.’” *Lama Holding Co. v. Smith Barney, Inc.*, 88 N.Y.2d 413, 422, 668 N.E.2d 1370, 1374 (1996) (“Damages are to be calculated to compensate plaintiffs for what they lost because of the fraud, not to compensate them for what they might have gained.”) (the “out-of-pocket rule”); *Dress Shirt Sales*, 12 N.Y.2d at 343-44, 190 N.E.2d at 12 (dismissing claim alleging “loss of bargain,” even though “[t]he misrepresentation possibly influenced the bargaining”).

C. The Claim That Capitol/EMI Committed Fraud In Performing the Contract Is Legally Invalid.

The other “fraud” theory is no more than a poor embellishment on the breach of contract claim. The duties allegedly breached all arose out of the parties’ contract, and the damages claimed are all recoverable in contract. A breach of contract does not transform into a tort simply because it is intentional or involves deception.

1. The Post-Contract Fraud Claim Merely Restates a Claim for Breach of Contract.

a. The Complaint does not plead the breach of any non-contractual duty.

“[C]ourts of this State have consistently held . . . that a cause of action for fraud does not arise when the only alleged fraud relates to a breach of contract.” *Metro. Transp. Auth. v. Triumph Adver. Prods.*, 116 A.D.2d 526, 527 (1st Dep’t 1986). A breach of contract is “not to be considered a tort unless a legal duty independent of the contract itself has been violated.” *Clark-Fitzpatrick, Inc. v. Long Island R.R. Co.*, 70 N.Y.2d 382, 389-90, 516 N.E.2d 190, 193-94 (1987); *Apple I*, 137 A.D.2d at 55. To state a tort claim, a plaintiff must allege both “[a] legal duty independent of the contractual obligations” and damages that go beyond the “benefit of the bargain” and are unique to the tort claim. See, e.g., *Sommer v. Fed. Signal Corp.*, 79 N.Y.2d 540, 551, 593 N.E.2d 1365, 1369 (1992); see also *767 Third Ave. LLC v. Greble & Finger, LLP*, 8 A.D.3d 75, 76 (1st Dep’t 2004) (applying C.P.L.R. §3016(b) to the tort/contract determination). “Both of these criteria, duty and appropriate damages, must be met.” *Joseph v. David M. Schwarz/Arch. Servs., P.C.*, 957 F.Supp. 1334, 1339 (S.D.N.Y. 1997).

The duty to render accurate accounts is solely contractual. See, e.g., *Edwil Indus., Inc. v. Stroba Instruments Corp.*, 131 A.D.2d 425 (2d Dep’t 1987). In *Edwil Industries*, the court affirmed the dismissal of a fraud claim that alleged that “the defendants, pursuant to a contract, were obligated to render accurate

statements of sales, and breached the contract by making false statements of sales.”

Id. at 425.

“Since the cause of action at issue here does not alleged the breach of a duty extraneous to, or distinct from the contract between the parties, Special Term properly dismissed that cause of action.” *Id.*

Likewise, in *Dayan Enterprises, Corp. v. Nautica Apparel, Inc.*, No. 03-Civ.-5706, 2003 WL 22832706 at *2 (S.D.N.Y. Nov. 26, 2003), the court held that, because a licensee’s “duty to produce accurate royalty reports for [the licensor] derives from its contract obligations,” the resulting fraud “claim is duplicative of the breach of contract claim.” *Id.*

This Court endorsed that principle in *Slavenburg Corp. v. Baby Doll Infants Wear Co.*, 181 A.D.2d 555 (1st Dep’t 1992), where the Court allowed a fraud claim to stand because the defendant “did not merely render an inaccurate account to plaintiff, which it was contractually bound to provide,” but engaged in a fraudulent conspiracy *unrelated* to performance on the contract.

In *Apple I*, the Court found an extrinsic duty outside the contracts because the trial court had sustained the “fiduciary duty” claim as at least “colorable” and because The Beatles’ purported ownership of the recordings under the 1969 contract gave them “property rights” as bailors. 137 A.D.2d at 57. For reasons discussed above, no fiduciary relationship could have extended past 1989, and The

Beatles do not allege that the new contracts treat the records Capitol/EMI produces as their property until sold.

Since they cannot bring themselves within *Apple I*, The Beatles offer two other bases for the post-contract fraud claim. First, they allege a “wanton disregard of [Capitol/EMI’s] obligations under the Royalty Agreement.” R.61. Second, they allege that Capitol/EMI falsified documents, drew up “bogus Scrap Certificates,” underreported royalties, and “generally used evasive tactics.” R.61. Both of these theories, however, depend solely on the defendants’ duty to perform under the contract.

As to the first claim, sprinkling “wantonly” and “fraudulently” throughout the Complaint does not convert a breach of contract claim into a tort claim: there is no tort action for “wanton breach of contract.” As this Court held in *Jericho Group, Ltd. v. Midtown Development, L.P.*, the allegation that a defendant “intended to breach a contractual obligation does not support an action for fraud.” 32 A.D.3d 294, 300 (1st Dep’t 2006).

The second claim, too, merely alleges that Capitol/EMI presented documents that did not comply with the contract – the liberal use of adjectives such as “deceptive” and “evasive” does not change the substance of the claim. “Merely . . . employing language familiar to tort law, does not, without more, transform a simple breach of contract into a tort claim.” *Clark-Fitzpatrick*, 70 N.Y.2d at 390.

The trial court asserted that “the Complaint adequately alleges the violation of various non-contractual duties,” describing the alleged pursuit of “secret undisclosed collateral side deals.” R.13. The court, however, could not identify the source of any obligation not to pursue such opportunities *other than contract*. The Complaint itself states, no fewer than seven times, that the side deals violated multiple specific contract provisions. See R.47, R.49-50. Thus, if there were violations of duty, they were contractual duties. The court also could not explain how pursuing business deals with third parties could constitute *fraud* against The Beatles: the opinion mentioned no misstatement in that context, no intent, no reliance, and no damages.

b. The fraud and breach of contract claims allege identical facts.

One way to determine whether a fraud claim duplicates a contract claim is to compare the factual allegations supporting each claim. See *Metro. Transp. Auth.*, 116 A.D.2d at 527 (dismissing fraud claim because “[n]one of these [fraud] allegations are distinct from those giving rise to the breach of contract claim and relate to *facts* collateral and extraneous to the contract” (emphasis added)).

Here, the Complaint uses virtually identical language to describe the fraud and contract claims. For example,

- Compare R.65 alleging breach of contract (“Capitol/EMIR have intentionally . . . submitt[ed] bogus and inadequate Scrap Certificates

. . . .”) with R.61 alleging fraud (“Capitol/EMIR falsified documents by submitting bogus Scrap Certificates”);

- Compare R.65 (“Capitol/EMIR have intentionally . . . improperly classif[ied] units as promotional”) with R.61 (“Capitol/EMIR . . . falsely classified units as promotional”);
- Compare R.65 (“Capitol/EMI have intentionally . . . exploit[ed] Beatles Group and Solo product with third parties without permission”) with R.61 (“Capitol/EMI . . . exploited product without permission”; “Capitol/EMI . . . hid lucrative side deals with third parties”); and R.62 (“Capitol/EMI fraudulently and intentionally failed to disclose various collateral benefits” with third parties).

c. The Complaint does not plead tort damages.

A tort claimant also must plead “special damages proximately caused by the false representation that are not recoverable under the contract measure of damages.” *Krantz v. Chateau Stores of Canada, Ltd.*, 256 A.D.2d 186, 187 (1st Dep’t 1998); *Dayan Enters.*, 2003 WL 22832706, at *2 (“Further, [licensor] has not alleged that it sustained any separate damages unrecoverable under the breach of contract claim as a result of the fraudulent royalty reports.”).²¹

“[W]here plaintiff is essentially seeking enforcement of the bargain, the action should proceed under a contract theory.” *Sommer*, 79 N.Y.2d at 552, 593 N.E.2d at 1369; see also *Clark-Fitzpatrick*, 70 N.Y.2d at 390 (dismissing tort claim where “the damages plaintiff allegedly sustained as a consequence of defendant’s violation of a ‘duty of due care’ . . . were clearly within the contemplation of the written agreement”).

²¹ Punitive damages do not qualify as special damages. See *Krantz*, 256 A.D.2d at 187.

In this case, The Beatles do not plead any separate damages from the alleged post-contract “fraud.” They claim only unpaid royalties. Whether The Beatles are entitled to additional royalties does not depend on whether any scrap certificates were “fraudulent” but whether EMI paid the correct amounts according to the contract. Put another way, if Capitol/EMI had committed the alleged fraud but complied with all (other) contract obligations and paid the correct royalties, there could be no damage from the fraud standing alone.

The Beatles argued below that the promotional distribution of Beatles recordings through third parties raised claims “collateral to the contract.” They do not contend, however, that those deals were themselves tortious or that they produced any damages not recoverable in contract. Indeed, as noted at p. 42-43, *supra*, the contracts expressly provide for promotional distribution. The only wrong alleged is a failure to pay royalties on those recordings. See R.45. Thus, the contract and fraud claims seek to recover the same unpaid royalties.²²

2. The Beatles Fail to Plead Reliance.

Justifiable reliance is another essential element of fraud. See, *e.g.*, *Lama Holding Co. v. Smith Barney, Inc.*, 88 N.Y.2d 413, 421, 668 N.E.2d 1370, 1373 (1996). Here, there is no allegation that The Beatles relied in any way on the

²² Plaintiffs argued below that so-called “market dilution” was an additional basis for fraud damages. Market dilution, however, is just another way of saying that recordings were distributed without payment of royalties. If Capitol/EMI had distributed the same recordings and paid royalties on them, the same “dilution” would have resulted, but that could constitute neither fraud nor breach of contract.

allegedly false reports. Indeed, they claim not that they believed the reports, but that they bargained hard for, and then vigorously exercised, the right to audit them to see *whether* they would rely on them. See R.37-38, R.39-43.

The Complaint also shows that any reliance would have been unjustifiable. This Court recently rejected a fraud claim because it did not believe that “plaintiffs, as sophisticated investors, [could] validly claim justifiable reliance . . . , as they could have discovered the underlying condition . . . by ordinary intelligence or with reasonable investigation.” *Zanett Lombardier, Ltd. v. Maslow*, 29 A.D.3d 495, 496 (1st Dep’t 2006). In *Shea v. Hambros*, 244 A.D.2d 39 (1st Dep’t 1998), this Court dismissed a fraud claim on the pleadings where:

“By his own account, [plaintiff] was a sophisticated businessman Given what [plaintiff] concedes was the sharply ‘acrimonious’ nature of the negotiations, to the degree that they were ‘almost broken off,’ and the dissension among the parties, he can hardly claim with any credibility that he, a savvy businessman, entered into the resulting agreements lulled by faith or trust in the parties across the bargaining table, or that he unwittingly gave up some valued right in the bargain.” *Id.* at 47.

The history of litigation between the parties also makes any reliance unreasonable as a matter of law. See *Eastbrook Caribe*, 11 A.D.3d at 297 (“Plaintiff had engaged in litigation [with defendants] In light of that dispute, plaintiff cannot adequately allege that it reasonably relied on a representation by defendants . . . as to that exact point.”).

Here, The Beatles not only *could* have discovered the alleged fraud, but they allege that they suspected it *all along*. As with the fiduciary duty claim, they cannot simultaneously make inflammatory allegations about Capitol/EMI's decades-long untruthfulness while also asserting that they trusted and relied on Capitol/EMI's representations.

III. THE DEMAND FOR PUNITIVE DAMAGES MUST BE STRICKEN.

A. The Alleged Misconduct Does Not Evince a “High Degree of Moral Turpitude.”

A plaintiff cannot recover punitive damages without establishing conduct that it is “so gross[,] morally reprehensible, and of such wanton dishonesty as to imply a criminal indifference to civil obligations.” *New York Univ.*, 87 N.Y.2d at 315-16, 662 N.E.2d at 767 (internal quotation omitted). A plaintiff seeking punitive damages must not only show “fraudulent or evil motive” but also must establish that the conduct “has the character of outrage frequently associated with crime.” *Morsette v. “The Final Call”*, 309 A.D.2d 249, 254 (1st Dep’t 2003).

The Complaint alleges no more than a failure to make royalty payments in a commercial relationship between adverse parties of considerable sophistication and financial resources. Even embellished with conclusory assertions of “intent” and “wanton[ness],” that claim does not come close to “moral turpitude.”

Any punitive award in this case also would contravene federal due process. In *State Farm v. Campbell*, 538 U.S. 408, 419 (2003), the Supreme Court held that

“punitive damages should only be awarded if the defendant’s culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence.” The allegations here would not satisfy due-process requirements. The Beatles allege no physical injury. Capitol/EMI’s alleged conduct did not endanger anyone’s health or safety. The Beatles are among the least “financially vulnerable” people in the world – all have huge fortunes, and Sir Paul is a billionaire. They are hardly among “the weakest of the herd – the elderly, the poor, and other consumers who are least knowledgeable about their rights and thus most vulnerable to trickery or deceit.” *State Farm*, 538 U.S. at 433 (opinion of Ginsburg, J.).

B. The Alleged Misconduct Was Not “Aimed at the Public Generally.”

The Complaint also fails to satisfy a separate requirement for a viable claim for punitive damages. The “purpose [of punitive damages] is not to remedy private wrongs but to vindicate public rights.” *Rocanova v. Equitable Life Assurance Soc’y of U.S.*, 83 N.Y.2d 603, 613, 634 N.E.2d 940, 943 (1994); see also *Best Payphones, Inc. v. Empire State Payphone Ass’n*, 272 A.D.2d 139, 139 (1st Dep’t 2000) (affirming dismissal of punitive damages claim, since there was no allegation that “conduct was part of a pattern of similar conduct directed at the public generally”). Therefore, even where the plaintiff pleads a “high degree of moral turpitude” and “such wanton dishonesty as to imply a criminal indifference

to civil obligations,” he may recover punitive damages only “if the conduct was ‘aimed at the public generally.’” *Rocanova*, 83 N.Y.2d at 613 (quoting *Walker v. Sheldon*, 10 N.Y.2d 401, 404-05 (1961)).

The Complaint does not allege a “pattern of conduct directed at the public generally.” The allegations all relate to royalty payments to these performers pursuant to a contract negotiated by sophisticated and wealthy parties, amply represented by legal counsel and business advisors. There is no allegation of harm to third parties. See R.64, R.66, R.67 (“*Plaintiffs* have been damaged.” (emphasis added)).

IV. THE DEMAND FOR PARTIAL RESCISSION IS INVALID.

A. Partial Termination is Not a Legitimate Legal Remedy.

The Complaint also seeks an “Order terminating the rights of Capitol/EMIR under the Royalty Agreements.” R.68. Such an order would not terminate the Royalty Agreements, but only “the rights of Capitol/EMIR.” It, therefore, would constitute partial rescission of the contract.

But partial rescission is not a valid remedy. See *Slater v. Slater*, 208 A.D. 567, 573 (1st Dep’t 1924) (“[A] contract cannot be rescinded in part and stand good for the residue. If it cannot be rescinded in toto, it cannot be rescinded at all.”); *Merryman v. Gottlieb*, 99 A.D.2d 893, 894 (3d Dep’t 1984) (“if this particular contract should have been rescinded at all, it should have been rescinded

completely and not partially”); *Simmons v. Crowley*, 112 N.Y.S.2d 851, 856 (N.Y. Co. 1952) (“Rescission is not fractional. You do not remove from a document the part you dislike and compel the other side to accept what is left. It is an all or nothing process in which the [plaintiff], willing to cancel and be restored to its original position [], must give back everything it now has that it did not have under the old contract.”).

The trial court apparently agreed that partial rescission is an unlawful remedy but misinterpreted the Complaint as seeking termination of the entire contract, asserting that “plaintiffs . . . seek to exercise their right to terminate *the parties’ agreements.*” R.14. The Complaint, however, carefully avoids seeking that relief, which The Beatles certainly do not want, because it would require them to repay millions of dollars in royalties paid under the contracts and to relinquish any claims to future royalties. The prayer for relief seeks an illegitimately one-sided decree, not complete termination:

“(e) An Order terminating *the rights of Capitol/EMIR* under the Royalty Agreements” R.68 (emphasis added).

B. Complete Termination Could Not Be Warranted.

Even assuming, as the trial court did, that “terminating *the rights of Capitol/EMIR* under the Royalty Agreements” really means terminating “the *parties’ agreements,*” the Complaint provides no basis for doing so. A “bona fide dispute concerning royalty payments does not, as a matter of law, establish a

material breach justifying rescission of the contract absent an express provision in the agreement.” *Gordy Co. v. Mary Jane Girls, Inc.*, Nos. 86 Civ. 6814, 87 Civ. 3438, 1989 WL 149290, at *45 (S.D.N.Y. Dec. 6, 1989) (quoting *Arthur Guinness & Sons, PLC v. Sterling Pub. Co.*, 732 F.2d 1095, 1101 (2d Cir. 1984)); *Nolan v. Williamson Music, Inc.*, 300 F. Supp. 1311 (S.D.N.Y. 1969), *aff’d*, 499 F.2d 1394 (2d Cir. 1974).

Gordy is particularly apt. There, recording artists sued their record distribution company over a royalty dispute, seeking termination of the royalty agreements. See *id.* at *45. The court explicitly rejected this request:

“In the absence of fraud *and* the complete failure to pay royalties, rescission is not appropriate arising out of the accounting claims.” *Id.* at *46 (emphasis added).

As in *Gordy*, Capitol/EMI has never ceased paying royalties. The Beatles simply claim that they are owed *more* royalties under the contracts that they seek to *enforce*, not to rescind. Thus, the plaintiffs’ remedy is a suit for breach of contract, not rescission, partial or complete.

V. THE DEMAND FOR TRANSFER OF EMI’S MASTER RECORDINGS WOULD UNJUSTIFIABLY CONFISCATE EMI’S INDEPENDENT PROPERTY RIGHTS.

Perhaps the most outlandish aspect of The Beatles Complaint is their demand for an order “directing that all rights to the Beatles Group and Solo Masters [under the Royalty Agreements] be transferred to the plaintiffs.” R.68. It is not clear what effect such an order would have, since ownership of the Masters

does not depend in any way on the Royalty Agreements. Capitol/EMI has owned the Masters for decades, because it commissioned The Beatles to perform various songs and produced the original recordings 40 years ago. The Court of Appeals recently ruled that this role automatically vested in Capitol/EMI permanent property rights recognized by New York common law. See *Capitol Records, Inc. v. Naxos of Am., Inc.*, 4 N.Y.3d 540, 830 N.E.2d 250 (2005) (recognizing record producer’s ownership of common-law copyright over recorded performances). Indeed, the 1989 NA Agreement accurately recites that “[t]he copyright in all the sound recordings . . . is owned by EMIR.” R.125 (emphasis added.) The Complaint does not say a word about any provision in the Royalty Agreements relevant to ownership of the Masters.

This demand is merely a gratuitous request for an arbitrary confiscation of Capitol/EMI’s property and should have been stricken. The most likely reason for including this demand is to generate publicity, since The Beatles’ lawyers have repeatedly emphasized it in the press, even to the exclusion of the monetary damages: “We are delighted to have the opportunity to pursue this claim for the return of the Beatles’ master recordings.”²³

It is pure double-speak to pursue the “return” of the Masters to The Beatles. They never owned them. The Masters have been the property of Capitol/EMI for

²³ See, e.g., BBC News, *Beatles to sue over royalty claim* (Aug. 30, 2006), available at <http://news.bbc.co.uk/go/pr/fr/-/2/hi/entertainment/5300304.stm>.

forty years. There is no conceivable legal theory under which disputes under contracts negotiated in 1989 and 1995 could lay a foundation for confiscating Capitol/EMI's pre-existing property, when those contracts not only authorize no such draconian punishment but expressly affirm Capitol/EMI's pre-existing property rights. This Court should ensure that the case proceeds without the baggage of an attention-grabbing but legally deluded demand.

CONCLUSION

For all of the foregoing reasons, Defendants-Appellants request that this Court (1) reverse the order below, (2) direct the dismissal of the First and Third Causes of Action, and (3) strike the demands for (a) awarding exemplary or punitive damages, (b) terminating Capitol/EMI's rights under the Royalty Agreements, and (c) directing the transfer to the Beatles Group of Capitol/EMI's pre-existing rights to the Solo Master recordings of The Beatles.

Dated: New York, New York
December 15, 2006

Respectfully submitted,

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C.P.L.R. 5531 STATEMENT

1. The index number of this case in the Trial Part is 604385/05.
2. The full title of the action herein is APPLE CORPS LIMITED, APPLE RECORDS, INC., KENNETH SIDNEY ROBERTS and NICHOLAS EDMUND VALNER AS EXECUTORS OF THE ESTATE OF GEORGE HARRISON, G.H. ESTATE LIMITED, YOKO ONO LENNON, SIR JAMES PAUL McCARTNEY, RICHARD STARKEY, and MPL COMMUNICATIONS, INC., Plaintiffs, against CAPITOL RECORDS, INC. and EMI RECORDS LIMITED, Defendants. The full names of the original parties to this action, as stated in the Complaint, are set forth above. There have been no changes in the parties to the action.
3. The action was commenced in the Supreme Court of the State of New York, County of New York.
4. The action was commenced by service of the Complaint on December 15, 2005. No other pleadings have been served.
5. The proceeding below is an action by plaintiffs against defendants for fraud, breach of contract, and breach of fiduciary duty, seeking compensatory and punitive damages and contract rescission.
6. This appeal is taken from an Order of the Supreme Court for the State of New York, County of New York, the Honorable Karla Moskowitz, Justice of

the Commercial Division, denying defendant-appellants' motion to dismiss the first and third causes of action and to strike plaintiffs' prayers for partial rescission and punitive damages. The Order was filed with the Clerk of the County of New York on August 23, 2006, and Notice of Entry was served on August 25, 2006.

7. This appeal is on a full reproduced record.

PRINTING SPECIFICATIONS STATEMENT

I hereby certify pursuant to N.Y.C.R.R. § 600.10 that:

1. This brief was prepared using Microsoft Word on Microsoft Windows XP Professional, Version 5.1.
2. This brief is printed double-spaced in 14-point Times New Roman font.
3. This brief contains 13,982 words, inclusive of point headings and footnotes and exclusive of pages containing the Table of Contents, Table of Authorities, proof of service, and this Statement.

Dated: New York, New York
December 15, 2006

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