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9  
10 **UNITED STATES DISTRICT COURT**  
11 **CENTRAL DISTRICT OF CALIFORNIA**

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12  
13 CENTURY OF PROGRESS  
PRODUCTIONS; CHRISTOPHER  
14 GUEST; ROB REINER  
PRODUCTIONS; UNITED  
15 HEATHEN; SPINAL TAP  
PRODUCTIONS; HARRY SHEARER;  
16 ROB REINER; and MICHAEL  
MCKEAN,

17  
18 Plaintiffs,

19 v.

20 VIVENDI S.A.; STUDIOCANAL;  
RON HALPERN, an individual;  
21 UNIVERSAL MUSIC GROUP, INC.;  
UMG RECORDINGS, INC.; and  
22 DOES 1 through 10, inclusive,

23  
24 Defendants.

Case No. 2:16-cv-07733-DMG-AS

**SECOND AMENDED COMPLAINT  
FOR:**

- (1) Breach of Contract;
- (2) Breach of the Implied Covenant of Good Faith and Fair Dealing;
- (3) Fraud by Concealment and Misrepresentation;
- (4) Accounting;
- (5) Declaratory Relief Re: Trademark Rights (28 U.S.C. § 2201); and
- (6) Declaratory Relief Re: Copyright Reversion (17 U.S.C. § 203)

**DEMAND FOR JURY TRIAL**

**PRELIMINARY STATEMENT**

1  
2 1. *This Is Spinal Tap* co-creators Harry Shearer, Rob Reiner and Michael  
3 McKean hereby join Christopher Guest in their individual capacities to file this  
4 Second Amended Complaint, while simultaneously clarifying the standing of their  
5 loan-out companies to sue. The *Spinal Tap* co-creators also add as a defendant  
6 Vivendi's co-conspirator and subsidiary Universal Music Group, while further  
7 explaining their claims of fraud. They further amend to answer together Vivendi's  
8 threats of retaliation for their filing of copyright termination notices to reclaim their  
9 creative ownership of *Spinal Tap*.

10 ***This Is Spinal Tap Is Not a "Work for Hire"***

11 2. Shortly after this lawsuit was first filed in October 2016, *Spinal Tap*  
12 co-creators Harry Shearer, Christopher Guest, Michael McKean and Rob Reiner  
13 exercised their rights to issue copyright termination notices pursuant to Section 203  
14 of the 1976 Copyright Act to recapture all copyrights to the characters, sound  
15 recordings, and musical compositions that appeared in *This Is Spinal Tap*, including  
16 the screenplay and the film itself. The termination notices were served, among  
17 others, on Vivendi subsidiaries StudioCanal and Universal Music Group.

18 3. In response Vivendi, in its February 28, 2017 motion to dismiss the  
19 co-creators' First Amended Complaint, threatened to file a lawsuit against Harry  
20 Shearer and to seek recovery of its attorneys' fees purportedly because the  
21 co-creators' works were "works for hire" which "are not eligible for termination under  
22 Section 203," and that the artists' filing of the copyright termination notices has  
23 placed a "cloud" over "the movie and music copyrights" to *This Is Spinal Tap*. This  
24 "cloud" allegedly has already damaged "StudioCanal's ability to distribute *Spinal Tap*  
25 and to otherwise enjoy its lawful rights to the movie." [Doc. # 24 at 3:4-18.]

26 4. Vivendi's claims are false: *This Is Spinal Tap*, its characters and its  
27 music are not "works for hire." They were developed before the artists entered into  
28 an agreement with Vivendi or its predecessors, and belong to the creators. In their

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1 capacities as individual copyright holders, Harry Shearer, Rob Reiner, Christopher  
2 Guest, and Michael McKean seek a judicial declaration that the termination notices  
3 are valid and as such cannot support Vivendi's claims of damages.

4 5. Section 203 of the Copyright Act of 1976 gives authors the right to  
5 terminate the grant of a copyright in "any work other than a work made for hire"  
6 made on or after January 1, 1978. 17 U.S.C. § 203(a). To protect artists, Congress  
7 made clear that termination "may be effected notwithstanding any agreement to  
8 the contrary." 17 U.S.C. § 203(a)(5). Termination is effected by serving a written  
9 notice upon the grantee or its successor any time during a five-year period generally  
10 starting 35 years after the date of the execution of the grant or the date of  
11 publication of the work. § 203(a)(3). Because the 35-year period began with grants  
12 made in 1978, opportunities to serve termination notices under Section 203 started  
13 to accrue for the first time on January 1, 2013.

14 6. *Spinal Tap* songs and characters were created starting in 1978, years  
15 before any agreement with Vivendi's predecessors. The *Spinal Tap* band first  
16 appeared on television in 1979, in a skit for a series executive-produced by Reiner  
17 and produced by Shearer called *The T.V. Show*. The band performed live for  
18 audiences prior to any contract for *This Is Spinal Tap*. The co-creators also  
19 registered copyrights in 1981 for the music and lyrics to "Stonehenge," "Sex Farm,"  
20 "Big Bottom," "Gimme Some Money," and "(Tonight I'm Gonna) Rock You  
21 Tonight." When the co-creators decided to make a feature they first created a  
22 20-minute film, complete with fully-realized characters with backstories and musical  
23 performances with lyrics, to shop in lieu of a script. Copyrights to these works  
24 belonged, unencumbered, to the co-creators upon their creation. 17 U.S.C. § 302(a)  
25 ("Copyright in a work created on or after January 1, 1978, subsists from its  
26 creation.")

27 7. After showing the 20-minute film to the major studios, Reiner, Shearer,  
28 Guest and McKean decided to work with an independent studio, Embassy Pictures.

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1 The co-creators incorporated a joint venture, Spinal Tap Productions ("STP") on  
2 May 6, 1982, and the next day signed an agreement with Embassy for production,  
3 financing, and distribution of "a motion picture presently entitled 'Spinal Tap.'"  
4 The Agreement gave Reiner, Shearer, Guest and McKean creative control of the  
5 motion picture, including over the screenplay, music, and other elements of the film.  
6 After editing all of the footage, the creators delivered an essentially finished product  
7 to Embassy, which was released in 1984 as *This Is Spinal Tap*.

8 8. Embassy was assigned the co-creators' copyrights in the works pursuant  
9 to a so-called "Instrument of Transfer" dated May 7, 1982, whereby the co-creators  
10 assigned to STP, and STP assigned to Embassy, the following rights "in the feature  
11 motion picture presently entitled 'Spinal Tap':

12 The sole and exclusive right in perpetuity to exhibit,  
13 distribute and exploit such motion picture and all elements  
14 thereof in all media, whether or not now known, throughout  
15 the universe, including, but not limited to, music and  
16 soundtrack rights, merchandising rights, video cassette and  
video disk rights, and theatrical sequel, theatrical remake  
and standard and non-standard television program rights."

17 9. Embassy's assigned rights in the copyrights have changed hands several  
18 times. The rights are currently claimed by StudioCanal and Universal Music Group  
19 subsidiary UMG Recordings, Inc., among others, pending reversion to Shearer,  
20 Reiner, Guest and McKean according to the co-creators' copyright termination  
21 notices.

22 10. Vivendi has challenged those termination notices, claiming without  
23 further explanation that "the movie and its music were created as works for hire."  
24 [Doc. # 24 at 3:13.] But to qualify as a "work made for hire," the work must either  
25 (1) be "prepared by an employee within the scope of his or her employment" or  
26 (2) be "specially ordered or commissioned" for use in one of nine enumerated  
27 categories of works "if the parties expressly agree in a written instrument signed by  
28 them that the work shall be considered a work made for hire." 17 U.S.C. § 101.

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1 11. The co-creators' works do not fall within these statutory criteria.

2 12. The pre-May 7, 1982 works are clearly not "works made for hire."  
3 Those works predated any agreement with Embassy; were not prepared under any  
4 employment relationship; were not specially ordered or commissioned; and were not  
5 subject to any agreement that they be considered "works made for hire." The  
6 co-creators therefore have the statutory right to recapture all copyrights to these  
7 works, including but not limited to copyrights to the musical compositions, sound  
8 recordings and *Spinal Tap* characters that appeared in the 20-minute film, and any  
9 other musical works created before May 7, 1982.

10 13. The post-May 7, 1982 works are also not "works made for hire."  
11 The production agreement with Embassy only assigns the copyrights in the works to  
12 Embassy; it does not create any employer-employee relationship between the  
13 co-creators and Embassy and does not state that the works shall be considered  
14 "works made for hire" owned by Embassy. Accordingly, the co-creators have the  
15 statutory right to recapture all copyrights to any of their works created on or after  
16 May 7, 1982, including but not limited to the screenplay, sound recordings, musical  
17 compositions and characters appearing in *This Is Spinal Tap*, as well the screenplay  
18 and the film itself.

19 **Continuing and Amended Claims Against Vivendi and**  
20 **Vivendi's Subsidiary Universal Music Group.**

21 14. Harry Shearer, creator of the radio and podcast program "Le Show,"  
22 and voice of some twenty-three characters on "The Simpsons," is co-creator of  
23 the movie classic *This Is Spinal Tap*, in which he performed as the musician  
24 Derek Smalls.

25 15. Christopher Guest co-created *This Is Spinal Tap* and performed as the  
26 musician Nigel Tufnel. Mr. Guest is also known for having written, directed and  
27 starred in films including "Waiting for Guffman," "Best in Show," "A Mighty Wind,"  
28 "For Your Consideration," and "Mascots."

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1           16. Rob Reiner co-created and directed *This Is Spinal Tap* and performed  
2 as its fictional director Marty DiBergi. Mr. Reiner is known for his work in notable  
3 films and television series, including his Emmy Award winning performances in  
4 "All in the Family" and as director of, among others, "Stand by Me," "The Princess  
5 Bride," "When Harry Met Sally...", "Misery," "A Few Good Men," and "The  
6 American President."

7           17. Michael McKean co-created *This Is Spinal Tap* and performed as the  
8 musician David St. Hubbins. Mr. McKean is also known for his performances in  
9 the films "Best in Show" and "A Mighty Wind" (in which he reunited with Guest  
10 and Shearer as The Folksmen), on "Saturday Night Live" and in the television series  
11 "Laverne & Shirley" and "Better Call Saul."

12           18. *This Is Spinal Tap* and its music, which Shearer, Guest, McKean and  
13 Reiner co-wrote, including such songs as "Sex Farm" and "Stonehenge," have  
14 remained popular for more than thirty years, and have earned considerable sums for  
15 the French conglomerate Vivendi S.A.

16           19. But not for the creators. Defendant Vivendi and its agents, including  
17 StudioCanal executive Ron Halpern, have engaged in anti-competitive business  
18 practices by manipulating the accounting between Vivendi film and music  
19 subsidiaries and have engaged in fraud to deprive the *Spinal Tap* creators of a fair  
20 return for their work.

21           20. To address this fraud, Guest on his own behalf, and Shearer, Reiner and  
22 McKean on their own behalf and through their respective loan-out companies,  
23 Century of Progress Productions ("CPP"), Rob Reiner Productions and United  
24 Heathen, and Spinal Tap Productions ("Plaintiffs") bring the present action seeking  
25 not less than four hundred million dollars (\$400,000,000) in compensatory and  
26 punitive damages. Shearer, Guest, Reiner and McKean have also issued notices of  
27 copyright termination in their capacities as individual copyright holders and CPP has  
28

1 filed trademark applications to secure creative rights which have been abandoned by  
2 Vivendi. Plaintiffs seek a judicial declaration vindicating those rights.

3 21. Since the movie's release in 1984, *This Is Spinal Tap* music,  
4 merchandise, classic phrases and images have become ubiquitous in popular culture.  
5 The movie itself had two theatrical releases and has been re-sold in a number of  
6 commercial formats. A series of companies has profited from merchandising, music,  
7 film, television and video rights. For many years, Vivendi and its subsidiaries,  
8 including Canal Plus, StudioCanal, StudioCanal Image, Universal Music Group and  
9 UMG Recordings, Inc. ("Vivendi"), have claimed and administered many of these  
10 rights and have been responsible for accounting to Plaintiffs.

11 22. But according to Vivendi, the four creators' share of total worldwide  
12 merchandising income between 1984 and 2016 was \$81 (eighty-one dollars).  
13 Between 1989 and 2016 total income from music sales was \$98 (ninety-eight  
14 dollars). The most recent accounting statement dated as of December 31, 2016 –  
15 which Vivendi failed to deliver until June 30, 2017, more than four months after it  
16 was contractually due and more than eight months after this lawsuit was filed –  
17 also implausibly claims an unrecouped, *negative* balance of \$14,003 (fourteen  
18 thousand and three dollars) as a result of newly-claimed expenses, including  
19 \$461,989 (four hundred sixty-one thousand, nine hundred eighty-nine dollars) in  
20 interest on "production advances" (for a film released in 1984) and an outrageous  
21 \$165,348 (one hundred sixty-five thousand, three hundred forty-eight dollars) in  
22 "litigation exp[enses]" associated with Vivendi's unsuccessful attempt to have  
23 this lawsuit dismissed. The message is clear: Vivendi has no intention of honoring  
24 its obligations to account honestly or to fairly compensate the *Spinal Tap* co-creators  
25 for their work.

26 23. Vivendi has engaged and is continuing to engage in anti-competitive  
27 and unfair business practices and has abandoned its obligations to enforce  
28 intellectual property rights in *This Is Spinal Tap*, unlawfully depriving Plaintiffs of

1 substantial revenues. Vivendi has also failed, and continues to fail, to account  
2 honestly for income actually received from *This Is Spinal Tap*.

3 **THE PARTIES**

4 24. Plaintiff Century of Progress Productions ("CPP") is a California  
5 corporation with its principal place of business in Sherman Oaks, California.  
6 CPP is the loan-out corporation of Plaintiff Harry Shearer ("Shearer") a citizen of  
7 Louisiana, residing in New Orleans.

8 25. Plaintiff Christopher Guest ("Guest") is a citizen of California,  
9 residing in Los Angeles.

10 26. Plaintiff Rob Reiner Productions ("RRP") is a California corporation  
11 with its principal place of business in Beverly Hills, California. RRP is the loan-out  
12 corporation of Plaintiff Rob Reiner ("Reiner"), a citizen of California, residing in  
13 Los Angeles.

14 27. Plaintiff United Heathen ("UH") is a California corporation with its  
15 principal place of business in Woodland Hills, California. UH is the loan-out  
16 corporation of Plaintiff Michael McKean ("McKean"), a citizen of California,  
17 residing in Los Angeles.

18 28. Plaintiff Spinal Tap Productions ("STP") is a California corporation  
19 that was incorporated on May 6, 1982 and at all times was entirely owned by CPP,  
20 Guest, RRP and UH. Defendants have an ongoing duty to account and pay to STP  
21 and its owners all royalties and other monies due under the May 7, 1982 Agreement  
22 at issue in this lawsuit. STP was dissolved in or about June 1986, and brings this  
23 action pursuant to California Corporations Code § 2010 to collect and distribute to  
24 its owners all royalties and other monies owed by Defendants.

25 29. Defendant Vivendi S.A. ("Vivendi") is a French corporation  
26 headquartered in Paris, France, doing business in and engaging in acts affecting  
27 Plaintiffs within this judicial district.  
28

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1 30. Defendant StudioCanal ("Canal") is a subsidiary of Vivendi,  
2 headquartered in Paris, France, doing business in and engaging in acts affecting  
3 Plaintiffs within this judicial district.

4 31. Defendant Ron Halpern ("Halpern") is an executive of Canal, resident  
5 in Paris, France, doing business in and engaging in acts affecting Plaintiffs within  
6 this judicial district.

7 32. Defendants Universal Music Group, Inc. and its subsidiary UMG  
8 Recordings, Inc. (together "Universal Music Group") are subsidiaries of Vivendi,  
9 headquartered in Santa Monica, California, doing business in and engaging in acts  
10 affecting Plaintiffs within this judicial district.

11 33. Does 1 through 10 are persons and/or entities whose true names and  
12 capacities are unknown to Plaintiffs and who participated in, conspired with, and/or  
13 caused Defendants to engage in the fraud and breaches of contract as alleged herein  
14 and who are otherwise responsible and liable to Plaintiffs for the wrongful acts  
15 alleged herein. Plaintiffs will amend this Complaint to allege the true names and  
16 capacities of said defendants as they become known.

17 **JURISDICTION AND VENUE**

18 34. This Court has jurisdiction under 28 U.S.C. § 1332 as the matter in  
19 controversy exceeds the sum or value of \$75,000 exclusive of interest and costs,  
20 and the action when filed was between citizens of a State and citizens or subjects of  
21 a foreign state.

22 35. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1338(a)  
23 because this action seeks declaratory judgment that Defendants lack rights to enforce  
24 both abandoned trademarks under the Lanham Act, 15 U.S.C. § 1051 *et seq.* and  
25 copyrights subject to termination under the Copyright Act, 17 U.S.C. § 203.

26 36. Venue is proper in this district under 28 U.S.C. § 1391(b) because a  
27 substantial part of the events that the claims are based upon occurred in this district.  
28

1 37. Jurisdiction and venue are proper in this Court because Defendants,  
2 through their predecessor-in-interest Embassy Pictures, a California joint venture,  
3 contractually consented to submit to the jurisdiction of the District Court of the  
4 Central District of California.

5 **ALLEGATIONS COMMON TO ALL CAUSES OF ACTION**

6 **The Genesis and Success of "This Is Spinal Tap"**

7 38. Christopher Guest, Michael McKean and Harry Shearer first performed  
8 together live as *Spinal Tap* in a television show in the 1970's. They later, with  
9 Rob Reiner, developed the characters in the *Spinal Tap* band and made a 20-minute  
10 film with improvised scenes and seven songs. In the process of attempting to turn  
11 that film into a feature-length movie, they formed a joint partnership, Spinal Tap  
12 Productions ("STP"), which they incorporated on May 6, 1982. On the strength of  
13 this work, on May 7, 1982, Guest and the loan-out corporations of Reiner, Shearer,  
14 and McKean, as co-owners of STP, signed an agreement (the "Agreement") with  
15 Embassy Pictures ("Embassy") for production, financing, and distribution of the  
16 motion picture *This Is Spinal Tap* ("TIST" or "the Film").

17 39. Under the terms of the Agreement, STP and its principals Guest and the  
18 loan-out corporations of Reiner, Shearer and McKean were to receive fixed, deferred  
19 and contingent compensation in the form of profit participation payments based  
20 on all sources of revenue, including, without limitation, merchandise and music.

21 40. TIST was released in 1984. The renowned Chicago Sun film critic  
22 Roger Ebert described TIST as "absolutely inspired" in a 1984 review that well  
23 summarized the Film's appeal:

24 Rock musicians never die, they just fade away, and  
25 "This Is Spinal Tap" is a movie about a British rock  
26 group that is rocketing to the bottom of the charts. It also  
27 is one of the funniest, most intelligent, most original films  
28 of the year.

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1 The movie looks like a documentary filmed during the  
2 death throes of a British rock band named Spinal Tap.  
3 It is, in fact, a satire. The rock group does not really exist,  
4 but the best thing about this film is that it could. The  
5 music, the staging, the special effects, the backstage  
6 feuding and the pseudo-profound philosophizing are right  
7 out of a hundred other rock groups and a dozen other  
8 documentaries about rock.

9 The group is in the middle of an American tour. The tour  
10 is not going well. Spinal Tap was once able to fill giant  
11 arenas, but its audiences have grown smaller and smaller,  
12 and concert dates are evaporating as the bad news gets  
13 around. No wonder. Spinal Tap is a bad rock 'n' roll  
14 band. It is derivative, obvious, phony and pretentious, and  
15 it surrounds itself with whatever images seem commercial  
16 at the moment (a giant death's head on stage, for one).

17 The movie is absolutely inspired in the subtle way it  
18 establishes Spinal Tap's badness. The satire has a deft,  
19 wicked touch. Spinal Tap is not that much worse than,  
20 not that much different from, some successful rock bands.  
21 A few breaks here or there, a successful album, and they  
22 could be back in business. (Proof of that: A soundtrack  
23 album, "Smell the Glove," is getting lots of airplay with  
24 cuts like "Sex Farm").

25 41. TIST was quickly recognized as a unique film with long-term appeal,  
26 as shown in its later inclusion in "best ever" lists such as *The New York Times Guide*  
27 *to the Best 1,000 Movies Ever Made*; *Entertainment Weekly's 100 Greatest Movies*  
28 *of All Time* where it appeared on the "Just Too Beloved to Ignore" list; and the  
29 *100 Greatest Movies of All Time* list published by Total Film. Confirming TIST's  
30 strong international appeal and following, in 2011 *Time Out London* named the film  
31 number one on its list of The 100 Best Comedy Movies. In 2002, the National Film  
32 Registry of the Library of Congress designated TIST as a culturally, historically, or  
33 aesthetically significant film. TIST still enjoys popularity on television, home video,  
34 and other media, including a 25th Anniversary Blu-Ray DVD release in 2009.

35 42. TIST was produced on a shoestring budget of approximately \$2.25  
36 million dollars. On information and belief, TIST's enduring popularity has

1 generated tens of millions of dollars in revenue in the thirty years since its original  
2 theatrical release, and its associated intellectual property has substantial value.

3 **The Terms of the Original 1982 Production Agreement**

4 43. The May 7, 1982 Agreement was drafted in several sections, including  
5 an eleven-page letter agreement with details of overall rights, obligations  
6 and compensation; a one-page Exhibit A Instrument of Transfer; a 48-page Exhibit  
7 B Standard Terms and Conditions, a fourteen-page Exhibit 1 to Exhibit B Formula  
8 for Computing Net Receipts, and a four-page Exhibit 2, Standard Delivery Items.  
9 The eleven-page letter agreement provides that in the event of any inconsistency  
10 between it and the Exhibit B Standard Terms and Conditions, the letter agreement  
11 "shall prevail." (§ 13.)

12 44. The Agreement is signed by Guest as President of STP, and includes  
13 Inducement Letters from Shearer (on behalf of himself and Century of Progress  
14 Productions), Reiner (on behalf of himself and Rob Reiner Productions), Guest  
15 (on behalf of himself), and McKean (on behalf of himself and United Heathen).

16 45. Paragraph 12 of the Agreement acknowledges that STP "is entirely  
17 owned by Rob Reiner Productions, United Heathen, Century of Progress  
18 Productions and Christopher Guest" and the Inducement Letters acknowledge that  
19 Rob Reiner Productions, United Heathen, Century of Progress Productions and  
20 Christopher Guest each "own one quarter (1/4) of all the shares of [STP]."  
21 Paragraph 13 of the Agreement further provides that "Embassy shall endeavor to  
22 add [STP], Rob Reiner Productions, United Heathen, Century of Progress  
23 Productions, Reiner, Shearer, McKean and Guest as additional named insureds in its  
24 errors and omissions insurance policy."

25 46. The Agreement includes identification of the creative team obligations  
26 as the Film's screenplay writers, composers/songwriters and actors, and in the case  
27 of Reiner, additional directorial duties.

28

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1           47. The Agreement specified various sums of fixed compensation for the  
2 creative team, as well as contingent compensation calling for a split of Net Receipts  
3 60% to Embassy and 40% to STP (§ 4a and 4b). With respect to the songs in the  
4 Film, all of which were composed by Shearer, Guest, McKean and Reiner, and the  
5 sound recordings embodying those compositions, all of which feature the musical  
6 performances of Shearer, Guest, and McKean, the Agreement calls for payment to  
7 Shearer, Guest, McKean and Reiner of 50% of the gross receipts from said music as  
8 well as a 6% performers' royalty plus a 3% producer royalty of the retail price of any  
9 soundtrack albums (§ 6). With respect to the compositions, the Agreement requires  
10 payment of 50% of gross receipts to Shearer, Guest, McKean and Reiner (§ 6).

11           48. Under the Agreement, Embassy promises, *inter alia*, to send  
12 Earnings Statements to STP showing the calculation of Net Receipts, first on a  
13 monthly, then quarterly, and after approximately three years, on an annual basis.  
14 But Vivendi, Embassy's successor-in-interest, has breached and continues to breach  
15 these promises.

16                   **Defendants' Acquisition of the Rights and Obligations in TIST,**  
17                   **and Fraudulent Accounting**

18           49. The catalog of Embassy, including unsuccessful films "bundled" with  
19 TIST, was acquired several times in a succession of transactions including sales to  
20 the Coca Cola Company, Parafrance, a subsidiary of L'Oreal and the DeLaurentiis  
21 Entertainment Group, Inc. In or around 1989, predecessors of Vivendi's subsidiaries  
22 acquired pertinent TIST rights.

23           50. Vivendi is responsible for accounting under the Agreement.  
24 Some profit participation statements were historically submitted to STP, c/o  
25 Creative Artists Agency ("CAA"), Reiner's agent. CAA does not and did not  
26 represent STP or Shearer, Guest or McKean or their respective loan-out companies.  
27 Those profit participation statements, Plaintiffs have recently discovered, reflect  
28 anti-competitive and unfair business practices in their self-dealing and wrongful

1 sharing of revenues between different Vivendi subsidiaries. Vivendi also unfairly  
2 bundled and cross-collateralized unsuccessful films in the Embassy catalogue with  
3 TIST and fraudulently underreported the revenues owed to Plaintiffs. The most  
4 recent participation statement "for the period ending December 31, 2016," which  
5 Vivendi delivered to STP c/o CAA on June 30, 2017 after this lawsuit was filed,  
6 reports that "[a]t this time, no payment is due" to the artists, because the *Spinal Tap*  
7 co-creators supposedly now have a negative balance of \$14,003 in unrecouped  
8 expenses.

9 51. Revenue streams arising from the film, including sound recordings and  
10 music publishing, were also included in the Agreement. The soundtrack music  
11 rights are now claimed by entities including another subsidiary of Vivendi, the  
12 Universal Music Group, which has an obligation to report and pay Canal, which in  
13 turn has an obligation to report and pay Plaintiffs pursuant to Defendants' accounting  
14 obligations. The accounting between the Vivendi subsidiaries is not at arm's-length,  
15 is anti-competitive, and deprives the TIST creators of a fair reward for their work.  
16 Particularly given that Vivendi has offset fraudulent accounting for revenues from  
17 music copyrights against equally dubious revenue streams for film and  
18 merchandising rights also controlled by Vivendi subsidiaries, Shearer, Reiner, Guest  
19 and McKean have filed notices of copyright termination for publishing and  
20 recording rights in *Spinal Tap* songs they co-wrote and co-recorded, as well as in the  
21 screenplay to the film and the film itself.

22 **CPP Investigates Defendants' Accounting and**  
23 **Discovers their Fraudulent Conduct**

24 52. In 2013, in anticipation of TIST's upcoming 30th Anniversary in 2014,  
25 CPP commissioned a study of the accounting statements and revenue streams  
26 associated with TIST. CPP learned the results of that study in or around  
27 November 2013.

28

1           53. CPP and Shearer then first discovered that Vivendi and its subsidiaries  
2 Canal, which administers and has a duty to account for revenue streams associated  
3 with the movie rights, and Universal Music Group, which administers and has a duty  
4 to account for revenue streams associated with the soundtrack music rights, had  
5 engaged in a pattern of anti-competitive and unfair business practices, had  
6 abandoned enforcement of valuable TIST rights, and had willfully concealed and  
7 manipulated years of accountings to retain monies due and owing to Plaintiffs.  
8 The other plaintiffs did not become aware of the bases for their claims until after  
9 the initial complaint in this lawsuit was filed on October 17, 2016.

10           54. Examples of Defendants' willful misconduct and intentional  
11 concealment of material facts in the accounting statements designed to deceive  
12 Plaintiffs and prevent them from discovering Vivendi's ongoing fraudulent  
13 accounting practices include but are not limited to:

- 14           • failure to remit statements and accountings, with gaps occurring in  
15 years that would have enhanced revenue, despite numerous requests  
16 for these statements made prior to the initiation of this lawsuit;
- 17           • failure to account for monies received, including a 2004 settlement  
18 payment received from MGM Home Video totaling over \$1.6 million  
19 dollars for underreported VHS and DVD revenues, when statements  
20 for the year 2004 were never submitted to Plaintiffs by Defendants;
- 21           • failure to account for and/or collect monies from exploitation of the  
22 soundtrack music rights claimed and administered by the Universal  
23 Music Group, which has reported a mere \$98 (ninety-eight) dollars  
24 in gross receipts from music sales from 1989 to 2016;
- 25           • improper expense deductions, including undocumented expenses  
26 for "Prints" and "Advertising & Publicity" allegedly totaling over  
27 \$3.3 million;
- 28           • undocumented charges to "Freight and other Direct Costs" totaling  
\$1,087,323 dollars, with over \$600,000 allegedly incurred from  
2007 to 2016, more than *twenty* years after the film's initial release,  
and nearly \$100,000 incurred from 2014 to 2016;
- failure to account for monies under the terms of the Agreement as  
"actually received by Embassy in the United States";

- 1 • failure to account for and/or collect revenue on merchandise and for  
2 use of material protected by *Spinal Tap* trademarks and copyrights;
- 3 • omission of material information concerning Vivendi's self-dealing  
4 and wrongful sharing of revenues from different Vivendi subsidiaries,  
5 including the improper and disproportionate allocation of costs and  
6 bundling and cross-collateralization of unsuccessful films in the  
7 Embassy catalogue.

8 55. Ron Halpern, during his management of the exploitation of TIST from  
9 1996 to 2009 repeatedly assured Plaintiffs and their agents during the same time  
10 period, including their manager Harriet Sternberg who represented the band from  
11 1992 through 2009, that he and his staff were fully supportive of the band and  
12 supported the co-creators' efforts to get all of the revenue they deserved. Mr.  
13 Halpern also assured attorney Barry Tyerman, who represented the band from  
14 September 2008 through 2009, that Mr. Halpern and his staff were fully complying  
15 with the Agreement, were providing accurate and reliable accountings to Plaintiffs –  
16 which included gross receipts and expenses from the film, television, movie and  
17 merchandising rights claimed and administered by Canal, and gross receipts and  
18 expenses from the soundtrack music rights claimed and administered by the  
19 Universal Music Group – and were using all available means to promote *Spinal Tap*  
20 assets and enforce *Spinal Tap* intellectual property to maximize revenue for the  
21 *Spinal Tap* creators.

22 56. From 2010 to 2012 Harry Shearer's business managers at the firm  
23 Power & Twersky made numerous, specific requests for all participation statements  
24 relating to *This Is Spinal Tap*. Vivendi's agent at Canal, Barbara DiNallo, contacted  
25 Power & Twersky on June 14, 2011, and "confirmed that [she] received [the]  
26 previous requests for all participation statements" and "stated that [she] would be  
27 able to comply by the end of June 2011."

28 57. Plaintiffs reasonably relied on these assurances. But the representations  
by Defendants' agents Ron Halpern and Barbara DiNallo were knowingly false when  
made or were made recklessly and without regard for their truth. Despite Plaintiffs'



1 reasonable diligence, CPP and Shearer were unaware until in or around November  
2 2013, and the remaining plaintiffs were unaware until after the initial complaint in  
3 this lawsuit was filed in October 2016, that Mr. Halpern, Vivendi and its subsidiaries  
4 had intentionally engaged in an extended and outrageous pattern of fraud and  
5 misconduct, and had abandoned their obligations to enforce intellectual property  
6 rights in *This Is Spinal Tap*, unlawfully depriving Plaintiffs of substantial revenues.

7         58. During a telephone call on September 23, 2004 concerning a major  
8 discrepancy with MGM Home Video's reporting to Canal of *This Is Spinal Tap*  
9 DVD and VHS sales which would have entitled Plaintiffs to additional royalties,  
10 Mr. Halpern assured Ms. Sternberg that he would speak with Canal's Senior Vice  
11 President and Chief Financial Officer (CFO), Robert Chamberlain, and promised  
12 that he would "continue to support [the co-creators] efforts in getting the money that  
13 [they] deserve[d]." Ms. Sternberg was later informed in a letter dated December 16,  
14 2004 that the auditor hired by Canal was unable to confirm that MGM reported the  
15 video sales properly and recommended that Ms. Sternberg discuss the matter with  
16 MGM. Only when CPP received the report it commissioned in 2013 did CPP and  
17 Shearer discover that Vivendi had received a settlement payment from MGM for  
18 more than \$1.6 million in 2004. That settlement payment was intentionally hidden  
19 from Plaintiffs: Vivendi to this day has failed to provide an accounting statement for  
20 the year 2004, and the \$1.6 million settlement does not appear on any of the other  
21 accounting statements provided to Plaintiffs.

22         59. Vivendi and its agents have also failed to enforce and collect revenue  
23 from *Spinal Tap* intellectual property for a wide range of unlicensed products  
24 infringing *Spinal Tap* trademarks and copyrights, including but not limited to a  
25 book titled "Smell the Glove" "a Little Stonehenge Book" featuring cartoon images  
26 of co-creators Shearer, Guest and McKean as the film's musicians Derek Smalls,  
27 Nigel Tufnel, and David St. Hubbins; a McDonald's promotion using the *Spinal Tap*  
28 slogan "Our Taste Goes to Eleven" with a picture of a guitar amp knob; infringing

1 merchandise, including "Spinal Tap – Volume 11" clothing, "Spinal Tap" necklaces,  
2 "This Is Spinal Tap" movie posters, "Spinal Tap" Matryoshka dolls, and even  
3 packaging tape sold as "This Is Spinal Tape"; and brewing companies selling their  
4 beer with *Spinal Tap* slogans including Bell's Brewery's "This One Goes to 11 Ale"  
5 and Full Sail Brewing Company marketing its "Session Premium Dark Lager" as  
6 "A beer that goes to 11."

7         60. In advance of the theatrical re-release of the film in 2000, managed  
8 for Canal by Ron Halpern, Mr. Shearer was asked to fly to London to meet with  
9 Halpern. During that meeting, a luncheon at the Groucho Club, Mr. Halpern  
10 informed Mr. Shearer that, in accord with Mr. Shearer's preferences to support  
11 "indies" – independent, creative, entrepreneurial companies – the United Kingdom  
12 re-release rights were being assigned to a small "boutique" distributor, who would  
13 welcome Shearer's personal involvement in marketing and advertising advice for  
14 the re-release. Mr. Shearer responded by sharing ideas with Halpern at that meeting.  
15 When Shearer returned to Los Angeles, he learned that in fact the United Kingdom  
16 distributor was not an independent "boutique," but a subsidiary of Metro-Goldwyn-  
17 Mayer. Mr. Shearer knew then that Ron Halpern was mendacious. But Shearer  
18 never imagined, until his review of a report in or around November 2013, that  
19 Halpern was capable of the level of deception and willingness to subvert contractual  
20 obligations that characterized Halpern's mistreatment of the *Spinal Tap* creators.

21         61. On information and belief, the conduct described here, including  
22 financial accounting, intellectual property and legal policies and practices of Canal  
23 and Universal Music Group, as well as the personal practices of Ron Halpern, are  
24 coordinated, controlled and directed by Vivendi. Canal, Universal Music Group and  
25 Ron Halpern are both ostensible and actual agents for Vivendi, and Vivendi has  
26 liability for the acts of each of these agents.

27         62. Vivendi is also liable for the conduct of Canal, Universal Music Group  
28 and Ron Halpern as alleged herein because, at all relevant times, there existed a

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1 unity of interest and ownership between them such that any separate corporate  
2 personalities no longer exist and adherence to the fiction of their separate existence  
3 would permit an abuse of the corporate form and would sanction fraud and promote  
4 injustice against Plaintiffs.

5 63. Vivendi touts itself as "an integrated media and content group" which  
6 "operates businesses throughout the media value chain, from talent discovery to the  
7 creation, production and distribution of content" through its "main subsidiaries"  
8 Canal and Universal Music Group.

9 64. Vivendi's subsidiaries do not have interests independent from Vivendi  
10 with respect to the exploitation of media and accounting obligations owed to  
11 Plaintiffs. They operate in practice as arms or divisions of Vivendi, responsible for  
12 administering Vivendi's accounting obligations under the direction and control of  
13 Vivendi. As reported in November 2015, Canal and Universal Music Group both  
14 "boosted Vivendi's results ... as the French conglomerate continues its  
15 transformation into a global media and entertainment company."

16 65. Vivendi, Canal and Universal Music Group have abused the corporate  
17 form to defraud Plaintiffs by, *inter alia*, engaging in anti-competitive and unfair  
18 self-dealing between Vivendi subsidiaries; cross-collateralizing unsuccessful films  
19 bundled with TIST in their accounting; failing to remit accounting statements;  
20 failing to respond to inquiries and information requests; failing to keep accurate  
21 records; failing to include revenues in accounting statements; claiming  
22 undocumented and false expenses as part of a fraudulent scheme to deprive  
23 Plaintiffs of their contractual rights; and failing to diligently exploit available  
24 revenue streams.

25 66. Vivendi also exercises direct control over its subsidiaries through the  
26 appointment of overlapping executives. For example, Vivendi's Chief Executive  
27 Officer, Arnaud de Puyfontaine, who serves as Chairman of Vivendi's Management  
28 Board, also serves as a Member of the Supervisory Board for both the Canal+ Group

1 and StudioCanal. In 2011, Vivendi appointed Lucian Grainge as the new Chairman  
2 and Chief Executive Officer of Universal Music Group, who Vivendi announced  
3 would continue to report to Vivendi's Chief Executive Officer and serve as a  
4 member of the Vivendi Management Board.

5 67. This is not the first time that Vivendi has directed and engaged in  
6 fraudulent accounting involving its subsidiaries. In 2003, Vivendi paid \$50 million  
7 and its former chief executive officer relinquished claims to a €21 million severance  
8 package to settle a civil fraud action that the United States Securities and Exchange  
9 Commission (SEC) prosecuted against Vivendi and its top executives concerning  
10 alleged financial fraud involving Vivendi's subsidiaries.

#### 11 **The SPINAL TAP Trademark**

12 68. In 1984, Defendants' predecessor, Embassy, filed a trademark  
13 application with the United States Patent and Trademark Office (USPTO) for the  
14 mark SPINAL TAP. The federal registration for that mark was cancelled by the  
15 USPTO in 1991. In early 2000, Defendants' predecessors filed certain other federal  
16 trademark registration applications with the USPTO for the mark SPINAL TAP as  
17 shown in Exhibit 1 hereto. In or about March 2002, as shown in Exhibit 2 hereto,  
18 the rights to those marks were conveyed to StudioCanal Image, a Vivendi subsidiary  
19 that subsequently merged into Canal, which is still identified by the USPTO as the  
20 last listed owner for those federal registrations.

21 69. Defendants subsequently abandoned, with no intent to resume, all rights  
22 to the SPINAL TAP marks, and the federal registrations for those marks were  
23 cancelled by the USPTO in 2011 and 2012 as shown in Exhibit 1 hereto. As  
24 additional evidence of such abandonment, Defendants did not oppose a trademark  
25 application filed on December 27, 2013 by Heretic Brewing Company to register  
26 the mark SPINAL TAP in connection with "beer" products, and that mark was  
27 registered by the USPTO on April 7, 2015 as shown in Exhibit 3 hereto.

28

1 70. Because the SPINAL TAP marks have been abandoned by Defendants,  
 2 CPP, on behalf of each of the four co-creators, has filed applications for federal  
 3 registrations of the mark SPINAL TAP as set forth in Exhibits 4 through 5 hereto.

4 **COUNT I**

5 **Breach of Contract**

6 **(Against Vivendi, Canal, and Universal Music Group)**

7 71. Plaintiffs repeat and reallege the allegations set forth in Paragraphs  
 8 1 through 70 above, as if fully set forth herein.

9 72. Defendants Vivendi, Canal, Universal Music Group and UMG  
 10 Recordings, Inc., through their predecessor-in-interest Embassy, entered into the  
 11 May 7, 1982 Agreement with Spinal Tap Productions ("STP") which was entirely  
 12 owned by Plaintiffs Guest, CPP, RRP and UH. (§ 12.) Defendants have an  
 13 ongoing duty to account and pay to Plaintiffs all royalties and other monies due  
 14 under the Agreement. Vivendi is responsible for accounting under the Agreement,  
 15 through its subsidiaries Canal, which administers film, television, video and  
 16 merchandising rights, and Universal Music Group, which administers sound  
 17 recording rights.

18 73. STP, although dissolved in or about June 1986, has the right to  
 19 prosecute this action against Defendants to enforce the Agreement and collect and  
 20 distribute to its owners all royalties and other monies owed them pursuant to  
 21 California Corporations Code § 2010.

22 74. Plaintiffs Guest, Shearer, Reiner, and McKean also have standing to  
 23 enforce the Agreement pursuant to California Civil Code § 1559 because each of  
 24 them is an intended third-party beneficiary of the Agreement. The Agreement was  
 25 expressly made for their benefit as acknowledged in the various provisions of the  
 26 Agreement calling for their essential creative services as "Screenplay Writers,"  
 27 "Composers/Songwriters," "Actors" and, in the case of Reiner, as "Director/Actor";  
 28 in Paragraphs 4 and 6 of the Agreement which expressly provide for payments – in

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1 fixed, deferred and contingent compensation and royalties from music – to Guest,  
2 Shearer, Reiner and McKean; in Paragraph 7 which expressly grants them rights to  
3 appear as actors in any *Spinal Tap* remakes or sequels at two times the fixed and  
4 deferred compensation and the same contingent compensation each received for  
5 their services in the original Film, or royalties if they did not act in such sequels or  
6 remakes; in Paragraph 8 which requires payments to Guest, Shearer, Reiner and  
7 McKean for any television programs and grants them rights as director, writers and  
8 actors in such television programs; and in Paragraph 13 which required Embassy to  
9 seek to add Guest, Shearer, Reiner and McKean "as additional named insureds in its  
10 errors and omissions insurance policy."

11 75. In the alternative, the loan-out companies of Shearer, Reiner and  
12 McKean, namely Plaintiffs CPP, RRP and UH, have standing to sue as intended  
13 third-party beneficiaries of the Agreement because the contracting parties  
14 specifically negotiated and intended that these loan-out companies would be the  
15 recipients of the three co-creators' benefits under the Agreement. The use of loan-  
16 out companies in the Agreement with Vivendi's predecessor by three of the  
17 co-creators was demanded by the artists and negotiated to provide certain tax and  
18 liability benefits for those artists. Although not specifically articulated in the  
19 "Inducement Letters" which formed part of the Agreement, a core purpose of the  
20 loan-out agreements, fully understood by all parties to the Agreement and custom  
21 and practice in the film industry, was to create a corporate shell for the artists' receipt  
22 of benefits and proceeds from the Agreement. The three co-creators who negotiated  
23 for the use of loan-out companies intended, and Vivendi's predecessor agreed, that  
24 payments and other benefits to the artists under the Agreement would be received by  
25 the loan-out companies rather than the artists in their individual capacities. The  
26 Inducement Letters attached to the Agreement confirm this bargained-for agreement:  
27 In exchange for Shearer, Reiner and McKean's right to receive the benefits of being  
28 paid through their loan-out companies, they and their respective loan-out companies

1 each agreed to "to perform all of the personal services required of [them under the  
2 Agreement]" and further agreed that in the event of any breach of the Agreement,  
3 Embassy "may proceed directly against the [loan-out company or the co-creator],  
4 and may obtain equitable relief ... as though such breach were committed by the  
5 [loan-out company or the co-creator]." This negotiated arrangement reflects the  
6 contracting parties' clear intent to confer both benefits and obligations on the  
7 co-creators' loan-out companies making them intended third party beneficiaries.  
8 Paragraph 13 of the Agreement, which requires Embassy to seek to add the  
9 individual co-creators as well as CPP, RRP and UH "as additional named insureds  
10 in its errors and omissions insurance policy" further confirms that the loan-out  
11 companies were intended third-party beneficiaries under the Agreement. Shearer,  
12 Reiner and McKean do not seek double recovery with their loan-out companies for  
13 any benefits they may receive from the present litigation, but do not waive their  
14 negotiated right to receive those benefits through their loan-out companies.

15 76. At all times, Plaintiffs performed their obligations under the  
16 Agreement.

17 77. Defendants have breached and are in continuing breach of their  
18 obligations under the Agreement by, *inter alia*, engaging in anti-competitive and  
19 unfair self-dealing between Vivendi subsidiaries; cross-collateralizing unsuccessful  
20 films bundled with TIST in their accounting; failing to remit accounting statements;  
21 failing to respond to inquiries and information requests; failing to keep accurate  
22 records; failing to include revenues in accounting statements; claiming  
23 undocumented and false expenses as part of a fraudulent scheme to deprive  
24 Plaintiffs of their contractual rights; and failing to diligently exploit available  
25 revenue streams.

26 78. Plaintiffs have been and continue to be damaged by Defendants' illegal  
27 acts and contractual breaches in amounts to be proven at trial.  
28

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**COUNT II**

**Breach of the Implied Covenant of Good Faith and Fair Dealing  
(Against Vivendi, Canal, and Universal Music Group)**

79. Plaintiffs repeat and reallege the allegations set forth in Paragraphs 1 through 78 above, as if fully set forth herein.

80. The May 7, 1982 Agreement, governed by California law, contains an implied covenant of good faith and fair dealing. Defendants Vivendi, Canal, Universal Music Group, and UMG Recordings, Inc. breached this implied covenant by their acts, including the anti-competitive and unfair business practices among Vivendi subsidiaries alleged herein.

81. Defendants have intentionally abused their power to frustrate Plaintiffs' right to receive the benefit of the bargain made in the Agreement, in a manner that goes beyond mere breach of the Agreement, but as part of an intentional scheme abusing Defendants' discretionary power to deprive Plaintiffs of the benefits contemplated in the Agreement.

82. Plaintiffs have been damaged by Defendants' wrongful conduct in amounts to be proven at trial.

**COUNT III**

**Fraud by Concealment and Misrepresentation  
(Against All Defendants)**

83. Plaintiffs repeat and reallege the allegations set forth in Paragraphs 1 through 82 above, as if fully set forth herein.

84. Since acquiring all pertinent rights in *This Is Spinal Tap*, Defendants Vivendi, Canal, Universal Music Group, and UMG Recordings, Inc., by and through their agents Ron Halpern, Barbara DiNallo and others, have issued periodic profit participation statements to Spinal Tap Productions c/o CAA, representing to Plaintiffs that the gross receipts, expenses and net profits identified therein were truthful and accurate.



1           85. Despite repeated requests made by Plaintiffs' agents from  
2 approximately 2009 to 2012, Defendants have failed to deliver to Plaintiffs  
3 numerous accounting statements, with gaps for years that would have significantly  
4 enhanced revenue, intentionally concealing material facts regarding the actual gross  
5 receipts, expenses and profits owed to Plaintiffs, namely any statements prior to  
6 1989, statements from October 1, 1992 to December 31, 1993 and July 1, 1994 to  
7 December 31, 1994, and statements for the years 2000 to 2001, 2003 to 2005, and  
8 2014. In the accounting statements that Defendants did deliver to Plaintiffs,  
9 Defendants intentionally concealed and/or omitted material facts that were known  
10 only to Defendants and that Plaintiffs could not have reasonably discovered.

11           86. Examples of Defendants' intentional concealment of material facts in  
12 the accounting statements, which were only discovered as a result of the 2013 study  
13 commissioned by CPP, include but are not limited to:

- 14           • failure to account for monies received, including a 2004 settlement  
15 payment received from MGM Home Video totaling over \$1.6 million  
16 dollars for underreported VHS and DVD revenues, when statements  
for the year 2004 were never submitted to Plaintiffs by Defendants;
- 17           • failure to account for and/or collect monies from exploitation of the  
18 soundtrack music rights claimed and administered by the Universal  
19 Music Group, which has reported a mere \$98 (ninety-eight) dollars  
in gross receipts from music sales from 1989 to 2016;
- 20           • improper expense deductions, including undocumented expenses  
21 for "Prints" and "Advertising & Publicity" allegedly totaling over  
\$3.3 million;
- 22           • undocumented charges to "Freight and other Direct Costs" totaling  
23 \$1,087,323 dollars, with over \$600,000 allegedly incurred from  
24 2007 to 2016, more than *twenty* years after the film's initial release,  
and nearly \$100,000 incurred from 2014 to 2016;
- 25           • failure to account for monies under the terms of the Agreement as  
26 "actually received by Embassy in the United States";
- 27           • failure to account for and/or collect revenue on merchandise and for  
28 use of material protected by *Spinal Tap* trademarks and copyright;

- 1 • omission of material information concerning Vivendi's self-dealing  
2 and wrongful sharing of revenues from different Vivendi subsidiaries,  
3 including the improper and disproportionate allocation of costs and  
4 bundling and cross-collateralization of unsuccessful films in the  
5 Embassy catalogue.

6 87. Defendants at all times had an affirmative duty to disclose to Plaintiffs  
7 all material facts concerning the actual gross receipts collected, expenses incurred,  
8 and profits owed to Plaintiffs because Defendants possessed exclusive knowledge  
9 of all material facts which were not known nor readily available to Plaintiffs and  
10 actively concealed those material facts from Plaintiffs, and because Defendants  
11 made partial representations of facts to Plaintiffs but intentionally failed to disclose  
12 other material facts making the accounting statements materially misleading and  
13 deceptive. Defendants intentionally concealed these and other material facts from  
14 Plaintiffs with the intent to deceive and defraud Plaintiffs.

15 88. Defendants also affirmatively represented that the accounting  
16 statements were truthful and accurate, both through affirmative representations made  
17 by Vivendi's agents, including Ron Halpern, and through Defendants' continued  
18 delivery of cumulative accounting statements without correction or amendment by  
19 their agent Barbara DiNallo. Defendants through their agents further affirmatively  
20 represented that they were using all available means to promote *Spinal Tap* assets  
21 and enforce *Spinal Tap* intellectual property to maximize revenue for the creators.  
22 Examples of these affirmative representations include, but are not limited to:

- 23 • Ron Halpern, during a telephone call on September 23, 2004,  
24 concerning a major discrepancy with MGM Home Video's reporting  
25 to Canal of *This Is Spinal Tap* DVD and VHS sales, assured Plaintiffs'  
26 then-manager Harriet Sternberg that he would speak with Canal's  
27 Senior Vice President and CFO, Robert Chamberlain, and promised  
28 that he would support the co-creators efforts to get any revenue they  
deserved. Ms. Sternberg was later informed in a letter dated  
December 16, 2004 that the auditor hired by Canal was unable to  
confirm that MGM reported the video sales properly and  
recommended that Ms. Sternberg discuss the matter with MGM.  
It wasn't until after CPP received the report it commissioned in 2013

1 that CPP and Shearer discovered that Vivendi had received a  
2 settlement payment from MGM for more than \$1.6 million in 2004.  
3 That settlement payment was intentionally hidden from Plaintiffs:  
4 Vivendi to this day has failed to provide an accounting statement for  
the year 2004, and the \$1.6 million settlement does not appear on any  
of the other accounting statements provided to Plaintiffs.

- 5 • Ron Halpern, from approximately September 2008 through 2009  
6 assured Plaintiffs' then-attorney, Barry Tyerman, that the accounting  
7 was accurate, that Halpern and his staff at Canal had not "ripped off"  
8 the co-creators, and that Canal was going "above and beyond" their  
9 contractual duties to the co-creators.
- 10 • Barbara DiNallo from approximately July 2011 to June 2017 sent  
11 periodic accounting statements to STP c/o CAA and to Harry  
12 Shearer's business managers at the firm Power & Twersky in response  
13 to formal requests for all accounting statements related to *This Is  
14 Spinal Tap*. Defendants represented, by each of the accounting  
15 statements that Ms. DiNallo delivered to Plaintiffs after being put on  
16 notice of Power & Twersky's formal demands for complete  
17 accounting statements, that the accounting statements provided were  
18 accurate and truthful.
- 19 • Barbara DiNallo among others at StudioCanal, from approximately  
20 2011 through 2016, told Power & Twersky that StudioCanal was  
21 aware of unlicensed products and unauthorized use of *Spinal Tap*  
22 intellectual property, and Justine Francke from Canal's Legal and  
23 Business Affairs office stated in an email dated April 4, 2014:  
24 "Please be sure that STUDIOCANAL is totally committed to  
25 defending its right holders' interests."

26 89. These representations were knowingly false when made and/or were  
27 made recklessly and without regard for their truth in derogation of Defendants'  
28 and their agents' duty to review and confirm the completeness and accuracy of the  
accounting statements before conveying to Plaintiffs that they were accurate and  
truthful. These representations were made by Defendants with the intent that  
Plaintiffs rely on them. Plaintiffs reasonably relied on these representations to  
their detriment.

90. These representations were made on behalf of Vivendi, Canal, and  
Universal Music Group, which are all responsible for exploitation of pertinent  
*Spinal Tap* rights and for accounting under the Agreement.

1 91. As a direct result of Defendants' intentional misrepresentations and  
2 active concealment of material facts, Plaintiffs were unaware of the true facts.  
3 CPP and Shearer did not discover Defendants' fraudulent accounting practices until  
4 approximately November 2013, and the other plaintiffs did not discover the bases  
5 for their claims until after the initial complaint in this lawsuit was filed on  
6 October 17, 2016. Had Defendants disclosed to Plaintiffs the concealed material  
7 facts, Plaintiffs would have acted differently, including by, without limitation,  
8 shifting control of the exploitation of these assets away from Vivendi many years  
9 earlier and by seeking to recover and enforce trademarks and other intellectual  
10 property rights many years earlier, Plaintiffs would also have avoided the expense of  
11 commissioning a study to discover Vivendi's fraud.

12 92. As a direct result of Defendants' intentional misrepresentations and  
13 active concealment of material facts, Plaintiffs have been harmed and have suffered  
14 damages in amounts to be proven at trial. The damages suffered by Plaintiffs as a  
15 result of Defendants' fraud are different from and in addition to those suffered under  
16 their breach of contract claims, including but not limited to the out-of-pocket  
17 expenses incurred to commission the 2013 study to discover Defendants' fraud, the  
18 lost time-value of money and interest on the monies wrongfully withheld from  
19 Plaintiffs, and punitive damages to punish and deter future fraudulent conduct both  
20 in this action and in the entertainment industry at large.

21 93. Defendants' conduct was willful, wanton and oppressive, and designed  
22 maliciously to steal from, deceive and injure Plaintiffs. Plaintiffs are entitled to an  
23 award of punitive damages to punish and deter this conduct.

#### 24 **COUNT IV**

#### 25 **For an Accounting**

#### 26 **(Against All Defendants)**

27 94. Plaintiffs repeat and reallege the allegations set forth in Paragraphs  
28 1 through 93 above, as if fully set forth herein.

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1 95. Defendants were obligated to provide to Plaintiffs statements accurately  
2 reflecting the amount of revenues derived from the distribution and exploitation of  
3 *This Is Spinal Tap* and associated music, merchandise and other rights, and to remit  
4 to Plaintiffs their share of revenues.

5 96. Despite demand therefor, Defendants have failed and refused, and  
6 continue to fail and refuse, to provide Plaintiffs with proper and accurate  
7 accountings reflecting the amount of revenues derived from the distribution and  
8 exploitation of *This Is Spinal Tap* and associated music, merchandise and other  
9 rights. Instead, Defendants have intentionally provided false and fraudulent profit  
10 participation statements to Plaintiffs.

11 97. The false and fraudulent profit participation statements submitted by  
12 Defendants are cumulative, and entitle Plaintiffs to an accurate and truthful  
13 accounting showing how the current cumulative numbers were calculated.

14 98. Plaintiffs are entitled to an order requiring Defendants to provide their  
15 complete books and records of account in all details.

16 **COUNT V**

17 **Declaratory Judgment of Trademark Rights, 28 U.S.C. § 2201, et seq.**  
18 **(Against Vivendi and Canal)**

19 99. Plaintiffs repeat and reallege the allegations set forth in Paragraphs  
20 1 through 98 above, as if fully set forth herein.

21 100. In 1984, Defendants' predecessor-in-interest Embassy filed a trademark  
22 application with the United States Patent and Trademark Office (USPTO) for  
23 the mark SPINAL TAP in connection with entertainment services rendered by a  
24 musical group. The federal registration for that mark (Registration No. 1311537)  
25 was cancelled by the USPTO in 1991 as shown in Exhibit 1 hereto.

26 101. In early 2000, Defendants' predecessor-in-interest, Canal + D.A., a  
27 Vivendi subsidiary, filed certain trademark applications with the USPTO for the  
28 mark SPINAL TAP in connection with, *inter alia*, entertainment services in the

1 nature of live musical performances by a group, videotape and film production of  
2 live musical performances, and certain merchandising associated with the mark as  
3 shown in Exhibit 1 hereto.

4 102. In or about March 2002, Canal + D.A. filed an instrument with the  
5 USPTO stating that it had merged with StudioCanal Image, a French joint stock  
6 company and Vivendi subsidiary, and that it was conveying its rights to the  
7 applications and registrations for the SPINAL TAP marks to StudioCanal Image,  
8 as shown in Exhibit 2 hereto. StudioCanal Image, which subsequently merged into  
9 Canal, is identified by the USPTO as the last listed owner for federal registrations  
10 for those SPINAL TAP marks, now cancelled, Registration Nos. 2499728, 2463576,  
11 2867023, 2881983 and 2881984.

12 103. Defendants subsequently abandoned the SPINAL TAP marks, resulting  
13 in the USPTO's cancellation of the federal registrations for those SPINAL TAP  
14 marks in 2011 and 2012 as shown in Exhibit 1 hereto. Defendants' abandonment of  
15 the SPINAL TAP marks is reflected by their discontinuation of use or enforcement  
16 of the marks in the ordinary course of trade for at least three consecutive years  
17 without intent to resume use.

18 104. Defendants' abandonment is further evidenced by the fact that  
19 Defendants did not oppose an application filed on December 27, 2013 by Heretic  
20 Brewing Company to register the mark SPINAL TAP for use in connection with  
21 "beer" products, which mark was registered by the USPTO on April 7, 2015  
22 (Registration No. 4717603) as shown in Exhibit 3 hereto.

23 105. Despite Defendants' abandonment of any trademarks rights related to  
24 *This Is Spinal Tap*, including in and to the mark SPINAL TAP, Defendants have  
25 sought selectively to claim rights to the marks against Plaintiffs, and have sought to  
26 prevent Plaintiffs from performing or selling merchandise in association with the  
27 mark SPINAL TAP unless Defendants grant a license and receive payment for  
28 such use.

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1 106. CPP, rejecting Defendants' claim of rights, has filed on behalf of each  
2 of the four co-creators applications with the USPTO for federal registration of the  
3 mark SPINAL TAP – which have been assigned serial numbers 87203893  
4 and 87203921 – for, *inter alia*, entertainment services in the nature of live music  
5 concerts and dramatic, comedic and musical performances and for certain  
6 merchandise as set forth in Exhibits 4 through 5 hereto.

7 107. A substantial controversy exists between the parties as to whether  
8 Plaintiff CPP has the right to use and register the trademark SPINAL TAP in  
9 connection with entertainment performances and merchandise. The controversy has  
10 sufficient immediacy and reality to warrant the issuance of a declaratory judgment.  
11 A judicial declaration is necessary and appropriate at this time in order that Plaintiff  
12 CPP and the four co-creators may ascertain their rights and duties with respect to  
13 the mark SPINAL TAP.

14 108. Plaintiffs seek declaratory judgment pursuant to 28 U.S.C. § 2201 and  
15 Federal Rule of Civil Procedure 57, confirming that their use of the SPINAL TAP  
16 marks in connection with the services and goods set forth in CPP's trademark  
17 applications does not infringe any abandoned trademark rights of Defendants.

## 18 **COUNT VI**

### 19 **Declaratory Judgment of Copyright Reversion, 17 U.S.C. § 203**

#### 20 **(Against Vivendi, Canal, and Universal Music Group)**

21 109. Plaintiffs repeat and reallege the allegations set forth in Paragraphs  
22 1 through 108 above, as if fully set forth herein.

23 110. Section 203 of the 1976 Copyright Act gives an author (or authors of a  
24 joint work) the right to terminate the grant of a copyright in a work executed on or  
25 after January 1, 1978. This termination right can be exercised at any time during a  
26 five-year period beginning 35 years after the date of execution of the grant; or, if the  
27 grant covers the right of publication of the work, the period begins at the end of the  
28 sooner of (i) 40 years from the date of execution of the grant or (ii) 35 years from

1 the date of publication of the work under the grant. 17 U.S.C. § 203(a)(3).  
2 Termination of the grant may be effected "notwithstanding any agreement to the  
3 contrary." *Id.* § 203(a)(5). The termination is effected by serving an advance notice  
4 in writing signed by the author or a majority of the authors who executed the grant  
5 upon the grantee or the grantee's successor in title. *Id.* § 203(a)(4). Upon the  
6 effective date of termination, all rights that were covered by the terminated grants  
7 revert to the author or authors subject to certain limitations. *Id.* § 203(b).

8 111. Shearer, Guest, McKean and Reiner are the authors of all works  
9 associated with the *Spinal Tap* band and motion picture *This Is Spinal Tap*,  
10 and owned all copyrights in the works immediately upon their creation including  
11 but not limited to copyrights in the musical compositions, sound recordings and  
12 characters appearing in the 20-minute film they created, and all musical  
13 compositions, sound recordings, and characters that appeared in *This Is Spinal Tap*,  
14 as well as the screenplay and the film itself (collectively, the "*Spinal Tap Works*").

15 112. Pursuant to so-called "Instrument[s] of Transfer" executed as part of  
16 the May 7, 1982 Agreement with Embassy, Shearer, Guest, McKean and Reiner  
17 assigned all of their copyrights in the *Spinal Tap Works* to Spinal Tap Productions  
18 ("STP"), which STP assigned to Embassy.

19 113. Defendants Vivendi, Canal, and Universal Music Group, among others,  
20 are successors-in-interest to Embassy's rights under the May 7, 1982 Agreement,  
21 including the copyrights in the *Spinal Tap Works* assigned to Embassy.

22 114. In October and November 2016, Shearer, Guest, McKean, and Reiner  
23 served on Defendants and others and recorded in the U.S. Copyright Office  
24 copyright termination notices pursuant to Section 203 of the Copyright Act of 1976  
25 to recapture all of their copyrights in the *Spinal Tap Works*. The termination  
26 notices, copies of which are attached as Exhibits 6 through 9 hereto, have effective  
27 dates starting March 2, 2019.

28



1 115. A substantial controversy exists between the parties with respect to the  
2 validity and legal effect of the copyright termination notices. Vivendi and Canal,  
3 in their February 28, 2017 motion to dismiss filed with this Court, have asserted  
4 that the creators' works constituted "works for hire" which "are not eligible for  
5 termination under Section 203" and threatened to file a counterclaim against  
6 Shearer for declaratory relief to confirm that the creators have no termination rights.  
7 [Doc. # 24 at 3:4-18.] Vivendi and Canal further asserted in the motion to dismiss  
8 that the artists' filing of the copyright termination notices has placed a "cloud" over  
9 "the movie and music copyrights" to *This Is Spinal Tap*, and that this "cloud"  
10 allegedly has already damaged "StudioCanal's ability to distribute *Spinal Tap* and to  
11 otherwise enjoy its lawful rights to the movie." [Id.] Plaintiffs are informed and  
12 believe that Vivendi's claim of damages is also asserted on behalf of its subsidiary,  
13 Universal Music Group, and that both entities intend to challenge the termination  
14 notices for the sound recordings from *This Is Spinal Tap*.

15 116. The controversy has sufficient immediacy and reality to warrant the  
16 issuance of a declaratory judgment. A judicial declaration is necessary and  
17 appropriate at this time in order that Shearer, Guest, McKean, and Reiner may  
18 ascertain their rights and duties with respect to the copyrights and ensure that they  
19 can rely on quiet, unclouded title to their copyright interests.

20 117. Plaintiffs seek a declaratory judgment pursuant to 28 U.S.C. § 2201  
21 and Federal Rule of Civil Procedure 57, confirming the validity and effectiveness  
22 of the copyright termination notices and that the exercise of their termination rights  
23 does not represent a breach of any rights asserted by Defendants.

#### 24 RELIEF REQUESTED

25 WHEREFORE, Plaintiffs respectfully request that the Court enter an Order:

26 (a) Compelling Defendants to produce the original books and records of  
27 account and to satisfactorily and accurately account to Plaintiffs with respect to all  
28 expenses and revenues for the film *This Is Spinal Tap*, including associated music,

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1 merchandise and other revenues, and to disgorge the monies due to Plaintiffs  
2 therefrom;

3 (b) Declaring that Plaintiff CPP's registration and use of the SPINAL TAP  
4 mark in connection with the goods and services set forth in its trademark  
5 applications do not infringe on any abandoned trademark rights of Defendants;

6 (c) Declaring that the copyright termination notices served on Defendants  
7 and recorded in the U.S. Copyright Office by Shearer, Guest, McKean and Reiner  
8 are valid and effective as of the termination dates set forth in the termination notices  
9 and do not infringe on any copyrights claimed by Defendants.

10 (d) Awarding Plaintiffs the following:

11 (i) Compensatory and punitive damages in amounts to be  
12 determined at trial;

13 (ii) Costs of suit;

14 (iii) Reasonable attorneys' fees;

15 (iv) Pre- and Post-Judgment Interest as allowed by law.

16 (e) Granting such other and further relief as the Court deems just and  
17 proper.

18 **JURY DEMAND**

19 Pursuant to Rule 38 of the Federal Rules of Civil Procedure, Plaintiffs  
20 demand a trial by jury on all issues triable by right to a jury.

21 DATED: October 19, 2017

**BALLARD SPAHR LLP**

*/s/ Peter L. Haviland*

Peter L. Haviland

Attorneys for Plaintiffs  
Century of Progress Productions,  
Christopher Guest, Rob Reiner  
Productions, United Heathen,  
Spinal Tap Productions, Harry Shearer,  
Rob Reiner, and Michael McKean

**CERTIFICATE OF SERVICE**

I hereby certify that on October 19, 2017, I electronically filed a true and correct copy of the foregoing **SECOND AMENDED COMPLAINT AND DEMAND FOR JURY TRIAL** through the Court’s CM/ECF system, which will send a notice of electronic filing to all interested parties in the action through their counsel of record as follows:

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