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Defendants Underdogs, Inc. (“Underdogs”) and Laura Albert respectfully submit this memorandum of law in support of their motion under Fed. R. Civ. P. 56, seeking dismissal of all the remaining claims asserted by plaintiff, Antidote International Films, Inc. (“Antidote”), as well as attorney’s fees and costs as the prevailing party under the option contract.

Preliminary Statement

Captivated by the novel, *Sarah*, film director Steve Shainberg pitched to Antidote the idea of making it into a movie. Antidote, motivated to work with Shainberg, negotiated with Judi Farkas for the film rights to the novel.

The end-result of their extensive negotiations was an option contract between Antidote and Underdogs, the latter owning all rights to the novel. Underdogs granted to Antidote the exclusive right, for the option period, to purchase rights to produce the film based on the novel *Sarah*, and to prepare a screenplay and otherwise develop the film; Antidote would own all rights in the developed materials (*e.g.*, the screenplay). Antidote paid Underdogs \$15,000 for the first option year, and then another \$15,000 for each of two, additional one-year extensions, which effectively tied up the work for three years.

Conspicuously absent from this contract—because it was never bargained for—were the rights to the JT LeRoy’s life-story (or biography). JT LeRoy was not even a party to the option, which was confined to the fictional novel. Now, Antidote confesses that they planned to weave elements of JT LeRoy’s supposed, real-life story into the fantastical world of *Sarah*. But their creative concept overstretched the narrow limits of the option contract.

During the final year of the option, an article in *New York Magazine* revealed that “JT LeRoy” was Laura Albert. Eager to capitalize on publicity elicited by the controversy, Antidote embarked on another, revised “meta-film.” This revised concept was to weave the life of Laura

Albert, and the controversy, into the *Sarah* film. And they were aware that other filmmakers, including the ubiquitous Harvey and Bob Weinstein, had begun developing on their own JT LeRoy projects.

In order to execute the newly-revised concept and still be in the mix of those jockeying to produce films capitalizing on the controversy, Antidote needed Laura Albert's life-story rights. Instead of offering to pay for them, Antidote opted to use the threat of a lawsuit to acquire those rights and further extend the option for another full three years without paying. Underdogs and Laura Albert rebuffed Antidote.

Frustrated by the rebuke as the final year of the option was to expire, Antidote concocted a supposed breach so as to trigger an automatic extension. Antidote then alleged fraud, in order to acquire Laura Albert's life-story rights through judicial reformation.

There is no precedent for finding liability against a novelist who attributes her own works to a pseudonym. Joyce Carol Oates writes, "[M]otives for writing under a pseudonym are likely to be as varied and idiosyncratic as there are pseudonymous writers."¹ Using a nom-de-plume is protected artistic expression, not actionable artifice.

In her moving *Paris Review* interview, Laura Albert revealed how her pseudonymous self (JT LeRoy) gave voice to inexpressible trauma she experienced, which resulted in multiple psychiatric hospitalizations and culminated in her being declared a ward of New York State as a teenager. Her personal story is a compelling counterpoint to her novel, *Sarah*. But the author's life-story was never part of the bargain.

¹ Joyce Carol Oates, *Success and the Pseudonymous Writer: Turning Over A New Self*, New York Times Book Review, December 6, 1987, *reprinted in* Joyce Carol Oates, *Pseudonymous Selves, in (Woman) Writer: Occasions and Opportunities* (Dutton 1988), *revised and reprinted at* <http://www.usfca.edu/~southern/rosamond.html> (December 11, 2003) (last visited January 10, 2007). A copy of the revised article is annexed as Exhibit A to the Declaration of Eric Weinstein accompanying this motion.

Statement of Facts

A full recitation of the material facts, with citations to evidentiary support in the record, is set forth in separately-numbered entries in the accompanying Local Civil Rule 56.1 statement. Those facts are cited in this brief as “SF-__.”

Standard on this Motion and Applicable Law

Summary judgment is appropriate where “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c); *see also Marvel Characters, Inc. v. Simon*, 310 F.3d 280, 285–86 (2d Cir. 2002).

The moving party bears the initial burden of identifying the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The opposing party then must come forward with “specific facts showing that there is a genuine issue for trial.” Fed. R. Civ. P. 56(e). If he fails to make “a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial,” then summary judgment must be granted. *Celotex*, 477 U.S. at 322. “Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial.” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (internal quotation omitted). The determination is “guided by the substantive evidentiary standards that apply to the case.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

New York law applies to this case. The option contains a choice-of-law provision, which states in pertinent part: “The laws of the State of New York applicable to contracts negotiated, executed, and fully performed within said State shall apply to this Agreement.”

Argument

I. DEFENDANTS DID NOT BREACH THE OPTION

A. Underdogs Did Not Breach the Sole Author Representation

In its July 17, 2006 letter to Underdogs, Antidote alleged a breach of paragraph 9(a) of the option—the representation and warranty that JT LeRoy is the “sole” author of the novel, *Sarah*. The provision reads in full: “JT LeRoy is the sole author of the Work and Owner is the sole and exclusive owner and proprietor throughout the universe of the Work and any and all Granted Rights granted to Producer herein.”²

The term *Owner* is defined in the preamble: “Underdogs, Inc. c/o Judi Farkas . . .” Option, at p. 1. The preamble also introduces JT LeRoy as the author of the *Work*, which is defined as: “That certain published literary property entitled ‘SARAH’ written by JT LeRoy and first published by Bloomsbury in 2000 and registered for copyright in the U.S. by JT LeRoy on [sic] 2000, Entry No. 2001275819.” With the basic terms defined in the preamble, Underdogs then represents and warrants in paragraph 9(a), that JT LeRoy is the “sole” author of the Work.

As explained in the accompanying expert report of Professor Leon Friedman, there was no breach of this representation. The clause is standard in entertainment contracts, to insure that (i) the purchaser has acquired all the necessary rights, (ii) there is no defect in the grantor’s title, and (iii) there is no co-author who could convey rights to a competitor. *See* Declaration and

² Option, ¶ 9(a). There is no allegation that Underdogs breached the second clause of paragraph 9(a); *i.e.*, that Underdogs failed to deliver the rights necessary to make the film. The term “Granted Rights” is defined, in pertinent part, as the “sole and exclusive right, title, and interest (including, but not limited to, all copyrights and renewals and extensions thereof) present and future in and to the Work, its characters, stories, story lines, plots, including without limitation the sole and exclusive rights to produce motion picture(s) . . . based upon or adapted from the Work.” Option ¶ 5. No third party has claimed, or could claim, rights that jeopardize Antidote’s ability to make the film.

Expert Report of Leon Friedman, dated November 16, 2006 (“Friedman Rep.”), ¶¶ 14, 15.

Friedman declares that he examined the option contract, and states,

the purpose of the “sole author” clause is **not** to assure the purchaser that the listed name of the author is or is not a pseudonym or pen name. Rather the purpose is to assure the purchaser that it has acquired all the necessary rights to be able to make the film, and no third party can come forward to claim any rights in the property.

Id. ¶ 18 (emphasis added).

Antidote does not allege and cannot prove any breach based on co-authorship or third-party authorship. Accordingly, Antidote cannot establish a breach of paragraph 9(a).

B. Underdogs Complied with the Obligation to Provide Documents

The only other alleged breach-of-contract concerns paragraph 13, which provides: “At Producer’s request, Owner will at no additional cost or expense to Producer, execute and deliver such further documents and perform such further acts consistent herewith as may be or become reasonably necessary or desirable to effectuate the purposes of this Agreement.”³

Underdogs complied with this provision. On February 27, 2006, Antidote’s attorney, Irwin Rappaport, requested that Underdogs and Laura Albert review and ultimately sign various documents to clarify Underdogs’ title to the Work. SF-54. In an email to Rappaport on March 3rd, the attorney for Underdogs and Laura Albert, M.J. Bogatin, approved the language (after consulting with Laura Albert and Carolyn Albert, the latter being Underdogs’ principal and Laura Albert’s mother). SF-55. Bogatin also requested confidentiality that would have allowed Antidote to share the documents with potential investors. SF-55.

³ Option, ¶ 13. Notably, Antidote mentioned only paragraph 9(a), not paragraph 13, in its July 17, 2006 letter alleging breach-of-contract.

Neither Rappaport nor Antidote responded to Bogatin's March 3rd email or his follow-up telephone messages. SF-56. Apparently, Antidote was satisfied that it acquired clear title to the novel *Sarah*. SF-57. Because Underdogs complied with Antidote's request for documents, there was no breach of paragraph 13 of the option.

II. ANTIDOTE CANNOT SATISFY THE ELEMENTS OF FRAUD

Under New York law, a party alleging fraud must establish, by clear and convincing evidence, all of the following five elements: (1) a material misrepresentation or omission of facts; (2) made with knowledge of its falsity; (3) with an intent to defraud; and (4) reasonable reliance on the part of the plaintiff; (5) that causes damage to the plaintiff. *Schlaifer Nance & Co. v. The Estate of Andy Warhol*, 119 F.3d 91, 98 (2d Cir. 1997); *Reznor v. J. Artist Management, Inc.*, 365 F. Supp. 2d 565, 575 (S.D.N.Y. 2005) (Rakoff, J.).

Antidote says they believed that the fictional work *Sarah* was the semi-autobiographical work of an actual, androgynous, reclusive street-hustler named JT LeRoy. Assuming that JT's supposed personal history (biography) constitutes the misrepresentations that Laura Albert and Underdogs allegedly made, those statements are not actionable.

A. There is No Scienter in the Face of a Valid Pseudonym

“Fraud presupposes a willful purpose resorted to with intent to deprive another of his legal rights.” *Reno v. Bull*, 226 N.Y. 546, 551, 124 N.E. 144, 145 (1919).

Liability cannot result from an author’s writing under a nom-de-plume, as distinguished from writing under another natural person’s name.⁴ As the Supreme Court explained, “Great works of literature have frequently been produced by authors writing under assumed names. Despite readers’ curiosity and the public’s interest in identifying the creator of a work of art, an author generally is free to decide whether or not to disclose his or her true identity.” *McIntyre v. Ohio Elections Committee*, 514 U.S. 334, 341 (1995).⁵

“An author’s decision to remain anonymous, like other decisions or omissions to the content of a publication, is an aspect of freedom of speech protected by the First Amendment.” *McIntyre*, 514 U.S. at 342; see *Muzikowski v. Paramount Pictures Corp.*, 2005 U.S. Dist. LEXIS 13127 * 38 (N.D. Ill, Jun. 10, 2005) (“Although the protections of the [First Amendment] are by no means absolute, many legally cognizable interests must sometimes yield when their enforcement would stifle the ability of another to express an idea or communicate a thought.”).

JT LeRoy was born out of the trauma that Laura Albert experienced as a child and onwards—trauma that resulted in multiple psychiatric hospitalizations, culminating in her being

⁴ The Court previously asked, hypothetically (during oral argument on the motions to dismiss) whether a judge can write a work titled *Life and Times in the Southern District of New York* identifying the author as William Shakespeare. The answer is no, because the author is impersonating Shakespeare. See *Roddy-Eden v. Berle*, 202 Misc. 261, 264 (N.Y. Sup. 1951) (refusing to enforce a contract between an unknown writer and Milton Berle that would identify Berle as the author of the book). Laura Albert and Underdogs did not impersonate anyone.

⁵ Among the distinguished writers mentioned by the Court in *McIntyre* are Mark Twain, George Sand and George Elliot. *Id.*, fn. 4. In her article “Pseudonymous Selves,” Joyce Carol Oates provides examples of writers (usually women) who wrote under (often male) pseudonyms for personal, political, and artistic reasons. See fn. 1, *supra*; Weinstein Dec. Ex. A.

declared a ward of New York State as a teenager. SF-5. She explains that JT LeRoy “existed” before she wrote any books, as a “release valve” for those painful experiences, a voice to express what was inexpressible shame and humiliation, with a ray of hope:

Through JT, I found a way to express the pain that I experienced in my life, and the drive to transcend the impulse toward self-destruction. JT possessed an ability to love and to ask for help under what felt to me was a crushing weight of suffering and paralysis.

SF-6. Clearly, Laura Albert did not intent to defraud or impersonate anyone. Being JT LeRoy was comfortably within the realm of artistic expression protected by the First Amendment.

B. The Author’s Personal History was Immaterial to the Bargain

Materiality is not based on a plaintiff’s subjective perceptions. “A party asserting fraud must be warranted in taking the misrepresented matter into account when deciding to act.”

Banque Franco-Hellenique De Commerce Int’l et Maritime, S.A. v. Christophides, 106 F.3d 22, 26 (2d Cir. 1997).

The test is an objective one: “whether the information would have been reasonably certain to have had a substantial effect on a reasonable person” in deciding upon the transaction. *Cresswell v. Sullivan & Cromwell*, 704 F. Supp. 392, 408 (S.D.N.Y. 1989), *aff’d in part, vacated and remanded in part on other grounds*, 922 F.2d 60 (2d Cir. 1990); *see also Metropolitan Life Ins. Co. v. Union Trust Co. of Rochester*, 268 A.D. 474, 483, 51 N.Y.S.2d 318, 326 (4th Dept. 1944), *aff’d*, 294 N.Y. 254, 62 N.E.2d 59 (1945).

In *Metropolitan Life*, the plaintiff purchased mortgages from the seller and received title policies at the time of purchase. Several of the properties soon became subject to superior liens for local property tax assessments, and in order to clear title, the purchaser was required to pay the delinquent assessments. The plaintiff alleged fraud, and testified that had it known about the

tax assessments, it would have rejected the loan applications. But at the time of the loan, the plaintiff did not seek information on the subject; and the loan submission sheet did not require the information. The appellate court concluded, “It is not possible now to charge the defendant for failing to disclose what did not appear to be material at the time, and as to which there is no substantial evidence that the plaintiff considered it material.” *Metropolitan Life*, 268 A.D. at 483, 51 N.Y.S.2d at 326.

Similarly here, the issue of JT LeRoy’s supposed personal history was not among the “key deal points” reached in April 2003. SF-22. The issue did not once come up during the four-month-long negotiations, which were addressed solely to the fictional work *Sarah*. SF-23, 24.

The option that Antidote signed concerned rights to produce the film based upon the novel, without referring to JT LeRoy’s biography. Although Antidote now claims that they planned to weave JT LeRoy’s personal history into the film, this plan did not find its way into the option contract.⁶ The option stands in stark contrast to another option that Antidote drafted, for the work “Famous Long Ago,” authored by Sixties activist Raymond Mungo. Included there was a provision expressly requiring the author to consult and provide information and materials concerning “incidents, events, experiences, observations and feelings,” and to consent to Antidote’s incorporating them into the film. SF-27, 28.

The test for determining materiality for fraud is to focus on the transaction, *i.e.*, the contract. “The fact represented as true must be material to the transaction. . . . It must be the very ground on which the transaction took place.” *Whitcomb v. Shultz*, 223 F. 268, 276 (2d Cir.

⁶ Antidote had an opportunity to discuss acquiring rights to JT LeRoy’s personal history and supposed celebrity. Perhaps Antidote did not want to pay for them. *See Grant v. Esquire, Inc.*, 367 F. Supp. 876, 883 (S.D.N.Y. 1973) (“If the publisher feels impelled to trade upon the name and reputation of a celebrity, it must pay the going rate for such benefit.”).

1915). The *Whitcomb* case involved a supply agreement, to produce and sell 10,000 vending machines (like a model submitted), by a manufacturer to a sales company. The sales company repudiated the contract after the first 2,100 machines were delivered. The manufacturer's assignee successfully sued the surety, which had guaranteed the sales company's performance (purchase and payment obligations), in an action at law. The surety then brought an action in equity to enjoin enforcement of the judgment on grounds of fraud, *i.e.*, that he was fraudulently induced to enter the surety contract by the manufacturer's representation that it would produce parts for the vending machines at its own plant, and not outsource the production.

The Second Circuit analyzed the surety contract: "This brings us to inquire what the contract of suretyship was." *Whitcomb*, 223 F. at 276. The Court held that the contract was to assure the sales company's purchase and payment obligations (of the supply agreement), not the manufacturer's obligations. Hence, the manufacturer's ability to produce parts in-house was not related to the surety contract. The Second Circuit further explained that even if the contract assured the manufacturer's obligations, the representation that it could produce parts at its own plant "would be immaterial" because the manufacturer's obligations did not concern the sourcing of parts for the vending machines. *Id.*

Here, the option contract was confined to the novel *Sarah*. It did not include Antidote's standard provision expressly obliging the author to consult on, provide, and consent to the use of all, "information, material, ideas, incidents, events, experiences, observations and feelings." SF-28. JT LeRoy was not even a party to the option contract. He was not obligated to provide *any* rights (let alone life-story rights), or assist in developing the film. Antidote was not warranted in taking the alleged misrepresentations into account in entering the option contract. They were not material to the bargain.

C. Antidote Could Not Have Reasonably Relied on JT LeRoy's Biography

There can be no reasonable reliance in the face of an express disclaimer. *Donahue v. Ferolito, Vultaggio & Sons*, 13 A.D.3d 77, 786 N.Y.S.2d 153 (1st Dep't 2004). In *Donahue*, the plaintiffs purchased and drank herbal iced teas and fruit punch, relying on deceptive advertising on the labels promising health benefits, when there were none. The appellate division affirmed dismissal of the fraud claim for failure to demonstrate justifiable reliance, in light of the product involved and an express disclaimer on the label that refuted the allegation of any promise of a health benefit.

Here, Antidote says it believed the novel was semi-autobiographical, largely because of information provided on the back cover of the book and on Bloomsbury's web site. This position is untenable: the very notion of a "semi-autobiographical novel" is an oxymoron. The word novel is defined as: "an *inventive prose narrative* of considerable length and a certain complexity *that deals imaginatively with human experience* through a connective series of events involving a group of persons in a specific setting." Webster's Third New International Dictionary (emphasis added).

The book clearly designates the work as a novel (on the front cover, the back cover, and the binding), and as fiction (on the back cover). SF-35. In defining the word *fiction*, Merriam-Webster provides this quote, attributed to British historian A.J. Toynbee:

When we call a piece of literature a work of fiction we mean no more than that **the characters could not be identified with any persons who have lived in the flesh, nor the incidents with any particular events that have actually taken place.**

Id. (emphasis added). Antidote concedes they knew the novel was a work of fiction. SF-34. The book's disclaimers—"novel" and "fiction"—are sufficient to negate Antidote's claim of reasonable reliance that the work is autobiographical.

In addition to the express disclaimers on the book, “[c]ircumstances may be so suspicious as to suggest to a reasonably prudent plaintiff that the defendants’ representations may be false, and that the plaintiff cannot reasonably rely on those representations, but rather must make additional inquiry to determine their accuracy.” *Schlaifer*, 119 F.3d at 98 (internal quotation omitted). In *Schlaifer*, the licensee of works in the estate of the artist Andy Warhol sued the estate for misrepresentation, concerning promises that the estate had exclusive ownership of all assets, when in fact some assets had entered the public domain or were held by third parties. Affirming summary judgment, the Second Circuit held there was no reasonable reliance: there were “red flags” flying during the contract negotiations. *Schlaifer*, 119 F.3d at 101.

The citation to Warhol is ironic. His name—and penchant for blurring the lines between fact and fiction—was invoked in a *New York Observer* article that Levy-Hinte read at very time he was negotiating the option. SF-38. The article discussed a reading of LeRoy’s works that Shainberg attended at the Public Theater. SF-36. It questioned JT LeRoy’s identity and personal history. So did JT LeRoy himself:

[LeRoy] explained that he saw Mr. Warhol’s Factory as a model: a group of talented outcasts who huddled together for warmth, simultaneously manipulating and rebelling against the traditional systems. “Andy fucked with the art world, and I think the literary world needs to be fucked with,” said Mr. LeRoy.

LeRoy even adopted Warhol’s signature prop, a shaggy blond wig. But Antidote paid no heed, took no precautions, and sought no assurances. SF-37, 39. On the contrary, when informed that Underdogs, not LeRoy, owned the literary rights to the novel, Levy-Hinte changed the “Owner” of the works to Underdogs. SF-29, 30. Yet, he did not secure the necessary name, likeness, or biography rights from JT LeRoy. If Antidote wanted those rights, they were downright reckless (“stupid” is how Levy-Hinte describes it) in preparing and negotiating the option. SF-31, 32, 33.

All of this not only undermines the claim of reasonable reliance, but also further undermines Antidote's allegation that the author's life-story rights were material.

D. Antidote's Injury was Neither Cognizable Nor Caused by the Alleged Fraud

A party seeking to recover damages for fraud must show actual pecuniary loss. *Dress Shirt Sales, Inc. v. Hotel Martinique Assocs.*, 12 N.Y.2d 339, 344, 190 N.E.2d 10, 12–13, 239 N.Y.S.2d 660, 664 (1963) (affirming summary judgment on issue of injury). The damages must be “the direct, immediate, and proximate result of the misrepresentation . . . and independent of other causes.” *Kregos v. The Associated Press*, 3 F.3d 656, 665 (2d Cir. 1993) (affirming a summary judgment dismissal of fraud claim on account of no pecuniary loss).

Antidote cannot establish pecuniary loss. The true measure of damage is indemnity for the actual pecuniary loss sustained as a direct result of the wrong, *i.e.*, the difference between the value of the bargain which a plaintiff was induced by fraud to make and the amount or value of the consideration exacted as the price of the bargain. *Lama Holding Co. v. Smith Barney*, 88 N.Y.2d 413, 421, 668 N.E.2d 1370, 1373, 646 N.Y.S.2d 76, 80 (1996); *Reno v. Bull*, 226 N.Y. 546, 553, 124 N.E. 144 (1919).

The burden is on the plaintiff to prove its actual pecuniary loss. *Ostano Commerzanstalt v. Telewide Sys., Inc.*, 794 F.2d 763, 766–67 (2d Cir. 1986). Antidote cannot cite evidence to support its conclusory allegation that its rights were rendered “worthless” by the controversy. Amended Complaint, ¶ 48. Antidote never even submitted the *Sarah* project to investors or distributors, either before or after the controversy. SF-66.

On the contrary, Levy-Hinte carefully guarded the film development and rights to *Sarah*, in hopes of making his “meta-film” or selling them to the Weinstein brothers. SF-61. Shainberg

himself admitted that another director “absolutely” could make a movie based on the novel *Sarah*. SF-67.

Nor can Antidote allege loss causation. This requires that the alleged misrepresentation proximately caused the injury. *Cumberland Oil Corp. v. Thropp*, 791 F.2d 1037, 1044 (2d Cir. 1986).

Here, Antidote (led by Shainberg) gave up their concept expressed in the contract early on, planning to weave JT LeRoy’s life-story into the novel *Sarah*. SF-46. They again changed concepts, in favor of Shainberg’s “meta-film” incorporating the controversy. SF-49, 50, 51, 53. Any injury was caused not by fraud, but upon the unilateral, independent decision they made to forego their original concept. *See Lama Holding Co. v. Smith Barney, Inc.*, 88 N.Y.2d 413, 422, 668 N.E.2d 1370, 1373 (1996) (dismissing a fraud claim where refusal to go forward was based on “an independent business decision” made by the plaintiffs).

III. RESCISSION IS UNAVAILABLE AS A REMEDY IN THIS CASE

A. There are No Grounds for Rescission

Antidote seeks rescission on account of misrepresentations “regarding *Sarah*’s authorship and the author’s biographical information.” Amended Complaint ¶¶ 151–52. A contract may be voidable on account of mistake “only where the asserted mistake concerns ‘a basic assumption on which the contract was made.’” *Independent Order of Foresters v. Donald, Lufkin & Jenrette, Inc.*, 157 F.3d 933, 940 (2d Cir. 1998); *see also Da Silva v. Musso*, 53 N.Y.2d 543, 552, 428 N.E.2d 382, 387, 444 N.Y.S.2d 50, 55 (1981) (mistake must be so material so as to go “to the foundation of the agreement”).

In *Dambmann v. Schulting*, 75 N.Y. 55 (1878), the plaintiff released the defendant's loan payment obligation based upon a mistaken assumption as to the defendant's financial condition.

The Court of Appeals held,

There was no mistake of any **intrinsic fact essential to the contract** or involved therein. The defendant's financial condition was an extrinsic fact, which might have influenced the plaintiff's action if he had known it. But ignorance of or mistake as to such fact is not a ground for affirmative equitable relief.

Dambmann, 75 N.Y. at 64.

Similarly here, Antidote may have held an incorrect assumption regarding JT LeRoy's supposed biography. But his biography was not part of the transaction, and "had no effect on the agreed exchange of performance." *Da Silva*, 53 N.Y.2d at 522, 428 N.E.2d at 387, 444 N.Y.S.2d at 55. Thus, the supposed mistake was not so material as to warrant rescission.

B. Antidote Ratified the Option and Therefore Cannot Rescind It

A party may not rescind a contract on grounds of fraud if, after acquiring knowledge of the supposed fraud, he affirms the contract by accepting a benefit under it. *See, e.g., Agristor Leasing-II v. Pangburn*, 162 A.D.2d 960, 557 N.Y.S.2d 183, 184 (4th Dep't 1990), *quoted in Petrello v. White*, 412 F. Supp. 2d 215, 227 (E.D.N.Y. 2006).

"It is well settled that a defrauded party to a contract may elect to either disaffirm the contract by a prompt rescission or stand on the contract and thereafter maintain an action at law for damages attributable to the fraud." *Big Apple Car, Inc. v. The City of New York*, 204 A.D.2d 109, 611 N.Y.S.2d 533, 534 (1st Dep't 1994).

After receiving notice of the alleged fraud (upon publication of the Beachy article in October 2005), Antidote stood on the contract (or at least their outsized version of the contract that included JT LeRoy's biography). They considered alternatives and, far from demanding

rescission, sought to leverage its rights into something grander. First, they tried to acquire Laura Albert's life-story rights to carry out their revised concept—the “meta-film.” SF-58. But they were rebuffed right away. SF-59. When that overture failed, Antidote still chose to maintain control over the rights, in hopes of selling them to the Weinstein brothers for a profit. SF-61. As late as July 17, 2006, just three weeks before the option was scheduled to expire, Antidote made a final attempt to keep the rights by declaring an automatic extension. SF-62.

IV. THE UNJUST ENRICHMENT CLAIM FAILS BECAUSE PAYMENTS WERE MADE UNDER AND FOR THE OPTION

Antidote alleges unjust enrichment against Underdogs and Laura Albert, because “they unjustly retained the money [\$45,000] paid to them” *See* First Amended Complaint ¶ 154. To state a claim for unjust enrichment, a plaintiff must show: (1) the defendant was enriched; (2) the enrichment was at the plaintiff's expense; and (3) the circumstances were such that equity and good conscience require the defendant to make restitution. *Hutton v. Klabal*, 726 F. Supp. 67, 72 (S.D.N.Y. 1989).

“The existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter.” *Clark-Fitzpatrick, Inc. v. Long Island R.R. Co.*, 70 N.Y.2d 382, 388, 521 N.Y.S.2d 653, 656, 516 N.E.2d 190, 193 (1987). Here, \$45,000 was paid for the option over its three-year existence (the original, one-year term plus two, one-year extensions).

Furthermore, Underdogs granted Antidote exclusive screenplay and other development rights, and refrained—for the entire three-year period—from alienating the film rights in the novel *Sarah*. The payment was *quid pro quo* for Underdog's granting the rights and restraining itself from entering into another deal for *Sarah*.

V. THERE ARE NO GROUNDS FOR REFORMATION

Antidote claims that reformation is warranted on grounds of fraud and mutual mistake. Amended Complaint ¶¶ 138 (fraud), 142 (mutual mistake). They seek to reform paragraph 8, which reads as follows: “Antidote shall have the unlimited and perpetual right to utilize Owner’s name, approved likeness and approved biography in connection with the Work. . . .” Option ¶ 8. The option having expired, this claim is conditioned on the Court’s finding a “material breach” and invoking the automatic extension of the option. Option ¶ 1(c)(ii).

The thrust of a reformation claim is that the contract does not set forth the actual agreement of the parties. Thus, the proponent must “show in **no uncertain terms**, not only that mistake or fraud exists, but exactly what was really agreed upon between the parties.” *Chimart Assocs. v. Paul*, 66 N.Y.2d 570, 574, 489 N.E.2d 231, 234, 498 N.Y.S.2d 344, 347 (1986) (affirming the First Department’s decision to grant the plaintiff’s motion for summary judgment against defendant’s claim of reformation) (emphasis added).

What Antidote conveniently overlooks is that the term *Owner* is defined neither as JT LeRoy nor as Laura Albert. According to the preamble of the option, the Owner is Underdogs—not the author. Underdogs, which owned only the literary rights to JT LeRoy’s works, did not and could not offer rights to the author’s biography. Antidote knew that Underdogs owned the literary rights in the novel Sarah, but neither knew nor inquired what other rights Underdogs owned. SF-31, 32, 33.

VI. UNDERDOGS IS ENTITLED TO ATTORNEY’S FEES AND COSTS

“[W]here a contract authorizes an award of attorney’s fees, such an award becomes the rule rather than the exception.” *McGuire v. Russell Miller, Inc.*, 1 F.3d 1306, 1313 (2d Cir. 1993). Underdogs and Antidote have requested attorney’s fees and costs, pursuant to paragraph

25 of the option, which reads in pertinent part: “In connection with any dispute arising in connection with this Agreement, the prevailing party shall be entitled to recover from the other reasonable attorney’s, fees and costs at both the trial and appellate levels.” Option ¶ 25. As the prevailing party, Underdogs is entitled to attorney’s fees, the amount of which should be determined in a separate, post-judgment hearing.

Conclusion

Antidote received exactly what they bargained for: the rights to develop a movie based on the novel *Sarah*. What changed was not the value of those rights, but their creative vision for the project. Unable to acquire the author’s life-story rights after-the-fact, Antidote asks this Court to transfer them against Laura Albert’s will, and to extend the option without establishing a breach. But the author’s biography was never part of the bargain. The Court should grant this motion for summary judgment, dismiss all of the remaining claims, and award attorney’s fees and costs to Underdogs.

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