Nos. 11-55104 & 11-55172

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CELADOR INTERNATIONAL, LTD.,

Plaintiff-Appellee/Cross-Appellant,

v.

AMERICAN BROADCASTING COMPANIES, INC.; BUENA VISTA TELEVISION, LLC; and VALLEYCREST PRODUCTIONS, LTD.,

Defendants-Appellants/Cross-Appellees.

Appeal From The United States District Court
For The Central District of California
The late Honorable Florence-Marie Cooper, District Judge
Honorable Virginia A. Phillips, District Judge
USDC No. 2:04-cv-03541-VAP

APPELLEE / CROSS-APPELLANT CELADOR INTERNATIONAL, LTD.'S PRINCIPAL AND RESPONSE BRIEF (SECOND BRIEF ON CROSS-APPEAL)

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CORPORATE DISCLOSURE STATEMENT

Plaintiff-Appellee / Cross-Appellant Celador International, Ltd. is a wholly-owned subsidiary of Celador Entertainment, Ltd.

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INTRODUCTION

Who Wants To Be A Millionaire was a phenomenal success in the United Kingdom and internationally—indeed, a cultural phenomenon ("final answer," "phone a friend"). That's why ABC sought out and directly contracted with the show's British owner (plaintiff Celador International Ltd. (Celador)) to produce, broadcast, and merchandise the show in North America, promising to split profits 50/50. But when the time came to split profits, the show—which had propelled ABC to the top of network rankings and "turned ABC around"—supposedly yielded an enormous loss on its network run.

How could this be?

The ostensible "loss" was the product of classic Hollywood accounting: Defendants arranged among themselves that *Millionaire* could never show a network-run profit for Celador to share in. The jury saw defendants' conduct for what it was, finding that defendants violated both express and implied contractual obligations: It awarded Celador what, in the context of *Millionaire*'s phenomenal success, were modest damages based on a fair market license fee for the show's network run.

No district court error contributed to this result, which was amply supported by the evidence. The Court should affirm.

JURISDICTION

Celador agrees with appellants' jurisdiction statement.

Jurisdiction is the same for the cross-appeal, which was timely filed 14 days after the appeal. ER270, 273.

STATEMENT OF ISSUES

Appeal

1. Did the district court properly decide that the Rights Agreement was ambiguous and subject to conflicting extrinsic evidence in submitting contract interpretation questions to the jury?

2. Does substantial evidence support the jury's express findings that the parties' contract:

   a. Obligated ABC to share its profits "derived by ABC/BVT from the exploitation of" *Millionaire*?

   b. Does not allow defendants to reduce Celador's merchandising profits share by deducting merchandising distribution expenses that necessarily duplicate the agreed 50% distribution fee?

3. Does substantial evidence support the jury's conclusion that defendants breached the implied covenant of good faith and fair dealing by entering into a series of unnecessary, backdated,

incomplete, and illogical transactions among themselves designed to avoid sharing network-run profits with Celador?

4. Did the district court act within its discretion in excluding an irrelevant, hearsay, unauthenticated, and confusing spreadsheet; irrelevant evidence of foreign and syndication performance; and unnecessary and argumentative jury instructions?

5. Did the district court act within its discretion in allowing Celador to present a damages range derived from alternative fair market network license fee calculations, especially where the jury likely did not adopt the approach defendants complain about?

6. Did the district court act within its discretion in excluding tangential and irrelevant evidence regarding complex corporate transactions occurring seven years after the Rights Agreement was signed?

Cross-Appeal

Did the district court erroneously bar Celador's fraud claim where ABC promised to share profits from exploiting *Millionaire* while secretly arranging with its affiliated entities to preclude Celador from sharing in ABC's exploitation?

Relevant statutory and rule provisions appear in Addendum C.

STATEMENT OF THE CASE

Celador sued American Broadcasting Company, Inc. (ABC), Buena Vista Television (BVT) and Valleycrest (an assignee) for failing to pay promised shares of *Millionaire*'s profits during its network run (i.e., when it was being broadcast over ABC). ER3796, 3802. Celador sued for breach of express contract, breach of the implied covenant of good faith and fair dealing, and fraud. *Id*.

For procedural reasons, the district court barred Celador "from claiming [that it was] entitled to share *directly* in ABC's revenues." ER239 (emphasis added). At the same time, the court held that Celador was "not prevented from claiming an *indirect* share of ABC's revenues, including advertising revenues and profits, that should have flowed to [Celador] through BVT" and was "free to present evidence of ABC's success, revenues, and profits derived from *Millionaire*, in order to establish what it should have paid to BVT, in the form of a license fee, or otherwise." *Id*. (emphasis added). Consistent with this ruling, Celador presented evidence of what a fair market value ABC-BVT license fee would have been, a fee in which Celador would have shared. This same damages measure applied under both the express contract and implied covenant theories.

Celador also sought damages because defendants short-changed it in sharing merchandising profits, by deducting tens of millions of dollars of expenses from merchandising revenue that they were not authorized to deduct.

After a 15-day trial with 20 fact witnesses, 8 expert witnesses, and 150+ exhibits, *see* SER23, 29-82, 86, Celador's claims for breach of contract and of the

implied covenant of good faith and fair dealing went to the jury. ER82-98. The district court directed a defense verdict on Celador's fraud claim. SER1-4; *see also* SER5-13.

The district court made several evidentiary and instructional rulings that defendants challenge on appeal; we address the details in the argument section.

The jury found that the Rights Agreement entitled Celador to 50% of ABC's profits and what should have been BVT's profits and that defendants took unauthorized deductions from merchandising income. ER82-97. The jury awarded Celador roughly $260 million in network-run license fee damages and $9 million in merchandising damages. ER99. The parties stipulated to $50 million in prejudgment interest. ER56. The court denied defendants' post-trial motions, rejecting many of the same arguments defendants urge on appeal. ER1-54.

STATEMENT OF FACTS

"Although the court should review the record as a whole, it must disregard evidence favorable to the [party challenging the verdict] that the jury is not required to believe, and may not substitute its view of the evidence for that of the jury." *First Nat'l Mortgage Co. v. Fed. Realty Inv. Trust*, 631 F.3d 1058, 1067 (9th Cir. 2011) (citation and quotation marks omitted). Defendants ignore this principle; we won't.

A. Parties.

Appellee and plaintiff Celador International Ltd. (fka Entertainment Developments) owned the rights to *Millionaire*. ER411-12, 859-60, 863-71, 2998-99; SER327-37. Its affiliate and agent, Celador Productions Ltd., negotiated the Rights Agreement on Celador International's behalf and on its own behalf, as owner of Paul Smith's services; it also produced *Millionaire* in the U.K. ER83, 406, 477-79, 3000-01.

Appellants and defendants are part of The Walt Disney Company (Disney), a vertically-integrated media conglomerate. ER569, 2275-76, 2455. ABC, a broadcast network, and affiliated company BVT, a distribution company, are parties to the Rights Agreement. ER3085; *see also* ER2281. Production company Valleycrest Productions Ltd. (Valleycrest) is an assignee. ER1277, 1407. Valleycrest, BVT, and another Disney entity, non-party Buena Vista Productions (BVP), shared officers and often acted interchangeably and for one another. ER1182-83, 1250-52 (BVT handled Valleycrest accounting), 1275, 1304-05

(Disney handled all audits), 1406-07, 1577-78, 3104-11 (Disney/Valleycrest account to Celador on ABC/BVT contract); SER201-03, 243 (BVT makes option payment; ABC reimburses it). Disney has guaranteed the judgment to stay execution on appeal. SER14-15.[1]

B. *Millionaire* Is A Smash Hit In Britain And Worldwide.

Celador chairman Paul Smith developed *Millionaire* in the United Kingdom. ER406-10, 2998-99.

Millionaire premiered in the U.K. in 1998 and was an immediate, overwhelming success. ER416-17. It quickly became an international phenomenon that Celador licensed throughout the world. ER416-19.

C. ABC Seeks The North American *Millionaire* Rights.

1. At ABC's behest, the William Morris Agency approaches Celador.

After seeing *Millionaire*'s U.K. version, senior Disney and ABC executives coveted the North American rights for ABC. ER1487-90, 2905-06, 2914-15; SER275.

After an initial lukewarm response from Celador, ER2906-08, ABC executive vice-president Michael Davies called Ben Silverman of the William Morris Agency (WMA) and promised to pay WMA a lucrative commission if it delivered *Millionaire* rights to ABC. ER2908-10.

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[1] Addendum A lists the principal players.

Silverman cold-called Celador's Smith to discuss North American *Millionaire* licensing rights. ER422-23, 427, 511-12, 3005. Celador never offered ABC rights in any other territory. ER635, 853, 899-900, 1026.

2. Celador insists on a deal directly with ABC, which ABC promises.

Celador wanted a direct network deal, *not* a deal with a production company. ER428, 519-20, 585, 654-55. Celador communicated its network-deal requirement to ABC, including directly to ABC's Davies. ER519 (Smith "wanted to be in business with a network"; WMA "communicated . . . Mr. Smith's business terms and his strategy to people at ABC"), 652 (Celador "wanted to make a deal with a network" and "told Mr. Davies, for example, that [it] wanted to make a network deal"), 654-55 (Smith "let people from ABC know," either directly or through WMA, that regardless of BVT's involvement Celador "was quite specific that [it] wanted a network deal").

Davies told Celador that ABC would be the "cleanest relationship"—that is, a "direct relationship" without other individuals or companies involved. ER528-29; *see also* ER2923.

Celador believed and relied on these representations. ER465-66, 530-32.

3. Celador and ABC agree to split network profits 50/50.

Early on, Celador and ABC agreed that they would share *Millionaire*'s North American profits 50/50. ER533-42, 3289-90. ABC's lead negotiator Lee Bartlett noted that this split applied to network profits, writing: "Network side,

Disney, 50/50" and "Network: 50/50 3rd off the top." ER2971-74, 3156-57. ABC proposed sharing profits in syndication, cable *and* network. ER923. That is what WMA understood from ABC. ER538, 540, 920-24, 3148-50.

Celador typically received 90% of *Millionaire* merchandising rights, but ABC insisted on a 50/50 merchandising split. ER448-50. In return, Celador received a 50/50 split on profits from the network broadcast. *Id.*

According to Bartlett, the deal was essentially complete by December 1998, and it was solely with ABC. ER2984-85, 2987. Silverman thought this 50/50 deal was extraordinary—"rich" and favorable to Celador. ER541-42.

4. ABC brings its affiliated entity BVT into the deal; ABC and BVT secretly agree to guarantee that Celador will never see a dime from *Millionaire*'s network-run broadcast.

Once Celador had committed to the ABC deal, ABC unnecessarily injected its affiliated entity BVT into the contract. ER1157-60. But ABC remained a party to the contract, which its lawyers negotiated and drafted. ER593-94, 1051, 3096.

Despite Celador's insistence on a direct deal with ABC and ABC's promise of such a deal, ABC never intended to share its network profits with Celador. ER1061, 1083-86. Before signing the Rights Agreement, ABC and BVT secretly agreed that (1) for no consideration, ABC would cede all *Millionaire* license rights to BVT; (2) in return, ABC would get a perpetual license for the network broadcast and keep all network broadcast profits; and (3) BVT would profit from first-run syndication. ER1157-58, 1160-61, 1173. ABC and BVT further agreed

that Celador would only share BVT's profits. ER1176, 1244-45. Central to this arrangement was a supposed ABC-BVT agreement that ABC would pay a license fee equal to BVT's production costs, meaning that no matter how many hundreds of millions of dollars ABC earned, BVT could not possibly do better than break even on the license fee. ER1244-45. Because BVT was entitled to a 10% overhead charge and interest, ER3102 ¶¶ 3, 4, the arrangement *guaranteed* that *Millionaire* would show a perpetual, ever-increasing network-run broadcast *loss*. ER938-39, 1244-45. Indeed, the longer *Millionaire*'s network run, the greater its supposed loss would be.

BVT's profit would come from merchandising and first-run syndication rights, which it considered the "home run" in the deal. ER1165-66, 1192. The earlier *Millionaire*'s syndication, the greater BVT's profit opportunity. ER1165-66.

According to BVT's head of business affairs, "there was really no reason based on the deal that ABC and BVT had that ABC even had to be a party to" the Rights Agreement except for "historical perspective" and that Celador "wanted to make a deal with ABC." ER1173-74.

No one told Celador about any of this. ER721-22, 937-38, 962-63, 1029; SER346.

D. The Celador-ABC/BVT Rights Agreement.

ABC in-house lawyer Lee Rierson drafted the Rights Agreement. ER1055, 3170-84.[2] Rierson started with another rights agreement, parts of which were revised during several months of negotiations. ER1056-60, 3185-235; SER212-23. In March 1999, Celador Productions signed the Rights Agreement in its own right and as agent for rights-owner Celador International. ER83, 475-79, 3096.

The Rights Agreement's principal features were:

ABC and BVT are both contracting parties. Both ABC and BVT were parties to the Rights Agreement, referred to as "*collectively* 'ABC/BVT.'" ER3085 (emphasis added).

ABC and BVT both receive full license rights. Celador licensed to "ABC/BVT" all rights to produce, broadcast, syndicate and merchandise *Millionaire* throughout North America. ER3085, 3087 ¶ 2.

"ABC/BVT" agree to share 50% of all profits derived by "ABC/BVT" from Millionaire. ABC and BVT promised Celador "fifty percent (50%) of one hundred percent (100%) of the Defined Contingent Compensation (as defined according to ABC/BVT's standard definition as set forth in Exhibit 'B' hereto) derived by ABC/BVT from the exploitation of any Pilot and Series produced hereunder." ER3088 ¶ 3.B(1). ("Defined Contingent Compensation" is simply a profits definition. *See* ER923. For clarity, we use the common term "profits.")

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[2] The final version, ER3085-3103, is Addendum B to this brief.

Exhibit B is an uncompleted boilerplate form titled "BVT Defined Contingent Compensation Definition." ER3102-03. It states that the "Producer"—not defined—"shall be entitled to ___ Percent of 100% of Defined Contingent Compensation" derived from "episodes of the Series produced by Producer." ER3102. Exhibit B's terms are "intended to be understood and applied *only* as defined and used *in the agreement* and are not intended to correspond to any conventional understanding or dictionary definition of such words and terms, whether used in the entertainment industry or any other industry or business . . . ." ER3103 (emphasis added).

At trial, ABC's Rierson agreed that there was a "conflict" between the agreement's ABC/BVT references and Exhibit B's BVT-only references. ER1092-93.

Merchandising: Only expenses "directly" related to the Pilot and/or Series may be deducted. In calculating merchandising profits, Exhibit B allows BVT to deduct a 50% "domestic merchandising" fee. ER3102 ¶ 1. It limits the deduction for out-of-pocket advertising, promotion and distribution expenses to those "*directly* related to the Pilot and/or Series." ER 3091 ¶ 3.B(3)(vi) (the Rights Agreement inserts "directly" into Exhibit B's language), 3102 ¶ 2 (emphasis added). "Directly" was added at Celador's request. ER881-83, 1103-04, 2307-10. Elsewhere Exhibit B distinguishes between "episodes of the Series" and "ancillary" rights, i.e., merchandising. ER661, 3102 ("Defined Receipts" definition).

E. *Millionaire* Is A Smash ABC Hit, Rescuing ABC From The Ratings Cellar.

Millionaire debuted on August 16, 1999, and was literally an overnight sensation, propelling laggard ABC to top ratings. ER526, 546, 1511, 2941-42, 2945-46. Its "stellar," "awesome" top-ratings performance turned around the whole ABC network. ER3302-03; SER277-79; *see also* ER1798 (*Millionaire* had an unprecedented four of the top 10 network rankings in its first season).

Disney CEO Michael Eisner described *Millionaire* as "the most important thing to happen to ABC since 'I don't know when'"—it was "going to turn around ABC." ER3302; *see* ER1503 ("Michael Dammann" is Eisner). Eisner valued *Millionaire* at a billion dollars or more. SER279 (as important as NFL deal); ER1529-30 (NFL deal $1+ billion per year), 3302 (*Millionaire* "worth maybe $1B, wild guess, maybe more").

F. Defendants Create A Flurry of Puzzling Post-Rights Agreement Transactions—Purposeless Except To Shield ABC's Network-Run Profits.

After the Rights Agreement had been signed, defendants entered into a mindboggling succession of agreements that shuffled *Millionaire* rights and obligations among various Disney-affiliated entities. Most, if not all, of these "agreements" were without consideration and were unnecessary, if not nonsensical, except as a way to ensure that *Millionaire* would purportedly *never*

earn network-run broadcast profits for Celador to share. The supposed agreements were:

- July 9, 1999: Buena Vista *Productions* (BVP) purportedly issues a perpetual network license to ABC, even though ABC, as a party to the Rights Agreement, *already has* that license. ER1274-76, 3085-96, 3286-88. At some unknown time, for no stated reason, and without documentation or consideration, BV***T*** had supposedly transferred its rights to BV***P***. ER1275-76. In return, ABC agrees to pay BVP a $187,500/$210,000 per half-hour/full hour episode license fee. ER3286-88. The purported license nowhere states that the license fee will always equal the production costs. ABC suggested the license fee amount. ER1222-23. Defendants contend now, as they did at trial, that this is the operative license agreement. APB15 n.3,[3] citing ER3287; *see* ER2819-20 (defendants' closing argument, referring to Exhibit 86 [ER3286-88] as the final license agreement).
- August 17, 1999 (the day after ABC's first *Millionaire* broadcast): ABC unilaterally modifies the ABC-BV***P*** license agreement so that BV***P*** cannot syndicate *Millionaire* in its second year without ABC's approval—eliminating the "home run" profit opportunity BV***T*** thought it had. ER1166, 1189-94, 3286-88. Shortly thereafter, ABC's president

[3] APB = Appellants' Principal Brief.

defends that decision, saying "it is impossible for me to deprive the network of a hit." ER1522-23; SER316.

- November 1999, backdated to July 9, 1999 (the date of the BV***P***-ABC license agreement): Valleycrest purports to license *Millionaire* to ABC on the same terms as the ABC-BV***P*** assignment. SER347-82. It can do this because, again at some unknown time and for no stated reason or consideration, BV***T*** supposedly orally transferred its rights to Valleycrest. ER1277-78, 1406-07. (Thus, BV***T*** claimed to transfer its rights separately to both BV***P*** and to Valleycrest.) The ABC-Valleycrest license is never signed. SER360; ER1268, 1413-15. Nonetheless, Disney later tells Celador's auditors that this is the *Millionaire* license agreement. ER1563-64; SER264-67.
- February-April 2000, backdated to April 24, 1999: ABC assigns all of its rights in the Rights Agreement to BVT, even though BVT, as a party to the Rights Agreement, *already has* these rights. ER1278-80, 3085-96, 3284-85. In two initial drafts ABC and BVT (and, therefore, presumably Celador) are to share in each other's gross receipts from distribution and exploitation, including BVT's sharing in ABC's gross revenues. SER317-23; ER1138-44. The final (April 2000) version deletes all reference to shared revenue/receipts. ER1144-45, 3284-85.

- August 2000, backdated to July 15, 1999: In an unexecuted draft document, BVT purports to assign all of its rights under the Rights Agreement to Valleycrest. SER244-50; ER1403-06.

G. ABC Increases Others' Compensation From The Network Run.

1. ABC pays BVT more money.

ABC repeatedly reworked its network-run deal with BVT, agreeing to pay BVT for supposedly increased production costs.

- March 2000: ABC agrees to pay BVT an additional $25,000 per week. The original draft called for ABC to share with BVT 50% of any revenue from any other ABC exploitation of *Millionaire*. ER1311, 3291. As finalized, however, there is no sharing of ABC revenue—instead *BVT* must share *its* income with ABC. ER1309-12; SER276, 384-85.
- June 2000: ABC agrees to pay BVT an additional $60,000 per week "production fee" and $500,000 for overhead costs for the 1999/2000 broadcast season. ER1147-48, 3293.

Nothing in the record, and no accounting defendants ever provided, shows what production costs actually were. Rather, "production costs" are simply numbers denominating cash-flow transactions between ABC and affiliated companies.

2. ABC increases WMA's *Millionaire* license-fee-based commission retroactive to *Millionaire*'s inception.

WMA's commission was based in part on *Millionaire*'s network license fee. SER255. *Millionaire*'s phenomenal success led WMA to complain that its commission was too small. In response, ABC agreed to pay WMA a commission based on a higher, "assumed" or "imputed" per-episode license fee ($250,000/$400,000 instead of $187,500/$210,000) retroactive to *Millionaire*'s first episode. ER942-51, 956-60; SER207-10, 251-52, 280. Celador knew nothing of this.

H. Despite *Millionaire*'s Unprecedented Success, Defendants Report Ever-Increasing Losses Prompting Celador's Audit.

According to defendants, the "billion-dollar" *Millionaire* franchise was a financial disaster.

Defendants' first accounting to Celador (called a profit participation statement) claimed a $9 million network broadcast *loss* and a $1.5 million merchandising *loss*. ER3106, 3108. The second accounting showed an $18 million network loss and a $2.1 million merchandising loss. ER3116, 3118.

According to defendants, the losses continued to mount in syndication: After three years on the network and seven years of syndication, *Millionaire* supposedly generated a *loss* of over $73 million on purported receipts (network and syndication) of $515 million. SER344; ER2104-05. To date, besides an

initial $250,000 option payment, ER481-82, Celador has received nothing for ABC's network broadcast and BVT's syndication of *Millionaire*.[4]

For merchandising, Celador received approximately $5.6 million in nonrefundable advances on gross receipts exceeding $71 million. SER343. But ABC/BVT claimed an overall merchandising *loss* based on the following deductions:

Merchandising distribution fee:	$35 million
Merchandising distribution expenses:	$36 million
WMA commission:	$3 million

Id.

These counterintuitive results are consistent with what defendants' expert conceded is a studio's goal of reporting the lowest net profits possible—a goal that, he admitted, studios achieve through excessive expense deductions and Alice-in-Wonderland, "a word means what I say it means" contract interpretations. ER2618-20.

Upon receiving the first statement in January 2001, Celador expressed to WMA its "grave concerns as to the accuracy of the reporting we have recently received from ABC," including the enormous distribution expense deductions. ER663-64, 3277. "Shocked" at the numbers and that *Millionaire* could be running at a loss, WMA suggested an audit, stating that "it is not possible to satisfactorily

[4] Celador Productions received approximately $21 million in executive producer fees for Smith's services. ER2553.

determine a) the reasonableness of some of the figures provided and b) if some of the calculations are in compliance with specific contract items." ER638-39, 1023, 3299; SER339. WMA recommended a full analysis of network receipts and production costs. ER3299-3300.

Celador promptly hired auditors to "[t]race gross receipts to network, syndication and selected merchandise license agreements." ER3280; *see also* ER1445. Defendants delayed the audit until the second accounting statement, in July 2001. ER1446, 1675-76, 3053; SER113-14, 291.

The auditors spent more than a year seeking necessary information from defendants, including network license fee documentation. ER1552-55, 1576-77, 2451-52, 3279; SER260, 293. Defendants claimed, but could not document, an express license-fee-equals-production-costs contract. ER1555, 1568-69; SER151.[5] To this very day—including in their opening brief—defendants have never identified a single piece of paper or oral communication to that effect.

In early 2003, the auditors issued a report identifying missing documents and unresolved issues. SER146-80. Celador and defendants entered into a tolling agreement while they attempted to resolve the outstanding issues informally. ER700-04; SER324-26. In 2004, after that effort was unsuccessful, Celador sued.

[5] Defendants initially claimed the unsigned Valleycrest-ABC license was the operative license agreement. ER1562-64; SER264-67, 347-82.

ARGUMENT SUMMARY

Standards of Review. Defendants incorrectly overstate the role of de novo review. The contract language and disputed extrinsic evidence render the Rights Agreement reasonably susceptible to Celador's interpretation. In that circumstance, contract meaning is a jury determination. Review is for substantial evidence, as is whether defendants breached the implied covenant. The remaining issues are subject to abuse of discretion review. Only the district court's determination that ambiguity exists and Celador's cross-appeal arising from a nonsuit are reviewed de novo.

Express Contract Breach. ABC is undeniably a party to the Rights Agreement, which defines ABC and BVT collectively as "ABC/BVT." *ABC/BVT* promised to share *Millionaire* profits "derived by *ABC/BVT*," according to the "*ABC/BVT* standard definition." On appeal, defendants, relying solely on Exhibit B, a boilerplate BVT form defining profits, claim that "ABC/BVT" *unambiguously* means only BVT. To state their argument is to refute it.

The Rights Agreement adopts Exhibit B as *ABC*/BVT's definition, not just BVT's. Exhibit B does not supersede the Rights Agreement. Indeed, it says the Rights Agreement's language controls.

Celador need not show that its interpretation is the only one possible (although it is the most reasonable). Ambiguity and disputed extrinsic evidence create a jury question. More than substantial evidence—overwhelming evidence—supports the jury's determination.

Implied Covenant Breach. The guaranteed-loss structure that defendants tried to foist on Celador violates the implied covenant of good faith and fair dealing. ABC and BVT schemed to shield *Millionaire*'s network broadcast profits from Celador. That scheme included a jumble of unnecessary, no-consideration, inexplicably backdated (when documented at all) and incoherent supposed transactions guaranteeing that *Millionaire*, on paper, would only lose money on its breathtakingly successful ABC network run—indeed, would lose more money the longer its run lasted. The implied covenant verdict affords an independent basis to affirm the judgment.

Network License Damages. Celador properly proved its damages based on the licensing structure that defendants purported to put in place, expert opinion as to fair market license fee value, industry custom that license fees are reset on success and defendants' conduct in resetting others' compensation (including back to the inception of *Millionaire*'s network run).

Merchandising. Celador specifically negotiated for the "*directly* related to" modification to Exhibit B's expense deduction. It bars double-dipping ancillary expense deductions on top of a 50% distribution fee. Substantial extrinsic evidence supports Celador's interpretation.

Evidence and Instructions. Defendants' evidentiary and instructional issues emphasize a spreadsheet found on WMA's computer whose author, assumptions, purpose, and methodology are all unknown. The district court appropriately exercised its discretion in excluding such speculative "evidence" on relevancy, hearsay, authenticity and Rule 403 grounds.

The remaining evidentiary and instructional arguments fare no better. The rulings were well within the district court's discretion, involving evidence that was irrelevant and more prejudicial and time-consuming than probative, and jury instructions that were unnecessary and argumentative.

Cross-Appeal. Celador's cross-appeal is conditional, effective only if the current judgment is reversed. In that event, the Court should remand Celador's fraud claim, which the district court erroneously dismissed. A promised network deal made with an admitted intent not to perform and a concealed arrangement to bleed all possible network-run profit from the deal is fraud.

The judgment should be affirmed. If not, retrial should include Celador's fraud claim.

ARGUMENT

I.

DEFENDANTS BREACHED THEIR CONTRACT OBLIGATIONS TO SHARE NETWORK-RUN BROADCAST PROFITS WITH CELADOR.

A. Breach Of Express Contract: The Text And Extrinsic Evidence Make The Rights Agreement Reasonably Susceptible To Celador's Reading And Support The Jury's Verdict.

The Rights Agreement requires ABC to share its *Millionaire* profits 50/50 with Celador. That's what Celador insisted on and that's the deal everyone negotiated: As Disney/ABC's negotiator wrote in his notes, "Network side 50/50." That's also what the contract explicitly says: Celador shares in the profits "derived by ***ABC***/BVT from the exploitations of any Pilot and Series produced hereunder"—i.e., *Millionaire*. ER3088 (emphasis added).

Yet defendants claim that the Rights Agreement *unambiguously*—as a matter of law—bars Celador from sharing ABC's network-run profits. This isn't even remotely plausible.

To prevail, Celador need only show that the agreement is *reasonably susceptible* to its reading in light of relevant, conflicting extrinsic evidence. *Compare* §§ I.A.1. & 2., *infra*. The judicial role is limited to the threshold reasonable-susceptibility determination, which is reviewed de novo. *In re Bennett*, 298 F.3d 1059, 1064 (9th Cir. 2002). After that, contract meaning is for the jury,

whose determination this Court reviews for substantial evidence, viewing the evidence and drawing all reasonable inferences in the verdict's favor. *First Nat'l Mortgage*, 631 F.3d at 1067-68; *City of Hope Nat'l Med. Ctr. v. Genentech, Inc.*, 43 Cal. 4th 375, 395 (2008).

1. Reasonably read, the Rights Agreement entitles Celador to share ABC's network-run profits.

a. The text expressly imposes profit sharing on ABC.

The starting point is the Rights Agreement's text. There, *ABC* promised to share its network profits:

- "This letter shall confirm the agreement between ***American Broadcasting Companies, Inc. ('ABC')*** and Buena Vista Television ('BVT') (***collectively, 'ABC/BVT'***)" and Celador. ER3085 (emphasis added); *see* ER1175-76 (BVT's Loughery: contract refers to ABC in its role as a broadcast network).
- Celador "shall be entitled to receive fifty percent (50%) of one hundred percent (100%) of the Defined Contingent Compensation [profits] (as defined according to ***ABC***/BVT's standard definition as set forth in Exhibit 'B' hereto) derived by ***ABC***/BVT from the exploitation of any Pilot and Series produced hereunder." ER3088 ¶ 3.B(l) (emphases added).
- Defined Contingent Compensation "shall be defined, accounted for and distributed in accordance with ***ABC***/BVT's standard definition, which is

> attached hereto as Exhibit 'B,' . . . ." ER3089 ¶ 3.B(3) (emphasis added). ABC thus adopted *as it own* the Exhibit B "standard definition" profits formula (all receipts less five specified deductions [distribution fee, *directly* related expenses, commission, etc.]).

ABC separately signed the Rights Agreement. ER3096. ABC's name is directly tied to the profits-sharing promise. The contract isn't just *reasonably susceptible* to a reading that ABC promised to share *Millionaire* profits—that is its *most* reasonable reading.

b. On its face, Exhibit B does not supersede the Rights Agreement.

Defendants claim that the boilerplate profits definition, Exhibit B, supersedes ABC's profits-sharing promise. They argue that because the form only names BVT, it transforms the Rights Agreement's "ABC/BVT" into merely "BVT." APB30. But Exhibit B doesn't *eliminate* ambiguity—it *creates* it, as both Judge Cooper and Judge Phillips found. ER20-22, 244. Even ABC's own draftsman, Rierson, admitted that Exhibit B "conflict[ed]" with the Rights Agreement. ER1092-93.

Under defendants' reading, Exhibit B effectively strikes "ABC" from the Rights Agreement's profits-sharing provision: Celador would receive net profits "(as defined according to ~~ABC~~/BVT's standard definition as set forth in Ex. 'B' hereto) derived by ~~ABC~~/BVT from the exploitation" of *Millionaire*. This reading is unreasonable under settled contract interpretation principles.

- "The whole of a contract is to be taken together . . . each clause helping to interpret the other." Civ. Code § 1641.[6] Courts must "give effect to every word or term employed by the parties and reject none as meaningless or surplusage," "interpret[ing] the contract in a manner that gives full meaning and effect to all of the contract's provisions and avoid a construction of the contract that focuses only on a single provision." *In re Crystal Properties, Ltd., L.P.*, 268 F.3d 743, 748 (9th Cir. 2001); *Brobeck, Phleger & Harrison v. Telex Corp.*, 602 F.2d 866, 872 (9th Cir. 1979) (favoring construction making contract internally consistent). References to ABC in the Agreement's body cannot be ignored. Read as a whole, the Rights Agreement does not limit profit sharing to BVT's profits.
- "Particular clauses of a contract are subordinate to its general intent." Civ. Code § 1650. Exhibit B must be read *in light* of—not *instead* of—the body of the agreement. And that is what Exhibit B says. Its terms are "to be understood and applied only as defined and used in *the agreement* . . . ." ER3103 (emphasis added). "[T]he agreement" is the Rights Agreement to which it is attached, not Exhibit B itself. *Compare* ER3102 (defining "'Defined Receipts'" "[f]or purposes of *this* Agreement" (emphasis added) *with* ER3102-03 (Participant "understand[s] the terms of *the* agreement *and* Defined Contingent

[6] All statutory references are to the California codes.

Compensation," defined in Exhibit B; no guarantee of participant's contingent compensation "provided in *the* agreement *and* defined herein [i.e., Exhibit B]," emphases added, both distinguishing between "the" agreement and Exhibit B).

- Coupled with ABC-BVT's supposed license-fee-equals-production-costs deal, defendants' reading makes network-run broadcast profits an impossibility. Indeed, the longer the network run, the bigger *Millionaire*'s network-run *loss*. The jury could properly find that the parties did not intend a guaranteed no-profits outcome. *See* Civ. Code § 1643 (contracts to be construed reasonably); ER1029 (had Celador known this, it would not have signed the contract).

- It is at least as likely as not that ABC simply adopted the Exhibit B profits definition *formula* as its own and didn't disavow its own profits-sharing promise. Exhibit B contains important blanks (e.g., profit share percentage). Incongruously with the deal here, it refers to the non-BVT profit participant as "Producer," not the "Owner" identified in the Rights Agreement, contemplating that "Producer" will physically produce the show, a role Celador was *not* undertaking. ER3102; *see* ER3088. Under Exhibit B, BVT subcontracts out *production services* to another entity, not vice versa. ER21 (district court: These discontinuities "permit[] an inference that other provisions of Exhibit B, including the sources of the compensation (*i.e.*, ABC's profits or revenues), are not fully articulated. . . . [W]hen read in conjunction with the Rights Agreement,

Exhibit B may reasonably be interpreted to entitle Plaintiff to a portion of ABC's profits or indirectly entitle Plaintiff to a portion of ABC's profits and revenues, distributed through BVT").[7]

- Exhibit B was a drafting shortcut, not a deal revision. *City of Hope*, 43 Cal. 4th at 393-94 (drafting history relevant to contract meaning). An ABC lawyer drafted the Rights Agreement. ER1055. The deal was far different from anything he (or for that matter ABC) had done in "a long, long time." ER1042-43; *see also* ER1037-40. He "pulled" a boilerplate BVT form for a "typical contingent compensation definition." ER1059-60, 1087, 1095. No evidence suggests that anyone thought Exhibit B changed the basic deal that Celador negotiated with ABC.
- The typewritten Rights Agreement prevails over Exhibit B's boilerplate form language. Civ. Code § 1651; Code Civ. Proc. § 1862.
- The provision at issue—sharing profits—benefits Celador. Between equally permissible constructions, the one favoring Celador, as the benefitted party, "is to be taken." Code Civ. Proc. § 1864.

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[7] Defendants suggest that Judge Phillips prejudged whether the Rights Agreement was reasonably susceptible to Celador's interpretation. APB30-31. Hardly. Exhibit B's BVT references, compared to the Rights Agreement's repeated "ABC/BVT" references, she held, sufficed to create ambiguity. Having so found, she identified Exhibit B's omission of essential terms and other incongruities as *further* textual ambiguity evidence. ER20-21.

Defendants suggest that it is "implausib[le]" that the parties could have failed to articulate sharing ABC's profits. APB31. But the Rights Agreement does just that: It entitles Celador to "fifty percent (50%) of the [profits] derived by ***ABC***/BVT . . . ." ER3088 (emphasis added). What's implausible is that Exhibit B's ambiguous BVT reference could write ABC out of a deal that otherwise specifically included it.

c. Defendants' other Exhibit B arguments are meritless.

Nothing else about Exhibit B *necessarily* subverts the Rights Agreement:

- Defendants claim that Exhibit B imposes a supposed industry-standard arrangement in which networks never share their profits. They rely on industry custom for deals between a profit participant like Celador and *a producer/distributor*—i.e., deals not involving *a network*. ER1843. Celador insisted on a different arrangement. A network—ABC—*was* a party. ER3085; *see* ER1173-74, 2988. In any event, Exhibit B expressly disavows hewing to industry standards: It rejects "any conventional understanding" as "used in the entertainment industry or any other industry or business . . . ." ER3103.
- Defendants note that the parties modified Exhibit B to replace a mistaken original reference to BVP, but did not expressly reference ABC. APB31, 36; ER1087-89, 3183. So what? Changing Exhibit B was unnecessary. ABC was already a contracting party, and it adopted Exhibit B's "BVT"

definition as its own—Exhibit B *contains* "***ABC***/BVT's standard definition" formula. ER3088-89 ¶¶ 3.B(1), 3.B(3) (emphasis added).

- Defendants argue that Exhibit B's deductions cannot relate to a network like ABC. APB31-32. Why not? Defendants nowhere explain. For example, ABC agreed to pay an agency package commission. ER3102 ¶ 5; SER211.
- Defendants argue that the Rights Agreement allows only review of BVT's books and records as part of an audit, with no mention of ABC. APB32. But Disney handles all audits for Disney-affiliated companies. ER3038-39. The parties here understood the audit provision to apply to all Disney entities, including ABC. *See*, *e.g.*, SER291; ER3037-39, 3055-56; SER293 (noting request for "all network start orders" and "all network invoices").

* * *

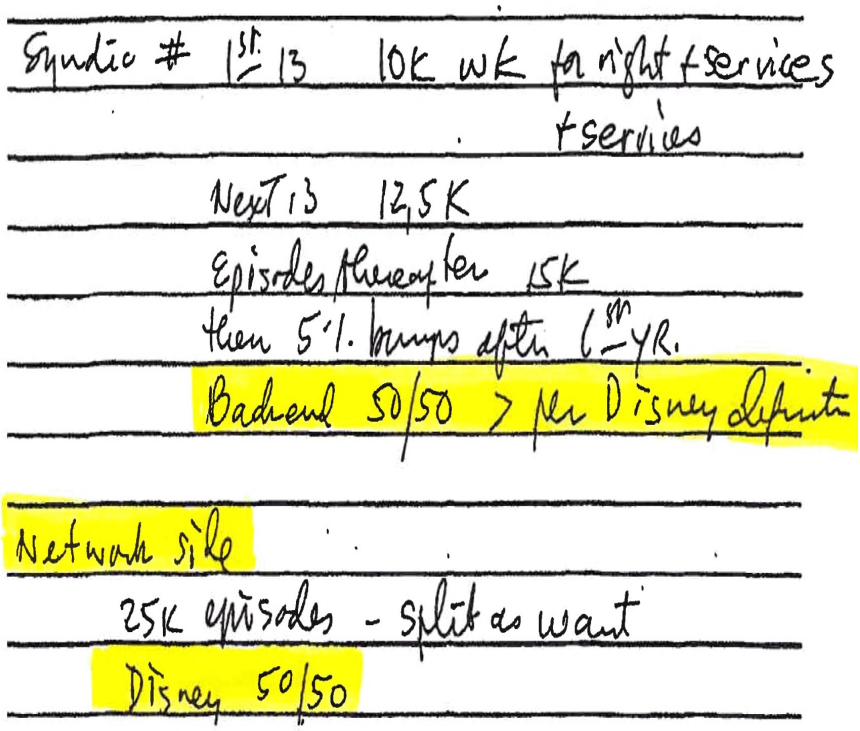
This evidence suffices to establish reasonable susceptibility to Celador's interpretation. The extrinsic evidence discussed in the next section bolsters that conclusion. *First Nat'l Mortgage*, 631 F.3d at 1066-67, citing *Pac. Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co.*, 69 Cal. 2d 33, 37 (1968) (in determining contract's "reasonable susceptibility" to an interpretation, extrinsic evidence must be provisionally considered). And because the extrinsic evidence was in conflict, interpretation was a jury question. *First Nat'l Mortgage*, 631 F.3d at 1067.

2. Substantial extrinsic evidence—including ABC's own negotiation notes and Celador's expressly-communicated requirement of a direct network deal—supports the jury's interpretation.

a. Construed most favorably to the jury's verdict, the extrinsic evidence supports the jury's finding that ABC promised to share its profits.

Substantial evidence supports the jury's conclusion that the deal included ABC's network profits:

- ABC's negotiator, Lee Bartlett, knew that this was a 50/50 *network* profits deal, stating in his contemporaneous notes:


Syndic # 1st 13 10K wk for right + services
+ services
Next 13 12,5K
Episodes thereafter 15K
then 5% bumps after 6th YR.
Backend 50/50 > per Disney definition

Network side
25K episodes - split as want
Disney 50/50

2 North American Offers Greg Lipstone

Syndic Cable

- 15 wk for his services
- 7,500 wk for rights

50 > 25 by creative 3rds. only up to 10% by non-creative 3rds

50/50 w/ 3rd against both Disney definition Non-creative 3rd ptys floor of 25%

Network

- 20 for EP
- 10 for rights

50/50 3rd off the top

ER3156-57 (highlighting added). "Disney" could *only* mean ABC. The jury certainly could conclude that "Network side . . . Disney [ABC] 50/50" meant that ***ABC*** agreed to share its network-run profits 50/50.

- That's the deal that ABC communicated to WMA as reflected in WMA's contemporaneous notes:

5) Profits - Syndication/Cable/Network

50/50 reducible to 25% by creative and for non-creative not more than 10% - 17.5% distribution fee.

ER3151, 3289; *see also* ER3149.

- According to Bartlett, the deal terms were closed by the time he left ABC in mid-December 1999 (i.e., before Exhibit B was added). ER2983-84. He "was making the deal for ABC." ER2987. The statement in his notes that "BVTV" [sic] would be the "layoff company" just meant that BVT would be "the internal company that would physically produce it." ER2960, 3164.
- WMA's Lipstone also knew from the outset the deal was with ABC—perhaps including another Disney company, but always with ABC. ER919; *see* ER23 n.11 (district court: jury could thereby infer that deal included sharing ABC profits).
- Celador's Smith insisted on a network deal, *not* a deal with a production company. ER428, 519-20, 585, 654-55. Celador communicated its network-deal requirement to ABC, including directly to Davies. ER519 (Smith "wanted to be in business with a network"; WMA "communicated . . . Mr. Smith's business terms and his strategy to people at ABC"), 652 (Celador "wanted to make a deal with a network" and "told Mr. Davies, for example, that [it] wanted to make a network deal"), 654-55 (Smith "let people from ABC know" either directly or through WMA that regardless of BVT involvement Celador "was quite specific that [it] wanted a network deal").

This evidence refutes defendants' claim that "all parties" understood that Celador "would not share in ABC's revenues," APB32-33, as does a mountain of other evidence from Celador and WMA. ER22-23 (district court: Celador

understood that it was entitled to share in ABC's profits); 456, 467-68, 484-86, 538, 650-51, 661 (Smith and WMA's Silverman understood Celador would share 50/50 in ABC's profits); *see* ER500-03 (district court rejecting argument that Smith's testimony is of uncommunicated intent).

b. The jury could reject defendants' disputed extrinsic evidence.

Defendants' real argument is that the jury had to accept extrinsic evidence supporting their position. Not so. Defendants' selectively-cited bits and pieces of evidence only underscore that this was a credibility battle for the jury to decide.

WMA's supposed understanding is not dispositive. Defendants' main point is that WMA—as Celador's agent—supposedly admitted to a claimed industry custom that no profit participant could ever share in network profits. APB32-33. According to defendants, WMA was the sole point of contact between Celador and defendants, so its understanding of the deal necessarily had to be Celador's understanding. Defendants are wrong for two reasons.

First, the jury did not have to believe the WMA witnesses. As the district court noted, "in reference to the WMA witnesses . . . '[t]he jury is free to disbelieve the testimony of these witnesses, particularly given their interest (a financial one) in the outcome of the litigation.'" ER27. The court was absolutely right: "Credibility . . . is for the jury—the jury is the lie detector in the courtroom." *United States v. Barnard*, 490 F.2d 907, 912 (9th Cir. 1973). The jury could infer that if agency employees ever wanted to "work in this town

again," they needed to toe defendants' party line as to how Hollywood deals "always" work. *Cf. San Diego Fed. Credit Union v. Cumis Ins. Soc., Inc.*, 162 Cal. App. 3d 358, 364 (1984) (insurance defense realities mean that counsel are necessarily beholden to carriers who repeatedly hire them). The jury, seeing the witnesses testify, could gauge that their loyalties lay with future substantial business sources—ABC, BVT, and Disney—rather than Celador.[8]

In any event, the WMA witnesses' understanding was only how a "typical deal" would work based on their "experience" on other deals. ER987, 2386. The jury could conclude this was *not* how the *unique* deal here worked. And in any case, the cited testimony related to sharing ABC's *advertising revenues,* APB32-33, *not* the *profits-sharing* promised here.

Second, the jury was hardly required to conclude, from the single out-of-context snippet of testimony defendants cite, ER663, cited at APB33, that Celador had no direct contact with ABC. The evidence was that both Smith and Celador lawyer Gregson had plenty of direct contact with ABC during the Rights Agreement negotiations, up to and including final document revisions. *E.g.*, ER29 (district court: Smith "was involved in negotiating the Rights Agreement"), 469-70, 673, 1054, 1104-06 (Smith and Gregson on late-stage negotiation call), 2221-30, 2263-65, 2268-69, 2286-87, 3007-10, 3236, 3256, 3311-12; SER181, 218, 224-25, 298, 315, 383.

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[8] Defendants argue that "Lipstone had an interest in helping *Plaintiff* secure a favorable verdict" so as to foreclose a Celador claim against WMA. APB45 (original emphasis). But by the time of trial, Lipstone worked for a competing talent agency. ER912.

The upshot is that the jury could conclude that Celador understood and communicated its expectation to share in ABC's network profits, regardless of any industry custom.

There was no delay suggesting that Celador acquiesced in defendants' contract interpretation. Repackaging arguments that the jury and district court flatly rejected, defendants assert a "rule of practical construction": that "the parties performed under defendants' interpretation for years" and that Celador failed to dispute defendants' calculation until late in this litigation.[9] APB34-35. This isn't remotely accurate.

The record belies any Celador delay:

- When Disney issued its first *Millionaire* participation statement, Celador (via WMA) immediately expressed "grave concerns" about its accuracy, ER1022, 3277, and promptly engaged an audit firm. *Defendants* delayed the audit for months. ER1446, 1675-76, 3053, 3280.
- Celador sought to audit the profit participation statements in their entirety. ER3278. An audit of one Disney entity is an audit of all. *See* SER291 (Disney accounting noting multiple Disney entities, including ABC, BVT, Valleycrest, ABC.com, Disney Book Publishing,

[9] The jury and district court rejected defendants' waiver and contractual "incontestability" clause defenses, both premised on claimed Celador delay. ER16-19, 98. Defendants have waived any appellate challenge to those determinations. *Indep. Towers of Washington v. Washington*, 350 F.3d 925, 929 (9th Cir. 2003) (courts "review only issues which are argued specifically and distinctly in a party's opening brief").

Disney Interactive Group, Hyperion Publishing and others from which information was gathered); *see* ER3037-39, 3055-56.

- The auditors tried, unsuccessfully, to obtain the necessary audit information from Disney, specifically seeking network license fee documentation. ER1552-55, 1576-77, 2451-52, 3279; SER274. The 2003 audit report states that "Valleycrest previously informed [WMA] of a document indicating that network license fees were always to be equal to production cost," but—in a statement that remains true today—"[n]o such document has been provided for our review." SER151.
- With unresolved issues remaining, Celador entered into a tolling agreement with defendants. ER700-04; SER325-26.
- In 2004, Celador commenced this lawsuit. ER718-19.[10]

The bottom line is that Celador questioned defendants' accountings immediately and persistently, culminating in this suit.

While emphasizing that WMA initially told Celador that "[i]n general, the structure of the statements appears to comply with the terms of your contract" (defendants omit "in general"), APB35, defendants ignore WMA's conclusion that: "[B]ecause the information provided on the Buena Vista statements is in

[10] *Oceanside 84 v. Fidelity Fed. Bank*, 56 Cal. App. 4th 1441 (1997), cited at APB35, is readily distinguishable. The party claiming breach undisputedly waited five years before raising *any* contract calculation issue. *Id.* at 1450. Here, Celador immediately commenced an audit.

summary only, it is not possible to satisfactorily determine a) the reasonableness of some of the figures provided, and b) if some of the calculations are in compliance with specific contract terms." ER3299. They also omit that WMA immediately recommended an audit of, among other things, "all compensation from the network," ER3300, and a full analysis of network prime time receipts, ER2462-63.

Defendants acknowledged that from the outset Celador claimed that "ABC, as it got increased ad revenue, didn't pay BVT enough on the network license." SER105-06. The district court agreed, allowing Celador to pursue its damages theory premised on "ABC's success, revenues, and profits derived from *Millionaire*, in order to establish what it should have paid to BVT, in the form of a license fee, or otherwise." ER239.

Industry custom about profit-sharing is irrelevant to the unique deal here. This was a direct deal between Celador and ABC for a show that was already a smash hit internationally. It was not a deal between a rights owner and a production company for an untested project. Defendants' reliance on typical production company-network and rights owner-production company deals is thus misplaced.

There is another reason why industry custom regarding profit-sharing is irrelevant: This deal was unprecedented.

- Only recently had regulations been repealed that barred networks from directly producing shows. ER1781-82. There was no industry custom as to direct network deals as of 1998-1999; there couldn't be.
- *Millionaire* was already a global sensation when ABC sought out Celador to acquire the North American rights. ER416-22.
- ABC desperately wanted to acquire the show. ER2908-10, 2923-27.
- Celador insisted on a network deal. ER428, 519, 652, 654-55, 2926.
- ABC is indisputably a party to the contract, something ABC and BVT witnesses could not reconcile with their claims about how these deals supposedly always work. ER1069-72, 1173-74.

The jury reasonably could conclude that the Celador-ABC deal didn't conform to any alleged industry custom about profit-sharing.

B. Breach Of The Implied Covenant Of Good Faith And Fair Dealing: Substantial Evidence Supports The Jury's Conclusion That Defendants Interfered With Celador's Right To Share *Millionaire* Network License Profits.

Using a maze of no-consideration, unnecessary, unreasonable, incomplete and illogical transactions, ABC and BVT ensured that Celador would never see a dime from *Millionaire*'s network run. Breach of the implied covenant is an independent ground compelling affirmance on the network license claim.

Whether defendants acted in good faith and dealt fairly with Celador was a jury fact question, subject to substantial evidence review. *Hicks v. E. T. Legg & Assoc.* 89 Cal. App. 4th 496, 509 (2001); see also *Ladd v. Warner Bros. Entm't, Inc.*, 184 Cal. App. 4th 1298, 1306-08 (2010); *Locke v. Warner Bros., Inc.*, 57 Cal. App. 4th 354, 367 (1997).

1. The implied covenant barred ABC and BVT from frustrating Celador's contractual right to share *Millionaire*'s network-run broadcast profits.

Long-settled law governs Celador's implied covenant claim:

- "The covenant of good faith finds particular application in situations where one party is invested with a discretionary power affecting the rights of another. Such power must be exercised in good faith." *Carma Developers v. Marathon Dev. Cal.*, 2 Cal. 4th 342, 372 (1992); *accord Locke*, 57 Cal. App. 4th at 363-64 (discretion to accept or turn down proffered movie deals had to be exercised in good faith); *Marsu, B.V. v. Walt Disney Co.*, 185 F.3d 932, 937 (1999) (applying *Carma Developers*; failure to exploit rights in good faith). Discretion must be exercised "in accordance with the parties' legitimate expectations." *Badie v. Bank of America*, 67 Cal. App. 4th 779, 795 (1998).
- The implied covenant prohibits a contracting party from "do[ing] anything which will have the effect of destroying or injuring the right of [the other party] to receive the fruits of the contract[.]" *Universal Sales*

Corp. v. Cal. Press Mfg. Co., 20 Cal. 2d 751, 771 (1942); *accord Ladd*, 184 Cal. App. 4th at 1306 (covenant operates to assure that ""neither party will do anything which will injure the right of the other to receive the benefits of the agreement,"" citation omitted).

- "[B]reach of a specific provision of the contract is not a necessary prerequisite"; "[w]ere it otherwise, the covenant would have no practical meaning, for any breach thereof would necessarily involve breach of some other term of the contract." *Carma Developers*, 2 Cal. 4th at 373. Conduct violates the implied covenant if it "is . . . contrary to the contract's purposes and the parties' legitimate expectations," *id.*, or constitutes an "'evasion of the spirit of the bargain.'" *R. J. Kuhl Corp. v. Sullivan*, 13 Cal. App. 4th 1589, 1602 (1993) (quoting Restatement (Second) of Contracts § 205 cmt. d. (1979)).
- "'Subterfuges and evasions violate the obligation of good faith in performance *even though the actor believes his conduct be justified*.'" *R. J. Kuhl*, 13 Cal. App. 4th at 1602 (quoting Restatement (Second) of Contracts § 205 cmt. d. (emphasis added)).
- Conduct "common in the industry" can be unreasonable and violate the implied covenant. *Ladd*, 184 Cal. App. 4th at 1308; *see* ER11-14 (district court rejecting defendants' "industry standard" argument, explaining why the same cases defendants cite on appeal are inapplicable and do not stand for the propositions claimed).

The implied covenant applies with particular force where one party's conduct operates to deprive the other party of an expected profit-sharing opportunity.

- "'Bad faith performance occurs precisely when discretion is used to recapture opportunities forgone upon contracting—when the discretion-exercising party refuses to pay the expected cost of performace.'" *Carma Developers*, 2 Cal. 4th at 372 n.11 (quoting Steven J. Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith* 94 Harv.L.Rev. 369, 373 (1980)). The "expected cost of performance" here is a 50/50 profits split.
- The implied covenant limited a network's discretion to diminish appellants' contractual percentage-of-proceeds right in the Fox Family channel's sale by structuring "the sale terms in a way that would hold down the sales price." *Woods v. Fox Broadcasting Sub., Inc.*, 129 Cal. App. 4th 344, 356 (2005).
- The implied covenant prevented a prospective property purchaser from evading a broker's commission by assigning the right to purchase a property and, accordingly, never personally completing the transaction, even though nothing in the contract expressly forbade the prospective purchaser's conduct. *R. J. Kuhl*, 13 Cal. App. 4th at 1603-04.
- "[C]ovenants to use 'good faith' or 'best efforts' to generate profits for a licensor *are 'routinely implied* where the licensor grants exclusive

> promotional or licensing rights in exchange for a percentage of profits or royalties,' even though the licensee does not expressly promise to do anything." *Wolf v. Walt Disney Pictures and Television*, 162 Cal. App. 4th 1107, 1120 (2008) (emphasis added, citation omitted).

Thus, although ABC/BVT had the contractual right to have BVT, ABC, an affiliated entity, or a third party produce *Millionaire*, ER3086-87 ¶ 2, and to assign the Rights Agreement, ER3093 ¶ 10, they had to do so in good faith and not so as to frustrate Celador's fundamental right to share profits. "'[G]ood faith' is applicable to a wide spectrum of conduct affecting obligations undertaken pursuant to contracts and *its meaning is necessarily dependent on the context*." *R. J. Kuhl*, 13 Cal. App. 4th at 1602 (emphasis added). The context here is whether Celador could be deprived of promised profits through defendants' extracontractual machinations.

The primary cases defendants rely on are not contrary. *Carma Developers*, 2 Cal. 4th at 374, held that there is no implied covenant breach where the parties "grant the right to engage in the very acts and conduct which would otherwise have been forbidden" (there, affording a commercial landlord the right to terminate a lease so as to lease directly to the tenant's prospective sublessee). Here, the parties did not grant ABC and BVT the right to allocate all profits from ABC's network-run broadcast solely to ABC.

Wolf, 162 Cal. App. 4th 1107 and *Third Story Music, Inc. v. Waits*, 41 Cal. App. 4th 798 (1995) are very different from this case. Both involved express grants of discretion that allowed the defendants to license "as [the

defendant] may see fit" and "at [the defendant's] election." *Wolf*, 162 Cal. App. 4th at 1121 n.7; *Third Story Music*, 41 Cal. App. 4th at 801, 808-09. The complaint was that the studio did not adequately exploit something that it had no obligation to exploit at all. That's not the claim here—no one disputes that ABC/BVT fully exploited *Millionaire*. Rather, the claim is that they did so in a manner that would show no profit to share with Celador regardless of how much money they made. *Wolf* and *Third Story Music* say nothing about this situation.

And, both *Wolf* and *Third Story Music* involved defendants' licensing to third parties; neither suggests that contracting co-defendants can enter into arrangements whereby they keep all profits and the other contracting party gets none despite an expressly-promised 50/50 sharing. There is no clause in the Rights Agreement that specifically allows ABC and BVT to retain all profits, denying any share to Celador.

Defendants seek to counter settled law by urging that "neither Plaintiff nor the district court could point to any case holding that a defendant who acted in subjective good faith and in accordance with industry custom nonetheless violated the implied covenant." APB43-44; *contra Ladd*, 184 Cal. App. 4th at 1308. But that's not the standard: "A party violates the covenant if it subjectively lacks belief in the validity of its act *or if its conduct is objectively unreasonable*." *Carma Developers*, 2 Cal. 4th at 372 (emphasis added); *R. J. Kuhl*, 13 Cal. App. 4th at 1602 (covenant applies even where party thinks its conduct justified). This is the standard that the jury was instructed to follow. ER118.

Nor does a supposed industry custom shield defendants from the implied covenant. Industry custom can be objectively unreasonable. *Ladd*, 184 Cal. App. 4th at 1308; ER26, 28. There's no everyone-does-it exception. The implied covenant protects the reasonable expectations of the disappointed party, not some unfair industry custom. *See* Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 Harv.L.Rev. at 379, 386 & n.79.

Ladd—an opinion defendants ignore—directly rejects defendants' "common in the industry" argument. It held that Warner Bros.' practice of "straight-lining"—allocating the same revenue to every movie in a licensing package, whether a hit or "B" movie—breached its implied covenant obligation to profit-participant Ladd, "to fairly allocate licensing fees to Ladd's movies based on their relative worth in licensing packages." 184 Cal. App. 4th at 1308. "[E]ven if straight-lining were a common practice, it would not absolve Warner of its duty to Ladd, as a profit participant, to fairly allocate fees derived from licensing packages." *Id.*; *see* ER51 (district court: no authority "support[s] Defendants' contention that where a party's actions conform to the relevant industry custom, the party's actions are not 'objectively unreasonable' as a matter of law"); ER2481 (district court: that graft may be customary in certain locales or industries does not make it reasonable). Celador had no "reasonable expectation" that it would be cheated, even if that's what routinely happens in the industry.[11]

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[11] *Hanson ex rel. Hanson v. Prudential Ins. Co. of America*, 783 F.2d 762 (9th Cir. 1985) demonstrates defendants' difficulty in finding supporting authority. This Court's six-line discussion there affirms a factual finding that insurance

(continued...)

2. Substantial evidence supports the jury's verdict.

a. ABC and BVT wrongly ensured that *Millionaire*'s network-run broadcast would create no sharable profits.

Millionaire's network-run was extraordinarily successful. But the purported ABC-BVT perpetual license-fee-equals-production-costs arrangement *guaranteed* that *Millionaire* would show a loss on ABC's network broadcast—a loss that could only *increase* the longer *Millionaire*'s network run.

How did this happen?

First, ABC and BVT secretly agreed that there would be no *Millionaire* broadcast profits for Celador to share. To effectuate that deal:

- ABC unnecessarily transferred all of its rights under the Rights Agreement—rights that Disney CEO Eisner valued at $1 billion-plus—to BVT for nothing.
- There was then an array of purported transfers among Disney affiliated entities (BVT, BVP, and Valleycrest), many of which were unnecessary, incomplete, nonsensical, backdated, and lacking consideration.

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[11] (...continued)
company conduct consistent with industry practice was not bad faith. *Id.* at 766-67. It does not create a per se standard, nor does it rule out the possibility that an unfair, but industry-prevalent, insurance practice could be bad faith.

- The end result of these various transfers—according to defendants—was that a show that had been a phenomenal success overseas would be guaranteed to never generate network broadcast profits in the U.S.
- After *Millionaire*'s early broadcast success, ABC and BVT renegotiated their license deal on several occasions, increasing weekly "production fees" and adding a half a million dollars in "overhead" costs. They also renegotiated WMA's commission, basing it on an increased "assumed" or "imputed" license fee, and making the increase retroactive to *Millionaire*'s first episode. ER942-46, 949-51; SER207-10, 251-52, 280. But ABC and BVT did not adjust their license fee arrangement to reflect *Millionaire*'s groundbreaking broadcast success even though they had to have known when they first created the ABC-BVT license that such post-success adjustments were industry standard. So defendants made sure that others benefitted from *Millionaire*'s broadcast success, but contrary to industry custom, kept *Millionaire* in a guaranteed-loss position, generating no profits to share with Celador.

Could the jury have found ABC/BVT's overall conduct objectively unreasonable? Absolutely. ER24-28 (district court: evidence demonstrated that defendants' overall treatment of Celador was objectively unreasonable).

That's the standard. It doesn't matter if defendants could somehow justify one step, or even each step in isolation—that's not enough. For defendants to prevail, they must show that, as a matter of law, no fair jury could find their overall treatment of Celador objectively unreasonable. They haven't done so.

Defendants argue that the parties' incomplete discussion of a contract provision seeking arm's length treatment between Disney affiliated companies precludes an implied covenant claim (defendants told Celador that transactions between affiliated companies, by definition, could never be at arm's length). ER2275-77. But the final contract also did not include ABC's proposed alternative provision deeming presumptively fair all transactions between ABC and its affiliated entities. ER2882-84. Such negotiations do not displace the implied covenant. Certainly there was no *express* contract provision allowing ABC and BVT to enter into arrangements that stripped Celador of all contract rights or profit expectations. *Cf. Wolf*, 162 Cal. App. 4th at 1121 n.7 (profit participant couldn't challenge licensing decisions where contract specified defendant had no obligation to license and could license "as [it] may see fit").[12]

Finally, defendants invoke the Rights Agreement's "warn[ing]" of "no guarantee" that contingent profits would materialize. APB49-50, citing ER3103. No quarrel there—of course there's never any *guarantee* of success. But here there *was* success—unprecedented, "awesome," "stellar" success. SER277-78. It wasn't a lack of success, but rather defendants' conduct, that shut Celador out. Their conduct guaranteed *no* profits. The no-guarantee clause was not a license to steal.

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[12] That Celador or WMA may have known that BVT would produce the U.S. show (the so-called "lay off") does not mean that either knew of or acceded to the ABC-BVT guaranteed-no-network-broadcast-profits arrangement.

b. Defendants' maneuvers were not indisputably reasonable.

On appeal, defendants claim that the three prongs of their ABC-BVT dealings—a perpetual license, a network license fee always equaling production costs, and not renegotiating a phenomenally successful show's license—were each objectively reasonable *as a matter of law*. APB40. But that's not the relevant question. The relevant question is whether the jury could find the overall effect unreasonable because it precluded any Celador network-run broadcast profits participation, especially where the whole arrangement was entirely unnecessary given Celador's direct contract jointly with ABC/BVT. As the district court concluded, substantial evidence demonstrated that "Defendants' *overall* treatment of Plaintiff was objectively unreasonable." ER28 (emphasis added).

The jury presumptively found the three elements to be objectively unreasonable overall:

Perpetual license. Richard Marks, Celador's entertainment industry expert, testified that during the relevant time frame (1999-2000), there was nothing typical about perpetual licenses. ER1780-84 (in 2000, reality programs *Big Brother* and *American Idol* did not have perpetual licenses). Defendants argue that "Marks did not testify that there was an established industry custom *against* perpetual licenses in 1999." APB42. So what? The question is whether a perpetual license was objectively unreasonable in *these circumstances*. The jury could easily find that it was. Defendants also argue that Marks' testimony should be discredited because

WMA's Lipstone knew that ABC and BVT would enter into a perpetual license. APB41. But the jury was not *required* to believe Lipstone's testimony, and in any event Lipstone did not say that a perpetual license without more (*e.g.*, an implied renegotiation right in the event of success) was always reasonable. ER1021. At most, there is a conflict in the evidence.

License fee equals production costs. To establish supposed industry custom (which as already shown is not dispositive), defendants rely heavily on their own testimony and WMA's testimony, particularly Lipstone's. APB42-45. But the jury was not required to believe any of these witnesses. Moreover, contrary to defendants' claim, APB42, the testimony *was* controverted. Celador's expert Marks testified that a license-fee-equals-production-cost arrangement may be a "good place to start; it's not a good place to finish." ER1846. Rather, he said, a perpetual license, coupled with a license-fee-equals-production-costs arrangement, "just doesn't make sense." ER1780. Lipstone testified too that a license-fee-equals-production-cost deal was acceptable initially, but not after success. ER2345-46. Nor did Lipstone assume a license-fee-equals-production-costs deal; he didn't learn of it until after the contract was signed. ER937-42; *see* SER206.

And the jury could conclude that, far from being something that "everyone" knew would happen, the supposed but undocumented license-fee-equals-production-costs agreement was a post-hoc invention to effectuate ABC-BVT's

pre-signing agreement that there would be no *Millionaire* broadcast profits for Celador to share.[13]

Renegotiation. Defendants finally claim that, as a matter of law, they owed no contractual obligation to renegotiate the Rights Agreement after *Millionaire* became a runaway success. APB47-48. But that isn't Celador's claim. Celador has *never* contended that *the Rights Agreement* should have been renegotiated *between Celador and ABC/BVT*.[14] Cases regarding good faith in renegotiating *the parties' own contract*, accordingly, are irrelevant. *See Los Angeles Equestrian Ctr. Inc. v. City of L.A.*, 17 Cal. App. 4th 432, 447 (1993); *Racine & Laramie, Ltd. v. Dep't of Parks & Recreation*, 11 Cal. App. 4th 1026, 1035 (1992).

What the evidence established—and defendants never disputed—is that it was industry practice to renegotiate *license fees* on success, ER1855-56, 1864-66, 2059, 2061, an industry practice under which ABC and BVT operated when they entered into their license arrangement. ABC's retroactive WMA commission increase to reflect *Millionaire*'s success illustrates the industry custom, as practiced by ABC itself. Here, that custom would mean adjusting *the ABC-BVT*

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[13] Emblematic of defendants' post-hoc rationales, instead of identifying an express license-fee-equals-production-costs agreement—there is none—defendants attempt to cobble together a claim by referring to multiple documents (a budget, a license agreement with fixed dollars, and supposed "add ons" that they never identified, documented or supported) and asking the Court to infer an agreement—an inference that the jury could properly have rejected.

[14] Celador's counsel misspoke on this point during closing argument; defendants' counsel quickly pointed out that Celador was not asserting a failure to renegotiate the Rights Agreement, and Celador's counsel agreed. ER2769-70.

license fee to fair market value. WMA's Lipstone knew of no reason why a perpetual license could not be renegotiated. ER1027. He testified that renegotiation on success typically occurs in all types of programming. ER2345-46.

There are further problems with defendants' no-need-to-renegotiate claim. ABC and BVT *did* renegotiate—multiple times—their network license deal in light of *Millionaire*'s success. ABC agreed to pay BVT an additional $500,000, and twice increased BVT's per-episode production fees. ER1147-48, 3293; SER384. ABC also unilaterally rescinded BVT's first-year syndication rights. ER1189-94, 3286-88. So, ABC and BVT renegotiated the license fee agreement to benefit themselves (and WMA), ignoring industry custom that likewise required increasing the license fee on success to benefit Celador.

Defendants argue that their conduct simply reflects the Rights Agreement's assumption that Celador was only to profit from *Millionaire*'s syndication and not from its network broadcast. APB49. But the Rights Agreement says just the opposite: The parties intended that Celador would share in *all profits* derived from *Millionaire*'s exploitation, as the jury found. And defendants' claim that Celador expected to profit only from syndication only digs defendants deeper into a hole, because they frustrated *that* supposed expectation, too, when ABC unilaterally curtailed BVT's—and therefore Celador's—potential syndication profits by taking from BVT the "home run" opportunity to exercise early syndication rights. ER1157-58, 1165-66, 1359, 1368-69, 1522-23, 3286-88; SER316.

Celador's rights were frustrated by the defendants' overall dealings with one another. The jury could conclude that defendants' overall conduct was objectively unreasonable and so breached the implied covenant.

3. The special verdict form supports the network license judgment on the implied covenant claim.

Defendants argue that if Celador loses on the express network license claim as a matter of law then the network license verdict must be reversed because the jury's special verdict finding breach of the implied covenant "does not reveal whether it relates to Plaintiff's network-license claim, its merchandising claim, or both." APB 51-52. Not so.

First, defendants agreed to the 18-page Special Verdict used in this case, ER32, including the district court's suggestion to provide only one damages verdict form encompassing both express breach and implied covenant theories. ER2842-43.

Beyond that, neither during the jury's several days of deliberations nor when the jury was polled and discharged did defendants attempt to remedy what they now contend was a fatal flaw in the verdict form. SER83-85; ER2881-98.

Objections to defects in a special verdict form are waived if not expressly made. *Guy v. City of San Diego*, 608 F.3d 582, 586-87 (9th Cir. 2010). They are also waived when, as here, the disappointed party, does not raise the issue "until after the jury was discharged, [as] the district court ha[s] no chance to develop a record" of what the jury did. *Yeti by Molly, Ltd. v. Deckers Outdoor*

Corp., 259 F.3d 1101, 1110 (9th Cir. 2001) (finding waiver in indistinguishable circumstances).

Second, when, as here, the jury separately determines claims, ER86-97, the judgment will be affirmed if substantial evidence supports *either* theory. *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 95 F.3d 1422, 1426 (9th Cir. 1996) aff'd, 526 U.S. 687 (1999). *Syufy Enterprises v. American Multicinema*, 793 F.2d 990 (9th Cir. 1986), on which defendants rely, is inapplicable. *Syufy* involved a general verdict, not separate special verdicts as here. *Id.* at 1001-02.

Even were *Syufy* applicable, it would not be dispositive. As in *Webb v. Sloan*, 330 F.3d 1158, 1167 (9th Cir. 2003), here the jury made separate liability findings so that "there is no danger that the jury found liability *only* on a legally defective theory." *Id*. (original emphasis). In answering special verdict questions 2 (merchandising distribution expenses not deducted), and 5 (BVT-affiliate merchandising receipts credited to BVT) as to the merchandising claim, ER84-85, the jury necessarily found *only* an express breach of contract. That's because the implied covenant claim was that by assigning merchandising rights to affiliated entities, BVT might have created a circumstance whereby receipts were not credited to it, a concern dispelled by the uncontroverted evidence and the question 5 finding. *See* ER85, 243, 2629-31, 3055-56. Thus, necessarily, the jury's implied covenant finding can only relate to the network-license claim, making clear exactly what the jury found.

Here, as in *Webb*, the various theories were "simply [alternative] means of seeking redress for the same injuries that arose out of the same common core of facts." 330 F.3d at 1167. Where two liability theories are determined yielding a single damages measure, the judgment should be affirmed if *either* liability theory is proper.[15]

Finally, defendants claim that the express contract theory somehow "tainted the jury's consideration of the implied covenant." APB50. Not so. The implied covenant protects that which the contract's express terms do not cover. And if the defendants believe the jury was confused as to that distinction, the appropriate argument would have been instructional error. That's what defendants really seem to be arguing when they say that the instructions "gave the jury no meaningful guidance" on certain matters. APB51. But it's far too late to raise this point: Defendants made no such objection in the trial court, and even here they do not address it as an explicit argument. Rather, they ask the Court to speculate about the jury's deliberative process, something "neither a trial court nor an appellate court has the authority to inquire into." *Smith v. Cupp*, 457 F.2d 1098, 1100 (9th Cir. 1972); *see Midwest Underground Storage, Inc. v. Porter*, 717 F.2d 493, 501 (10th Cir. 1983) ("It is well settled that a verdict will not be upset on the basis of speculation as to the manner in which the jurors arrived at it").

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[15] Defendants suggest this rule conflicts with Supreme Court authority, relying on Judge Kozinski's dissent in a 1990 opinion. APB52 n.17. But a decade later Judge Kozinski joined *Webb*, 330 F.3d at 1161.

II.

THERE WAS NO NETWORK LICENSE FEE EVIDENTIARY OR INSTRUCTIONAL ERROR.

A. The District Court Properly Refused Defendants' Argumentative And Misguided Jury Instructions.

Courts properly refuse jury instructions that are legally incorrect, unsupported by evidence, misleading, or argumentative. *Smith v. Sumner*, 994 F.2d 1401, 1404 (9th Cir. 1993); *Bird v. Lewis & Clark College*, 303 F.3d 1015, 1022 (9th Cir. 2002). That's what happened here.

1. Uncommunicated understanding: Defendants did not request the instruction they advocate; the instruction they did request was argumentative and admittedly unnecessary.

Defendants claim that the court should have instructed the jury that it had to find that Smith's understanding of the Rights Agreement was communicated before considering Smith's testimony concerning the contract's meaning. APB53. But that's not the instruction they requested nor the argument they offered the district court. Rather, they argued that an uncommunicated-understanding instruction was appropriate regarding a *different witness*—Gregson—testifying on a *different topic*—merchandising. ER129, 304. In lieu of the instruction sought, the district court directed that Gregson's subjective intent was not to be argued. Defendants acceded to that solution in lieu of the proffered jury instruction, saying "Okay. Fine." ER129.

Apart from this bait-and-switch problem, defendants do not address the district court's finding that the proffered instruction was argumentative and unnecessary. ER129. They do not discuss the proposed instruction's one-sided language and imbalance (i.e., omitting that *communicated* intent would be dispositive, Civ. Code § 1649). "[A] court is not required to accept a proposed instruction which is manifestly intended to influence the jury towards accepting the [proponent's] evidence. . . ." *United States v. Sarno*, 73 F.3d 1470, 1485 (9th Cir. 1995) (citation omitted).

Nor was the instruction necessary. The court instructed the jury to "decide what the *parties*"—[plural]—"intended." ER112 (emphasis added). The court scrupulously precluded uncommunicated-understanding evidence, sustaining objections on that ground throughout the trial. ER249, 486, 490-503, 667-69, 877-80, 883-84; *see also* ER28-29 (rejecting defendants' post-trial claim that Smith's understanding was uncommunicated). Defendants do not challenge any rulings admitting undisclosed-understanding evidence, thus waiving any such challenge. *Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir. 1999). They cannot use a proposed jury instruction to re-argue unchallenged evidentiary rulings.

2. Renegotiation: The requested instruction misleadingly addressed a theory that Celador did not advance.

Celador did *not* argue that ABC/BVT had any obligation to renegotiate *the Rights Agreement*. Celador's trial theory was that industry custom as reflected by the defendants' own conduct meant that a *network license agreement* between

ABC and BVT required, on *Millionaire's* success, that ABC and BVT renegotiate *between themselves their network license fee*. ER1027, 2283-84, 2345-46 (Lipstone: no reason perpetual license could not be renegotiated; successful shows' licenses regularly renegotiated in all types of programming), 1785-87, cited at APB53 (Celador's expert Richard Marks testifying that the practice is that "the network and the producer would renegotiate to allocate now a piece of that success to the producer").

The instruction defendants proffered was that a failure to renegotiate a contract could *never* breach the implied covenant, not even if renegotiation was an industry-standard practice. ER305. That's not the law; the instruction was therefore improper; so the district court acted within its discretion in rejecting it.

B. The District Court Acted Within Its Discretion In Excluding Defendants' Spurious, Tangential And Irrelevant Evidence.

The district court has "broad discretion," entitled to "considerable deference," to admit or refuse evidence. *Sprint/United Mgmt. Co. v. Mendelsohn*, 552 U.S. 379, 384 (2008); *McEuin v. Crown Equip. Corp.*, 328 F.3d 1028, 1035 (9th Cir. 2003). Only a "'manifestly erroneous'" ruling warrants reversal. *De Saracho v. Custom Food Mach., Inc.*, 206 F.3d 874, 879 (9th Cir. 2000). Any ground the record supports, regardless whether articulated by the district court, requires affirmance. *United States v. Pang*, 362 F.3d 1187, 1192 (9th Cir. 2004); *United States v. Gonzalez-Rincon*, 36 F.3d 859, 866 (9th Cir. 1994).

1. The district court properly excluded a spreadsheet of unknown provenance and purpose.

Defendants devote almost a sixth of their brief to challenging the exclusion of a single piece of evidence: a spreadsheet WMA produced in discovery that compares different scenarios of WMA's commissions tied to *Millionaire's* profit share.[16] No party disputed that the spreadsheet was created after the Rights Agreement was signed. APB55-67. But, after an exhaustive two-day Rule 104 hearing seven months before trial—which defendants fail to mention—no WMA witness could confirm that anyone at WMA had created the spreadsheet, or knew when, by whom or why the spreadsheet was made. No one at WMA had ever before seen anything like the spreadsheet.[17]

a. No WMA witness recognized the spreadsheet.

The spreadsheet first appeared on WMA's server in October 1999, six or seven months after the Rights Agreement was signed. ER3459. Defendants contend that WMA created the spreadsheet, but the actual author's identity is unknown. A junior WMA accountant, Anna MacInnis, whom defendants claim

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[16] What defendants call "a series of detailed spreadsheets," APB55, is, in fact, a single spreadsheet in several iterations with the supposedly relevant format and data remaining the same, APB57 ("the only figure that meaningfully changes from one version of the spreadsheet to the next is the show's [irrelevant] syndication value").

[17] Consistent with Rule 104, no evidentiary objections were allowed and no documents were received in evidence during that hearing. ER3382-89.

was the author, is deceased. APB58. There is no other way to learn anything else about the origin of the spreadsheet because no witness recognized it.

The only evidence about the spreadsheet's provenance was forensic: It was located on a WMA server and backup tapes; its file properties screen listed MacInnis in the "author" field and records October 1999 as the date the spreadsheet first was saved to the system. Another WMA employee viewed and printed the file at a later date. *See* APB58-59.

But whether MacInnis created it or received it from someone else—maybe ABC—is unknown. ER3515.

MacInnis' boss, David Leffin, designated as WMA's person most knowledgeable about the spreadsheet, did not recall ever having seen it before this litigation. ER3634-36.[18] Neither MacInnis nor Leffin were involved in the negotiation of the Rights Agreement or the renegotiation of WMA's commission. ER3636-38; *see also* ER3552-55 (MacInnis, Leffin not listed among the players). Leffin did not know the source of the information used in the spreadsheet or who prepared it. ER3635-36. Nor did Lipstone, the WMA agent who negotiated the Rights Agreement. ER3552-54, 3584-86. Lipstone did not recognize the spreadsheet as the kind of document used in WMA's ordinary business nor did he know how the document was created or the source of the information in it.

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[18] The district court initially mistakenly believed that Leffin ordered the spreadsheet prepared. ER3707. It changed its view after Celador pointed out that he did not know anything about the spreadsheet. ER3715, 3722-23. So the district court's "revers[ing] course" was hardly "inexplicabl[e]," as defendants claim. *See* APB59.

ER3585-86. According to expert testimony, the spreadsheet was neither reliable nor trustworthy. ER3657.

b. The spreadsheet is irrelevant because it cannot be imputed to Celador.

There is no evidence that Celador knew about the spreadsheet. Defendants argue instead that the spreadsheet shows that WMA knew that *Millionaire*'s license fee would always equal production costs, and that WMA's understanding must be imputed to Celador. Not so. The spreadsheet certainly doesn't demonstrate what WMA knew when the Rights Agreement was being negotiated in early 1999; the spreadsheet wasn't created until at least six months later. And if it reflected WMA's understanding at that later date, that understanding could not be imputed to Celador because by late 1999 WMA was no longer acting as Celador's agent.[19]

WMA's alleged understanding. Essential to defendants' argument is that MacInnis did, in fact, create the spreadsheet. But no evidence established that fact. No one testified that the spreadsheet was WMA's understanding, as opposed to, say, ABC's.

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[19] Defendants newly argue on appeal that the spreadsheet is relevant even without imputation, as a third party's reading of the contract. APB66. Such third party opinions are irrelevant. *See DVD Copy Control Ass'n. v. Kaleidescape, Inc.*, 176 Cal. App. 4th 697, 715 (2009). In any case, since the spreadsheet related to WMA's commission renegotiation, if anything it reflects WMA's knowledge that deals are renegotiated on success—knowledge that necessarily also informed WMA's reading of the Celador-ABC/BVT deal.

The spreadsheet does not establish that during the Rights Agreement negotiation WMA knew of ABC/BVT's secret agreement to a license fee that always equals production costs. In fact, Lipstone testified that he learned of the supposed license fee-equals-production cost deal *after* the Rights Agreement was signed. ER937-38.

Nor is the spreadsheet "'[t]he practical interpretation of the contract'" by a party. *S. Cal. Edison v. Superior Court*, 37 Cal. App. 4th 839, 851 (1995). Whoever created the spreadsheet did not do so in the course of furthering *Celador*'s interests or interpreting the contract *on Celador's behalf*. Even defendants recognized that the spreadsheet was part of *WMA*'s commission negotiation. APB63 (spreadsheet "likely prepared in connection with WMA's negotiations with ABC of *its* package commission") (emphasis added).

Imputation. Even if the spreadsheet does show WMA's understanding, it cannot be imputed to Celador.

First, as the district court properly observed, "it is unclear whether Ms. MacInnis was [Celador's] agent." ER10 n.2.

Second, even if MacInnis could somehow qualify as Celador's agent, as the district court also observed, "as Defendants cannot establish the Exhibits relate to a matter within the scope of the agent's employment, the Exhibits are not an agent's admission under FRE 801(d)(2)(D)." *Id*. The court was right: the undisputed evidence establishes that when the spreadsheet first appeared on WMA's server, WMA was negotiating a separate deal for *its own* commission.

ER3578, 3597, 3603, 3606; *see* APB63; ER3673 (spreadsheet offered to show WMA's understanding in Oct.-Dec. 1999).

Not only did these negotiations have nothing to do with Celador's contract rights, ER3598, but WMA's goal was contrary to Celador's interests, as WMA's commission was a charge against the profits (had there been any) that Celador was supposed to share. ER3102 ¶ 5*; see also* ER3607-09 (Smith upset at WMA's increased commission). As WMA was acting for itself and only for itself, there is no imputation: "[I]t is well established that where the agent acts in his own interest *or where the interest of the agent is adverse to his principal, the knowledge of the agent will not be imputed to the principal*." *People v. Park*, 87 Cal. App. 3d 550, 566 (1978) (citations omitted, original emphasis). That renders inapposite the agency authorities that defendants cite. APB65-66; *see* ER205 (district court grants defendants' JMOL motion "on the issue that William Morris served as agent for Celador Productions *in connection with the negotiation of the Rights Agreement*" (emphasis added)); *see also* ER122 (jury instruction: agent acts within scope of authority when "engaged in the performance of duties which were expressly or impliedly assigned to the agent by the principal"). The spreadsheet was not prepared within the scope of WMA's agency and cannot be imputed to Celador.

c. The spreadsheet is hearsay.

The spreadsheet is also inadmissible hearsay, ER9; Fed. R. Evid. 801, in fact, *multiple* hearsay.

It is an out-of-court assertion of fact: This is what a *Millionaire* profit scenario looks like (hearsay level 1). But someone had to input the spreadsheet's data. Whoever did so—especially if it was MacInnis—did not make up the data. The creator (who may not have been from WMA) obtained the information—both the data and how the contract supposedly operated—from *somewhere* (hearsay level 2). "Inputting data into a computer represents a non-verbal assertion under Rule 801 and is subject to the hearsay rule." 5 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Federal Evidence*, § 900.07 [1][d][iii] at 900-97 & n.62 (2d ed. 2011). According to defendants, the spreadsheet is critical because it refers to "Paul Smith's definition." APB63. But MacInnis never met Paul Smith. So someone had to tell her what his definition supposedly was (hearsay level 3). Defendants had to overcome each hearsay level, and they didn't even try. Fed. R. Evid. 805.

Defendants emphasize that the spreadsheet, and particularly "Paul Smith's Definition" were referred to in an email—never admitted into evidence—from WMA lawyer Petillo to Leffin, sent while WMA's increased commission was being negotiated. APB63. But Petillo's email says that *ABC* offered a percentage based on "Paul Smith's definition." ER3755. The term as likely originated with ABC as with WMA. And defendants didn't call Petillo to testify at the

104 hearing, didn't ask the district court to reconsider the admissibility of the spreadsheet when Petillo did testify at trial, never questioned Petillo about the email's contents, and never offered the email into evidence during trial. Whatever the reference to "Paul Smith's definition" might be, it is unexplained hearsay.

Defendants claim that they offered the spreadsheet to show WMA's knowledge rather than the truth of its contents. ER9; APB67-68. To the contrary, the spreadsheet was necessarily offered for the truth of the matter stated in the spreadsheet itself—that WMA knew that ABC and BVT had agreed that the license fee for *Millionaire* would always equal its production costs. "When the existence of knowledge is sought to be used as the basis for a further inference, the hearsay rule may be violated. That possibility becomes a reality when the purpose of the evidence of knowledge is to prove the existence of the fact known." 2 Kenneth S. Broun, *McCormick on Evidence* § 250 at 147 (6th ed. 2006). If not offered for the truth of the matter, WMA's knowledge is irrelevant. Defendants wanted to prove WMA's "knowledge" of supposed contract terms to show that those were, in fact, the terms (i.e. sharing profits didn't mean sharing network profits). That's hearsay.

The hearsay rule protects the opportunity for cross-examination so critical to truth-finding in our adversary system. *NLRB v. First Termite Control Co.*, 646 F.2d 424, 426-27 (9th Cir. 1981). If cross-examination of the statement's substance is material, then it is being offered for the truth of the matter. Here, cross-examination as to the how's, what's and wherefore's of the spreadsheet's assertions would be crucial to its relevance. It was therefore being proffered for

the truth of the matter asserted. Since no WMA witness knew anything about the spreadsheet, there was no opportunity for cross-examination, and the court properly excluded the spreadsheet.

Defendants have not argued that any hearsay exception applies, thus waiving any such argument. *Smith v. Marsh*, 194 F.3d at 1052. Hearsay independently justified exclusion.

d. The district court properly concluded that defendants failed to authenticate the spreadsheet.

Defendants claimed that the spreadsheet was a WMA-prepared document reflecting WMA's knowledge of a license-fee-equals-production cost deal. It was their burden to present a substantial *evidentiary*, not conjectural, basis for that assertion. Fed. R. Evid. 901(a); *United States v. Caldwell*, 776 F.2d 989, 1001 n.16 (11th Cir. 1985). The district court did not abuse its discretion in concluding that they failed to do so. ER5-6, 235-36; *United States v. Perlmuter*, 693 F.2d 1290, 1292 (9th Cir. 1982).

An expert testified that the computer records were untrustworthy and unreliable in identifying the spreadsheets' author and source; WMA's in-house computer guru testified that no one could know whether MacInnis or someone else created the spreadsheet. ER3515, 3656-57. No one at WMA recognized the spreadsheet as a WMA record or could say what it was. A jury could only speculate that MacInnis created it and speculate as to its meaning and purpose. On this record it could do nothing more. There's no evidentiary basis to conclude

that the spreadsheet reflected *WMA*'s understanding of the Rights Agreement or knowledge of the license fee arrangements made *over six months before*. The authenticity hurdle may not be high, but it is above speculation and conjecture.

That WMA produced the spreadsheet in discovery is irrelevant. APB61-62. Production shows only that the spreadsheet was on WMA's computer system. Defendants' cases are not contrary. They demonstrate only that production *can* support an authentication finding, not that it *compels* such a finding. *E.g.*, *Jones v. Nat'l Am. Univ.*, 608 F.3d 1039, 1045 (8th Cir. 2010) (affirming district court's authenticity finding); *United States v. Black*, 767 F.2d 1334, 1342 (9th Cir. 1985) (same); *see also Chemetall GMBH v. ZR Energy, Inc.*, 320 F.3d 714, 722 (7th Cir. 2003) (affirming excluding as unauthenticated memorandum produced from expert witness's files, "even though a contrary conclusion on this evidence might also have been reasonable"); *cf. United States v. Hubbell*, 530 U.S. 27, 36 & n.19 (2000) (producing documents per subpoena *may be* testimonial, triggering Fifth Amendment protections; not addressing authentication in civil litigation). Automatic authentication would improperly undercut judicial discretion. ER7; *see also Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 505 F. Supp. 1190, 1223 (E.D. Pa. 1980) (discovery production not "an admission of authenticity [absent] specific assertion by the producing party regarding the nature or authorship of the documents produced").

e. The district court acted within its discretion in excluding the spreadsheet under Rule 403.

Federal Rule of Evidence 403 also supports the district court's ruling. ER234-36. The court's weighing of probative value against unfair prejudice/confusion is afforded considerable deference. *Sprint/United Mgmt.*, 552 U.S. at 384; *McEuin*, 328 F.3d at 1035.

There was no abuse of discretion here. The spreadsheet's uncertain provenance made its relevance tenuous and its probative value minimal. If admissible, it was barely so. It could well have an improper superficial allure to a jury. Celador's inability to cross-examine MacInnis or anyone other than the WMA witness who retrieved it from WMA's server (but had no recollection of it) would have been highly prejudicial: It would have given defendants free rein to argue to the jury a meaning without any basis in fact. They could have attacked the Rights Agreement based on a document that no witness recognized or could explain, inviting the jury to engage in conjecture and speculation.

These circumstances easily allowed the district court to conclude that fairness considerations substantially outweighed the spreadsheet's minimal probative value. Evidentiary rules must be construed to "secure fairness in administration, . . . [and] to the end that the truth may be ascertained and proceedings justly determined." Fed. R. Evid. 102. Allowing one side to present essentially anonymous information that is not subject to cross-examination is neither fair nor just, and it does not promote ascertaining the truth.

Finally, defendants quibble that the district court's ruling does not recite the governing Rule 403 standard. It need not. Where Rule 403's factors are raised, it is presumed that "Rule 403 must have 'figured crucially in the court's mind.'" *Bowoto v. Chevron Corp.*, 621 F.3d 1116, 1131 (9th Cir. 2010). Rule 403's factors were thoroughly briefed here. ER1, 234; SER17-18, 21-22, 88-90, 92-93.

2. The district court acted within its discretion in excluding irrelevant and prejudicial evidence of foreign licensing and syndication performance.

a. Foreign licensing.

The Rights Agreement covered only North American rights. The district court properly excluded as irrelevant evidence regarding Celador's foreign rights. ER207-08.

Defendants argue that Celador would not have expected compensation for valuable North American rights because it was making lots of money elsewhere under contracts having nothing to do with defendants. APB68-69. The court properly rejected that theory. In any event, defendants were able to make their point via testimony from Lipstone that foreign distribution can take a show from a loss position to a profit position. *See* ER992-93.

Defendants argue that a post-trial order mistakenly stated that defendants did not want foreign rights. APB69. So what? The key point—as the district court observed earlier—is that defendants *did not get* any foreign rights. SER98; ER247. Defendants knew that when they signed the 50/50 deal. ER3085

(Rights Agreement is for "all North American" *Millionaire* rights); *see* ER3155 (Bartlett notes "North American broadcast rites [sic] only"). Foreign rights had no bearing on Celador's entitlement to 50% of network license profits in the only relevant market: North America.

The proffered evidence's only other possible purpose was impermissible: to inflame the jury against Celador.

b. Syndication.

Celador's damage claim was that ABC should have paid a higher license fee during *Millionaire*'s network run. ER2085. Defendants complain that the district court, on Rule 403 grounds, excluded deposition testimony on *Millionaire*'s performance *in syndication*. APB70-71. That ruling was well within the court's broad discretion.

Millionaire's *syndication* performance had no bearing on Celador's right to share in ABC's *network*-run profits, or on whether ABC should have paid BVT a higher license fee for the *network* run—i.e., before the show went into syndication. Whether Celador made money in syndication is irrelevant to whether it was *also* due a network-run profits share. And, as with foreign rights, defendants actually did present syndication performance evidence. ER2553-57.

Moreover, defendants raised syndication profits only after obtaining a ruling barring Celador's claim that syndication delays at ABC's behest unfairly depressed syndication profits. ER2235, 2257-58, 2261. The district court fully

weighed the relevant factors and properly exercised its discretion. ER210, 2232-37, 2254-62, 2359-60.

III.

CELADOR'S EVIDENCE OF NETWORK LICENSE DAMAGES WAS MORE THAN ADEQUATE.

The jury has wide latitude in determining damages: "The law requires only that some reasonable basis of computation of damages be used, and the damages may be computed even if the result reached is an approximation." *GHK Assocs. v. Mayer Grp., Inc.*, 224 Cal. App. 3d 856, 873 (1990). "Where the *fact* of damages is certain, the amount of damages need not be calculated with absolute certainty. . . . This is especially true where, as here, it is the wrongful acts of the defendant that have created the difficulty in proving the amount of loss of profits. . . ." *Id*. at 873-74 (original emphasis).

This Court reviews for substantial evidence, affording "'substantial deference to a jury's finding of the appropriate amount of damages.'" *Harper v. City of L.A.*, 533 F.3d 1010, 1028 (9th Cir. 2008).

These principles require affirming the network license damages award.

A. Ample Evidence Supports The Fair Market License Fee Award.

Celador established that the Rights Agreement required both ABC and BVT to share profits with Celador and that these profits should have included a fair market license fee. Defendants breached both the express contract terms and the implied covenant by failing to establish and pay a fair market license fee for

Millionaire, as between themselves. Celador presented a single damages measure: what a reasonable ABC-BVT license fee would have been and what Celador's 50% share should have been. This damages measure comports with the arrangement that ABC and BVT themselves made.

Celador's damage evidence, presented through experts, was as follows: (1) what a fair market license fee for *Millionaire*'s network run should have been; (2) multiplied by the number of network episodes; and (3) less the production expenses reported by defendants on the profit participation statements. The remainder was profit, 50% of which was owed to Celador.

Celador did not present direct evidence of ABC's advertising revenue because of a pre-trial ruling that defendants obtained requiring Celador to establish its damages as money that should have flowed to BVT in the form of a license fee. ER238-39. Defendants do not challenge the district court's ruling permitting the very damages presentation Celador made. ER239.

Defendants do not and cannot seriously dispute that the jury's license-fee damages verdict falls squarely within the evidence's reasonable range. Two experts—Richard Marks, a transactional entertainment lawyer who has represented studios and producers for 35 years, and RAND Corporation senior economist James Dertouzos, who began a study of television advertising rates for the U.S. Army years before Celador retained him in this case—provided fair-market license fee estimates of between $2.4 million and $3.0 million per episode. ER1766-72, 1800, 1889, 1895, 1974-75. They looked at *Millionaire*'s ratings and ad prices, examined the ratio of license fees to ad rates for

similarly-rated shows, and studied different types of programming. ER1788, 1800, 1918-22, 1969-71.

Marks testified that the license fee should have been reset once *Millionaire* succeeded—certainly by Episode 108, if not as early as Episode 13 or 31. ER1801. Dertouzos testified that license fees are typically reset between episodes 100 and 120. ER1902. WMA's Lipstone testified too that license fees were renegotiated on a show's success, regardless of the type of programming involved. ER2345-46.

Accountant Steven Sills calculated four different scenarios: A $2.4 million license fee beginning at Episode 1 ($289 million) (since WMA's commission was renegotiated retroactive to Episode 1) or at Episode 108 ($202 million), and a $3 million license fee beginning at Episode 1 ($395 million) or at Episode 108 ($279 million). ER2079; SER341-42.

The jury awarded $260 million, which falls between Sills' figures for a $2.4 million or $3 million license fee beginning at Episode 108 ($202 million and $279 million) and well below his calculations starting at Episode 1 ($289 million to $395 million). ER99. Defendants limit their network license fee damage attack to an evidentiary one, APB72-79; they do not openly argue that no substantial evidence supports that award.

B. Defendants' Attacks On The Damages Evidence Are Meritless.

1. Defendants fault Celador for failing to prove damages under a theory that it did not pursue.

Defendants argue that there is no evidence of ABC's advertising revenue. APB37-38. Of course there isn't. That wasn't Celador's damage claim because defendants insisted below, and the district court required, that Celador *not* directly claim a share of those revenues. ER239. Rather, as the district court specifically allowed, Celador compared *Millionaire*'s post-success actual spot ad rates (the source of ABC's ad revenue) to the spot ad rates of other successful shows whose per-episode license fees had been renegotiated in order to determine what *Millionaire*'s per-episode license fee should have been. ER239, 1788-90, 1963-71; *e.g.*, SER95, 105-06 (defendants: "this entire case, insofar as the network license was concerned, was tried on one and only one theory, that is, that ABC didn't pay BVT enough"). This evidence is fully consistent with the court's order.

2. The evidence supported damages based on a fair market license fee starting at Episode 1, even though the jury likely did not calculate damages that way.

Defendants argue that the district court should have barred Sills from testifying to what the damages would be if a reasonable fee was applied "back to inception"—that is, starting with Episode 1. The argument goes nowhere.

Sills did not testify that the jury should or should not make a back-to-inception damages calculation. Rather, he calculated total damages based on what a $2.4 million and a $3 million reasonable license fee would yield starting alternatively at Episode 1 and Episode 108. The *evidence* fully supported his Episode 1 assumption. But even if it didn't, back-to-inception was just an assumption that the jury was free to accept or reject.

a. ABC's own conduct supported applying a fair market license fee starting at Episode 1.

The record solidly supported applying a fair market license fee retroactive to Episode 1. ER34-35 (district court so finds). ABC *did* increase *Millionaire*'s license fee retroactive to Episode 1 in light of *Millionaire*'s success—just not in a way that benefitted Celador: ABC recalculated WMA's commission using license fees increased *retroactive to Episode 1*, but nevertheless did not use a fair market license fee. ER34 (citing SER208); ER945-51. It paid BVT $500,000 *retroactively* for overhead costs already incurred. ER3293. There was no error in allowing a calculation of damages based on a fair market license fee beginning

with Episode 1 as an approximation of damages. *See GHK Assocs.*, 224 Cal. App. 3d at 873.

Defendants' other challenges to an Episode 1 calculation are equally unavailing.

- Defendants ignore relevant expert testimony in asserting that the evidence did not support applying a fair market license fee before Episode 108. APB74. Marks testified that a $3 million fee beginning at Episode 108 was "very conservative" and that he could have used a much earlier starting point. ER1801; *see also* ER1855-56 (*Survivor* license fee renegotiated after 13 episodes); ER1871 (*Millionaire* was successful early, with 22 million viewers in its second week).[20]
- Defendants miss the point in asserting that renegotiating with one party doesn't require renegotiating with all parties. APB75. Celador's Episode 1 calculation is a *damages* estimate, not a theory of liability. Once the jury decided liability in Celador's favor, how far back damages should go was for the jury to decide based on the evidence. The jury could find that a fair market license fee for *Millionaire* should be no less retroactive than WMA's renegotiated license fee. As the district court noted, defendants' argument "improperly conflates a lack of duty to renegotiate . . . with an appropriate measurement of damages." ER34.

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[20] Defendants' footnote attack on Episode 108 as a starting point, APB74 n.20, ignores this substantial evidence. ER1801 (Marks: Episode 108 is reasonable); ER1902 (Dertouzos: license fees typically reset between episodes 100 and 120).

- Celador did not "all but concede[]" that the Episode 1 calculation was improper. APB75. Its position was the same as its position here: Although the jury *could* have applied a fair market license fee retroactive to Episode 1, it almost certainly did not do so. ER285 & n.14.

b. Any claimed error was harmless: The jury almost certainly did not award damages based on a license fee retroactive to Episode 1.

Defendants' argument also fails because Sills' Episode 1 estimates almost certainly made no difference. *Boyd v. City & County of S.F.*, 576 F.3d 938 (9th Cir. 2009) (error harmless if probably would not have made a difference).

The jury's $260 million verdict is between Sills' two estimates beginning at Episode 108—$202 million ($2.4 million license fee) and $279 million ($3 million license fee). It is $*30 million below* any estimate starting at Episode 1. ER2079 ($289 million and $395 million).

Sills presented both the Episode 1 and Episode 108 calculations in the same format, and did not emphasize one over the other. ER2079, 2087-92, 3309-10. Celador's counsel did not argue for one starting point over the other. Explaining that there were bases for using either one, counsel reviewed both sets of calculations and told the jury that the damages were up to it. ER2777.

If there was error, it surely made no difference, and therefore was harmless.

3. There is no basis for second guessing the jury's view of the expert testimony, the sufficiency of which defendants never challenge.

Defendants ultimately resort to denigrating the expert fair market license fee testimony. *See* APB77-78. But they do not argue that the testimony is insufficient to support the verdict, so they have waived any such claim. *Smith v. Marsh*, 194 F.3d at 1052. The argument that they do make—that the jury probably found Marks' opinion unpersuasive—distorts both the record and the standard of review. *See Harper*, 533 F.3d at 1021 (jury verdict must be upheld if supported by evidence adequate to support the jury's conclusion, viewing the record in the light most favorable to the nonmoving party, even if it is also possible to draw a contrary conclusion). It also impermissibly invades the jury's thought processes. *Smith v. Cupp*, 457 F.2d at 1100; *Midwest Underground Storage,* 717 F.2d at 501.

Defendants' other summary attacks merely rehash criticisms that they made at trial (*e.g.*, SER140, 141-42; ER2827-28) and that the jury was free to reject. In a nutshell:

- Marks' methodology was hardly arbitrary. Marks did not use "a single point of comparison," APB78, in reaching his opinion. He considered the top ten programs in 1999-2000, eliminated *Millionaire* because it occupied four of the top ten spots for the broadcast year; eliminated *Survivor* and *The Practice* which hadn't been renegotiated; and eliminated *Monday Night Football*. He based his $3 million fair market

value license fee opinion on the ad rates and license fees of three other top ten shows—*ER*, *Friends*, and *Law & Order*. To be conservative, he used *Law & Order* as most comparable to *Millionaire* because the license fees of *Friends* and *ER* would have produced a much higher license fee opinion for *Millionaire*. ER1788, 1797-1801.

- Contrary to defendants' claim, *Law & Order* was not an inapt comparison because it is scripted and *Millionaire* is not. APB78. If anything, differences in the economics of scripted and reality shows cut in favor of Celador: Dertouzos testified that the license fee for a game show should be *higher* than for a scripted show because the producer has no prospect of making money on reruns. ER2054-55.
- The claim that Celador did not identify any reality show with a license fee approaching $3 million ignores that defendants themselves elicited testimony from Marks that he *was* aware of such a show. Defendants simply did not ask him to name it. *Compare* APB78 *with* ER1813; *see also* ER1799 (identifying several scripted shows with higher license fees). And, in any event, *Millionaire* was a unique prime-time *game show*. ER517-18, 1531-32.
- The claim that Marks and Dertouzos failed to control for production costs, APB78-79, is both irrelevant and wrong. Dertouzos implicitly tested for costs. ER2050. Even defendants' expert could not confirm that production costs impact license fees; he conceded that, if anything,

license fees for reality shows should be *higher* as a percentage of production cost than for a scripted show. SER143-44.

IV.

THE JURY PROPERLY DETERMINED THAT THE RIGHTS AGREEMENT DID NOT PERMIT DEFENDANTS' DOUBLE-DIP MERCHANDISING FEE AND EXPENSE DEDUCTIONS.

Defendants' misreading of the Rights Agreement does not stop at network broadcast profits. They also misread the Rights Agreement to ensure no merchandising profits beyond certain non-refundable advances (about $5 million out of $70+ million in merchandising revenue).

Here's how. The Rights Agreement affords Celador a 50% share of merchandising profits "from all sources worldwide from exploitation of . . . *ancillary and subsidiary rights*." ER3102 (emphasis added); *see* ER3088. It grants BVT a 50% merchandising *fee* (here, $35 million), deductible before the profits split. ER3102 ¶ 1; *see* ER3140. But BVT *also* deducted merchandising *expenses* (totaling $36 million). ER3140. It did so even though the Rights Agreement limits deductible expenses to those "directly related" to the "Pilot and/or Series"—the modifier "directly" having been added, as the jury found, ER84, to preclude deducting just such ancillary merchandising expenses. With deductions for fees (50%), expenses (50+%), and WMA's commission (another $3 million), *Millionaire* inevitably showed a merchandising loss.

Defendants argue that the Rights Agreement *unambiguously* permits them to deduct *both* merchandising fees (50%) *and* expenses (50+%). Indeed, according to their expert, 50% merchandising expenses is "right on line with" what "would be expected." ER2651-52. Thus, defendants contend the merchandising profits promise is another guaranteed no-profits provision.

Defendants are wrong. They ignore "*directly* related to." The Agreement is reasonably susceptible to Celador's no-double-deduction reading, especially in light of the conflicting extrinsic evidence. Interpreting the Agreement was therefore the jury's job. *First Nat'l Mortgage*, 631 F.3d at 1067; *City of Hope*, 43 Cal. 4th at 395.

A. The Provision Permitting Deductions Only For Expenses "*Directly* Related To The Pilot And/Or Series" Was Reasonably Susceptible To Celador's Interpretation—That It Excluded Merchandising Expenses Beyond The 50% Merchandising Fee.

The Rights Agreement promises Celador a share of profits from "all sources worldwide from exploitation" of *both* "[a] episodes of the Series *and* [b] ancillary and subsidiary rights." ER3102 (emphasis added). Merchandising falls under ancillary and subsidiary rights. ER661, 1081, 1179. The dispute is whether merchandising *expenses* are deductible from *Millionaire*'s profits on top of the 50% merchandising *fee*, ER3102 ¶ 1.

The Agreement's five specific deduction categories nowhere mention merchandising expenses. ER3102 ¶¶ 1-5. Only Paragraph 2 is at issue

here—"[o]ut-of-pocket advertising, promotion and distribution expenses *directly* related to the Pilot and/or Series." ER3091 ¶ 3.B(3)(vi), 3102 ¶ 2 (emphasis added). Defendants argue that these expenses are *unambiguously*—as a matter of law—deductible from merchandising receipts notwithstanding the qualification that the expense must be "directly related to the Pilot and/or Series."

The district court found otherwise. ER45-49. The contract text and extrinsic evidence support that conclusion and the jury's finding that, in fact, the expenses are not deductible:

- To be deductible, expenses must "*directly*" relate to "the Pilot and/or Series." ER3091. In defining "receipts" from which deductions are to be made, Exhibit B specifically distinguishes between "episodes of the Series" and "ancillary and subsidiary [i.e., merchandising] rights." ER3102; *see* ER3089 (distinguishing between "merchandising" cost and revenues and those "relating to the production of the Pilot and/or Series"). A distinction made in one contract clause logically should carry through to other clauses. *Levi Strauss & Co. v. Aetna Cas. & Sur. Co.* 184 Cal. App. 3d 1479, 1486 (1986) ("words used in a certain sense in one part of a contract are deemed to have been used in the same sense elsewhere in that instrument"); Civ. Code § 1641 (contract provisions must be read together). That's especially true here, since both provisions appear on the same page in Exhibit B. It's certainly reasonable to connect merchandising expenses to ancillary and subsidiary rights, rather than to "episodes of the Series," and just as reasonable to equate

"episodes of the Series" to "Pilot and/or Series." To the extent the latter are at all different, that's fodder for ambiguity, not clarity. *See In re Bell*, 19 Cal. 2d 488, 499-500 (1942) ("and/or" inherently ambiguous); *Cal. Shipbuilding Corp. v. Indus. Accident Comm'n*, 85 Cal. App. 2d 435, 436 (1948) (same).

- The "*directly*" limitation was specifically negotiated—inserted at Celador's request into defendants' otherwise boilerplate language. ER882, 1095, 1103, 3091. Its addition presumptively had a substantive effect. Civ. Code § 1651 (specifically added words control over form language); Code. Civ. Proc. § 1862 (written words control over printed form). Necessarily, it narrows the deduction.
- ABC agreed to insert "directly" during in-person contract negotiations with Celador where the parties discussed a "[c]ap on ad/promo/distrib expenses; or estimate"; ABC's executive, Winograde, specifically initialed the change. ER1101-05; SER223, 225 (ABC phone participant Rierson's notes).
- Merchandising expenses were not identified as deductible with the specificity required by commonly-understood industry custom. ER1803-04, 1806-07.
- The 50% distribution fee was substantially greater than the 7½% Celador normally paid. ER449.

B. Defendants' Unambiguity Claim Distorts The Record.

1. Defendants' textual arguments highlight the Agreement's ambiguity.

Picking and choosing contract language, defendants attempt to correlate profits "derived . . . from the exploitation of any Pilot and Series" with expenses "directly related to the Pilot and/or Series." APB81. They assert that "it *necessarily* follows that merchandising expenses are '[directly] related to the Pilot and/or Series." *Id*. (emphasis changed). Says who? Nothing in the agreement equates "derived from" with "directly related to." Settled rules of construction dictate otherwise: "When two words are used in a contract, the rule of construction is that the words have different meanings." *Queen Villas Homeowners Ass'n v. TCB Prop. Mgmt.*, 149 Cal. App. 4th 1, 9 (2007). "[*D*]*irectly* related to" is narrower than the generic "derived from." Equally telling, defendants ignore that elsewhere the Agreement distinguishes between revenues received "from the exploitation of the episodes of the Series and [those from] ancillary and subsidiary rights." ER3102 ("Defined Receipts" definition).

Noting that "costs and revenues in connection with merchandising" are to be treated separately from those "relating to the production of the Pilot and/or Series," defendants next argue that there could be no merchandising "costs" if merchandising expenses were not deductible. APB81-82 citing ER3089. But BVT's merchandising fee and WMA's commission, both deductible,

are costs. ER3102; *see* ER47 (district court so observes). Defendants' wholly unsupported claim that only charges that can create a negative balance can be "costs" is nonsensical. Indeed, defendants' accounting lists WMA's commission in the same "expense" category as the other items it argues are costs, and like other merchandising "costs and revenues" treats it separately from production/broadcast costs and revenues. ER3140. If anything, the merchandising "costs and revenues" provision suggests a distinction from "Pilot and/or Series" costs and revenues, further supporting *Celador*'s reading. *Compare* ER3089 *with* ER3102 ¶ 2.

Defendants' trial presentation highlighted the ambiguity. Their expert painstakingly had to "to piece together . . . three different sets of words in the contract" to opine that merchandising expenses were deductible. ER2642; *see* ER2593-94, 2596.

2. Defendants cannot discount the relevant extrinsic evidence supporting Celador's interpretation.

Defendants claim that Marks' testimony on industry custom was improper legal opinion. APB84. But Marks did *not* offer a legal opinion. He testified as "to the custom and practice that [he had] lived with for three decades," "[b]ased on looking at hundreds, if not thousands, of definitions like this, and understanding the custom and practice . . . ." ER1803-06. Defendants do not challenge his industry-custom testimony. Juries properly evaluate expert testimony regarding customary industry usage as regards specific words, phrases, or provisions.

Wolf v. Superior Court, 114 Cal. App. 4th 1343, 1354-55 (2004) (expert testimony improperly excluded as to customary industry meaning of "gross receipts").

Nor was Marks' testimony the only extrinsic evidence. Defendants' witness testified that merchandising expenses typically run 50% of revenues. ER2651-52. But the 50% distribution *fee* far exceeded the 7½% Celador typically paid, ER449, a circumstance that allowed the jury to conclude that the parties did not intend a double charge for the same costs so as to yield a no-profits deal. *See* Civ. Code §§ 1641, 1647 (contracts interpreted with reference to surrounding circumstances); Code Civ. Proc. § 1864 (provisions to be read in favor of party benefitted).

That other conflicting extrinsic evidence exists, *e.g.*, ER2597, 2643, is irrelevant. "When, as here, ascertaining the intent of the parties at the time the contract was executed depends on the credibility of extrinsic evidence, that credibility determination and the interpretation of the contract are questions of fact that may properly be resolved by the jury." *City of Hope*, 43 Cal. 4th at 395.

Indeed, the extrinsic evidence *defendants* rely on raises just such credibility issues. *Compare* ER1000-01 cited at APB83 *with* ER999-1000, 3149 (Lipstone did not know whether merchandising expenses were deductible; his negotiation notes mention deductible merchandising *fee*, but not *expenses*); *see* ER49 (district court: witnesses defendants rely on were "interested participants the jury was not required to believe").

V.

THE DISTRICT COURT ACTED WELL WITHIN ITS DISCRETION IN EXCLUDING EVIDENCE REGARDING A COMPLEX, IRRELEVANT CORPORATE TRANSACTION.

The district court exercised its discretion to exclude a November 2006 document pertaining to a long-after-the-fact, irrelevant corporate realignment. ER230, 248, *see* APB86-90; ER221 (defendants describing document as "in anticipation of [a corporate] sale"), 229-30 (proffer re complexity of document and transaction), 3313 (document at issue). Its parties are Celador Productions and another commonly-owned entity as "assignors" and Celador International as "assignee." ER3315. All parties are affiliated Celador entities. *Id*. Defendants claim the document sheds light on whether Celador Productions signed the Rights Agreement as the undisclosed agent of Celador International.

Hardly.

Celador *International* owned the U.S. rights to *Millionaire*, not Celador Productions. ER477-79, 3000-01. Contracts are construed to be "capable of being carried into effect." Civ. Code § 1643. If Celador Productions didn't act as Celador International's agent, then no broadcast rights were conveyed to defendants and the Rights Agreement was illusory. Having accepted the contract's benefits, defendants cannot avoid paying the true rights owner, Celador International. *See Melchior v. New Line Prods., Inc.*, 106 Cal. App. 4th 779, 787-90 (2003).

Celador Productions was denominated "Owner" in the Rights Agreement because it owned and conveyed Smith's executive producer services. ER3085. Celador Productions therefore signed in *two* capacities: *both* in its own right (as to Smith's executive producer services) *and* as Celador International's agent. ER476-79, 3085, 3092-93 ¶ 6. It represented that it had "the exclusive right to grant all the rights and to perform all services referred to herein." ER 3095 ¶ 12, 3098 ¶ 3(c), (d). Similarly, Smith's consent explicitly says, "I hereby confirm that *Owner* has the full right and authority to grant all rights granted." ER3096-97.

Returning to the excluded document, it is unclear what the document even means. Self-described variously as a "deed of assignment" or "transfer agreement," ER3313, 3315-24, 3334, it *appears* to describe numerous rights as among commonly-owned entities, ER3325-33 (133 contracts to be assigned, 34 contracts "to be novated"). It is governed by "the law of England and Wales." ER3324 ¶ 12.1. Defendants never proffered evidence or argument as to the document's meaning under that law (e.g, what is a "novation" between related parties *not* including third parties to the original contract?), nor did they make an offer of proof that the Rights Agreement was or was not thereafter "novated." Having failed to make such proffers, defendants cannot claim error on appeal. *Tennison v. Circus Circus Enters., Inc.*, 244 F.3d 684, 689 (9th Cir. 2001).[21]

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[21] Defendants do *not* claim that the actual corporate sale was relevant. *See* ER223 (defense counsel: "the actual sale document, it doesn't really matter to me, and I wasn't even planning on asking, did you sell the company?").

Counterbalancing whatever limited relevance the document might have were considerations of undue time consumption, potential for confusion, prejudice, and the cumulative nature of the evidence. The document was part of a complex corporate transaction. Its meaning "would depend on the context of the document as a whole." ER230. Having failed even to address these considerations, defendants have waived on appeal any claimed evidentiary error.[22] Both Rules 402 and 403 warranted exclusion. *Sprint/United Mgmt.*, 552 U.S. at 384 (Rule 403 gives court broad discretion); *Bowoto*, 621 F.3d at 1131 (court need not recite Rule 403 formula ruling); *United States v. Pang*, 362 F.3d at 1192 (court must affirm on any ground record supports).

Finally, any possible error was harmless. The overwhelming evidence supports the jury's finding, ER83, that Celador Productions acted as Celador International's agent. ER406 (both Celador Productions and Celador International/Entertainment Developments were involved in Rights Agreement negotiations), 679-81 (Celador International/Entertainment Developments sent invoice to defendants), 1112-13 (same), 712-13 (same re accounting statement); 1301 (same), 716-18; SER203 (Celador International/Entertainment Developments invoice), 204 (payment on same invoice), 226-28 (royalty report for *Millionaire* board game on Celador International letterhead), 239-40 (Celador International letter to defendants), 325 (tolling agreement between defendants and

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[22] The document was also cumulative as to Smith's and Gregson's financial stake, which Smith admitted. ER809, 811; *see* SER100-01 (defense counsel conceding that admission would allow defendants to "work around" the agreement).

Celador International).[23] The district court properly recognized defendants' last-minute proffer for what it was: a distraction raised by desperate parties for whom the case was not going well. Its exclusion ruling was within its broad discretion.

[23] Defendants suggest that the Celador Productions-as-agent theory came late in the case. APB86-87. Not so. ER3000-01, 3019 (April *2006* Gregson deposition: Celador Productions might have entered the agreement on behalf of Celador International); ER2733-34 (July 2008 Celador interrogatory response lays out theory).

CROSS-APPEAL

THE DISTRICT COURT SHOULD HAVE ALLOWED THE JURY TO DECIDE CELADOR'S FRAUD CLAIM.

If the Court affirms the judgment, Celador is satisfied with the disposition; it seeks no other relief. But if the Court reverses, it should permit Celador to try its fraud-in-the-inducement claim.

Review of the district court's judgment as a matter of law is de novo, construing all evidence and inferences in Celador's favor. *Torres v. City of L.A.*, 548 F.3d 1197, 1205-06 (9th Cir. 2008). "If conflicting inferences may be drawn from the facts, the case must go to the jury." *Byrd v. Maricopa Cnty. Sheriff's Dep't*, 565 F.3d 1205, 1215 (9th Cir. 2009).

A. The Substantial Evidence: ABC Promised, But Never Intended To Honor, A Network Deal.

Davies convinced Celador to cut a deal with ABC by telling Smith that:

- ABC was the only network that could guarantee production of *Millionaire*, ER464, 2926-28;
- ABC was the "perfect home" for *Millionaire*, ER527, 2925, 2928, 2964-65;
- ABC would be the "cleanest relationship" for Celador because there would be a "direct relationship" with the network without other companies or individuals involved, ER528-29;

- The *Millionaire* franchise would be developed for the parties' mutual benefit, ER464-65;
- ABC and Disney would aggressively "monetize" *Millionaire*'s brand, ER529-30, 872.

Thus, from the outset ABC promised a network deal, not a production company deal. And that is exactly what the Rights Agreement—drafted by ABC's lawyer—created: A direct deal with ABC, in which Celador would share the network's success. ER3085. Celador reasonably relied on these promises. ER465, 530.

But ABC never intended to participate in a network deal. Even before it signed the Rights Agreement, ABC secretly agreed with BVT to transform the network deal into the very production company deal that ABC promised Celador would not happen. *See* ER1157-58, 1160-62, 1173, 1176, 1244-45. Even now, ABC still disavows any Rights Agreement obligation. According to defendants' witness, ABC signed the Rights Agreement not because it intended to undertake any obligation, but only as a charade to keep up the pretense that Celador was obtaining a network deal. ER1171-73. It was a classic bait and switch—offer a network deal, then claim that it was always a production company deal.

Celador knew none of this. ER721-22, 937-42, 962-63, 1028-29.

B. The Network Deal Pretense Was Fraud.

Fraud encompasses "misrepresent[ing] a material fact," "suppress[ing] facts," or "ma[king] a promise intending not to perform it." *Miller v. Fairchild Indus., Inc.*, 885 F.2d 498, 509 (9th Cir. 1989) (applying California law). ABC's conduct partook of all three: (a) misrepresenting that it was entering into a network deal, (b) suppressing the true facts—its secret, behind-the-scenes agreement with BVT to transform the deal into a production company arrangement, one with a license-fee-equals-production-cost formula that would guarantee network *losses* for Celador, and (c) promising a network deal that it never intended to create.

Locke, 57 Cal. App. 4th 354, is on point. There, a studio had discretion to determine whether a producer's proposed films merited its interest, but it failed to disclose that it never intended to make the proposed films. *Id*. at 367. The appellate court held that these facts, if proven, constituted actionable fraud. *Id*.

So, too, here. Despite its promises of a network deal to Celador, ABC never intended to create that deal. Before signing the Rights Agreement, ABC agreed with BVT to a license-fee-equals-production cost, guaranteed broadcast loss scheme—converting a network deal into a guaranteed-loss production company deal. Construed in Celador's favor, the evidence and inferences show deliberate deception.[24]

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[24] This is consistent with the contract claim. "An action for promissory fraud may lie where a defendant fraudulently induces the plaintiff to enter into

(continued...)

As for the statements themselves, the district court reasoned that "[t]he evidence regarding the allegedly fraudulent representations simply reveals statements that are too vague, conclusory and of the nature of opinion to be actionable, particularly in the context of this record." SER3. That "context," the court said, was "(1) Mr. Smith's level of business experience and sophistication in the entertainment industry, (2) Celador's representation in the transaction by [WMA], and (3) the lack of interest in the series on the part of other networks or buyers." *Id*.

In effect, the district court held that it was unreasonable for Celador and WMA to rely on ABC when it promised *and signed* a network deal. But "[e]xcept in the rare case where the undisputed facts leave no room for a reasonable difference of opinion, the question of whether a plaintiff's reliance is reasonable is *a question of fact*." *Alliance Mortg. Co. v. Rothwell*, 10 Cal. 4th 1226, 1239 (1995) (emphasis added); *see Miller*, 885 F.2d at 510 ("Actual fraud is a question of fact involving determinations of intent and evaluations of credibility properly resolved by the jury"); *Gray v. Don Miller & Assocs., Inc.*, 35 Cal. 3d 498, 503

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[24] (...continued)
a contract. [Citations.] In such cases, the plaintiff's claim does not depend upon whether the defendant's promise is ultimately enforceable as a contract. 'If it is enforceable, the [plaintiff] . . . has a cause of action in tort as an alternative at least, and perhaps in some instances in addition to his cause of action on the contract.' Rest.2d Torts, § 530, subd. (1), com. c., p. 65." *Lazar v. Superior Court*, 12 Cal. 4th 631, 638 (1996) (recipient of false promise may sue in both tort and contract). If the claims are inconsistent, Celador need not elect a remedy until all claims are finally determined.

(1984) (fact question "whether the person who claims reliance was justified in believing the representation in the light of his own knowledge and experience").

Here, the facts *are* disputed, and there is *ample* "room for a reasonable difference of opinion." Given ABC's express network deal promise, no amount of industry custom would require a jury to believe that Celador or WMA should have intuited ABC's secret, behind-closed-doors deal with its affiliated entity BVT, or to realize that ABC viewed itself as only a sham party to the Rights Agreement. Quite the opposite: WMA's industry experience led it to believe that it had obtained for Celador a unique, extraordinary, "rich" deal. ER541-42.

Other network interest is irrelevant. Celador premises its claim on the deal that ABC promised but never intended to honor, not on what some other network might have promised.

The fraud claim should have been decided by a jury. If the Court reverses, it should permit Celador to try that claim.

CONCLUSION

The judgment should be affirmed.

If not, the fraud claim should be reinstated.

Dated: September 30, 2011

By: /s/ Robin Meadow

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ADDENDUM A – Cast of Characters

Celador

Paul Smith	Managing Director, Chairman and CEO, Celador International, Ltd. and Celador Productions, Ltd.
Sarah Gregson	Celador Productions' Director of Business and Legal Affairs; in-house counsel for Celador International

William Morris Agency

Greg Lipstone	Vice-President/agent responsible for ABC account; lead negotiator on principal deal points
Angela Petillo	Attorney; helped negotiate Rights Agreement
Ben Silverman	Agent originally contacted by ABC to obtain *Millionaire* rights; helped negotiate deal points
David Leffin	Vice-President of Participations
Anna MacInnis	Junior accountant, deceased

Sills & Adelman, Auditors (retained by Celador)

Steven Sills	Oversaw Celador audit; damages expert witness
Diana Crudeli	Conducted Celador audit
Anita Wu	Conducted Celador audit

The Walt Disney Company

Corporate parent of
American Broadcasting Corp. (ABC)
Buena Vista Television (BVT)
Buena Vista Pictures (BVP)
Valleycrest Productions

Michael Eisner	Board Chairman and CEO, Walt Disney Company
Michelle Gazica	Senior Vice-President, Participations and Residuals, Walt Disney Pictures

ABC

Robert Iger	President and Chairman, ABC Media; President, Disney International
Michael Davies	Executive Vice-President; contacted WMA and Smith to obtain *Millionaire* rights for ABC
Lee Bartlett	Attorney, Vice-President of Business Affairs; lead negotiator on principal deal points
Jana Winograde	Senior executive, ABC's Business Affairs and Contracts Department
Lee Rierson	Attorney; drafted Rights Agreement

BVT

Mort Marcus	President (also of BVP and Valleycrest)
Don Loughery	Attorney, Head of Business Affairs
Lori Bernstein	Attorney, Senior Vice-President of Business Affairs

ADDENDUM B - RIGHTS AGREEMENT

JOINT EXHIBIT 1A

ABC, Inc.

As of December 1, 1998
Revised February 12, 1999
Revised February 26, 1999
Revised March 1, 1999
Revised March 2, 1999
Revised March 5, 1999

Celador Productions
c/o William Morris Agency, Inc.
151 El Camino Drive
Beverly Hills, California 90212
Attn: Greg Lipstone

RE: "WHO WANTS TO BE A MILLIONAIRE" -- OPTION/ PURCHASE OF RIGHTS/EXECUTIVE PRODUCER AGREEMENT ("AGREEMENT")
CELADOR PRODUCTIONS ("OWNER") F/S/O PAUL SMITH ("ARTIST")

Dear Greg:

This letter shall confirm the agreement between American Broadcasting Companies, Inc. ("ABC") and Buena Vista Television ("BVT") (collectively, "ABC/BVT"), on the one hand, and Celador Productions ("Owner") f/s/o Paul Smith ("Artist") on the other hand: (i) for ABC/BVT to acquire exclusively all North American rights to the television quiz show concept and format currently entitled "WHO WANTS TO BE A MILLIONAIRE" (the "Property"), as that format s embodied in the promotional videotape for the British version of the television show heretofore provided to ABC/BVT by Owner and (ii) for ABC/BVT to engage Artist's services as an executive producer in connection with the production of a series based on the Property. The terms of the agreement shall be as follows:

1. OPTION/GUARANTEE. In consideration of the payment of Two Hundred Fifty Thousand Dollars ($250,000) ("Option Guarantee") to Owner, Owner hereby grants ABC/BVT an exclusive and irrevocable option through December 31, 1999 ("Option Period") to acquire all rights to the Property in the Territory, as defined in paragraph 5 below ("Option"). The Option Period may be extended through June 30, 2000 ("Option Extension Period") by notice to Owner prior to the expiration of the Option Period and payment promptly thereafter of an additional Two Hundred Fifty Thousand Dollars ($250,000) ("Option Extension Guarantee").

A. The Option Guarantee and, if the Option Period is extended, the Option Extension Guarantee, shall be fully applicable against, and recoupable from, the

2040 Avenue of the Stars Los Angeles, CA 90067-4785 (310) 557-7777

SERIES\MILLIONAIRE-RIGHTS-EP6.DOC

"Rights/Executive Producer Fees" as defined and set forth in paragraph 3.A. below, and shall be payable as follows:

(1) one-half (1/2) of the Option Guarantee (i.e., $125,000) shall be payable promptly following execution of this Agreement, which payment shall be recouped ratably over the first twelve (12) Series episodes produced (the foregoing recoupment schedule is subject to change if the Series is not produced for network television, based on the fees payable pursuant to Paragraph 3.A.(2).);

(2) The remainder of the Option Guarantee (i.e., $125,000) shall be payable promptly following the expiration of the Option Period (i.e., December 31, 1999), and shall be recouped ratably over the Series episodes produced for the first and/or second Series year (the foregoing recoupment schedule is subject to change if the Series is not produced for network television, based on the fees payable pursuant to Paragraph 3.A.(2).).

(3) In the event that ABC/BVT extends the Option Period, then the Option Extension Guarantee shall be payable one-half (i.e., $125,000) promptly following the notice of extension (which notice shall be given no later than December 31, 1999) and one-half (i.e, $125,000) promptly following the expiration of the Option Extension Period (i.e., June 30, 2000). The foregoing payments shall be recouped ratably over the Series episodes produced for the first and/or second Series year (the foregoing recoupment schedule is subject to change if the Series is not produced for network television, based on the fees payable pursuant to Paragraph 3.A.(2)).

B. The Option shall be exercised by ABC's or BVT's commencing production on a pilot, presentation tape and/or sets of airing and/or non-airing test episodes ("Pilot") or a series ("Series") containing element(s) of the Property or, at ABC/BVT's discretion, the Option may be exercised by written notice to Owner.

C. In the event that ABC/BVT elects not to order further episodes of the Series and at such time the Option Guarantee (and, if applicable, the Option Extension Guarantee) has not been fully paid to Owner (either in the form of Option Guarantee or Option Extension Guarantee payments or in the form of Rights/Executive Producer Fees), then the remainder of such monies due shall be payable promptly following the expiration of the Option Period or the Option Extension Period, whichever is applicable.

2. SERIES. The Series may be produced, at ABC/BVT's discretion, by BVT, ABC, an entity affiliated with BVT or ABC, or a third party. In the event that the Series is produced by a third party, ABC/BVT will remain secondarily liable for the obligations to Owner and Artist hereunder. The Series may be produced for the ABC Television Network, first-run syndication,

pay or basic cable, and/or any other television media. If ABC/BVT exercises the Option as set forth in paragraph 1.B. above, then ABC/BVT shall own, subject to Owner's rights of reversion as set forth in paragraph 4 below, the exclusive rights throughout the Territory (as defined in paragraph 5 below), in perpetuity, to the Property (including, but not limited to, all concepts, ideas, elements or other constituent elements of the Property), and all rights to distribute and exploit all programs and adaptations of the Property, including but not limited to ownership of the copyrights therein, throughout the Territory, by any means whether now known or hereinafter invented, including, but not limited to, television, digital television, video and computer games, video cassette, video and laser disc, any computer assisted media (including, but not limited to CD-ROM, CD-I, and similar disc systems, interactive media and multi-media and any other devices and/or methods now existing or hereinafter devised), character, sequel, remake, theme park, stage play, sound recordings, merchandising and all allied and ancillary and subsidiary rights therein.

3. CONSIDERATION. In consideration of the rights set forth above and services by Artist as set forth elsewhere herein, subject to ABC/BVT's exercising the Option as set forth herein, Owner shall be entitled to the following consideration:

A. Pilot and/or Series Compensation -- Rights/Executive Producer Fee: ABC/BVT shall engage Owner's and Artist's non-exclusive executive producer services at the following "Rights/Executive Producer Fees," whichever are applicable pursuant to the applicable intended initial use (these fees shall be inclusive of the fees for ABC/BVT's ongoing rights to the Property as set forth herein):

(1) If the Series is to be produced for exhibition on a National Network (i.e., ABC Television Network or another national television broadcast network [CBS, NBC, Fox, UPN, WB]: ABC/BVT shall pay to Owner a Rights/Executive Producer Fee of $25,000 (30-minute programs) or $35,000 (60-minute programs) per episode produced, with a minimum of six (6) episodes guaranteed in the first Series year and a minimum of thirteen (13) episodes guaranteed in the second and subsequent Series years for which Series episodes are produced. If Series episodes are ordered for exhibition on a National Network for a second and/or subsequent Series year, then the foregoing fees shall be increased by five percent (5%) (on a cumulative basis) in each succeeding Series year.

(2) If the Series is to be produced for exhibition in any television media other than a National Network: ABC/BVT shall pay to Owner a Rights/Executive Producer Fee of $15,000 (30-minute programs) or $22,500 (60-minute programs) per stripped week of episodes produced for the first thirteen (13) weeks; $17,500 (30-minute programs) or $25,000 (60-minute programs) per stripped week of episodes produced for the next thirteen (13) weeks; and $22,500 (30-minute programs) or $30,000 (60-minute programs) per stripped week of episodes produced for all weeks thereafter; with a minimum of

thirteen (13) stripped weeks guaranteed in the first Series year; a minimum of seventeen (17) stripped weeks guaranteed in the second Series Year, and a minimum of twenty-two (22) stripped weeks guaranteed in the third and subsequent Series years for which Series episodes are produced. For purposes of this Agreement, the term "stripped" shall mean on a two- to five-time-per-week basis (initial exhibition). Notwithstanding the foregoing, if the Series is to be produced for initial exhibition on a once-per-week basis, then the foregoing fees shall be the per-episode fees payable to Owner; and if the Series is produced for initial exhibition on a more-than-five-time per week basis, then the foregoing fees shall be increased pro rata (i.e., by one-fifth) for each episode greater than five in such week. If Series episodes are produced under this subparagraph 3.A.(2) (i.e., in any television media other than a National Network) for a second and/or subsequent Series year, then the second Series year fees shall be $22,500 (30-minute programs) or $30,000 (60-minute programs) per "stripped" week of episodes produced, and shall be increased by five percent (5%) (on a cumulative basis) for the third and each succeeding Series year.

B. Contingent Compensation:

(1) Provided that Owner and Artist fully perform all services required hereunder, and further provided that Owner and Artist are not in material breach hereof, Owner shall be entitled to receive fifty percent (50%) of one hundred percent (100%) of the Defined Contingent Compensation (as defined according to ABC/BVT's standard definition as set forth in Exhibit "B" hereto) derived by ABC/BVT from the exploitation of any Pilot and Series produced hereunder. Said participation shall be reducible by up to ten (10) percentage points by third party participations paid to non-creative third party participants, and shall be reducible by up to twenty-five (25) percentage points by third party participations paid to creative third parties (including but not limited to writers, producers, executive producers, directors, actors), but in no event shall Owner be reduced below a floor of twenty-five percent (25%) of one hundred percent (100%) of the Defined Contingent Compensation. The first fifteen (15) percentage points of the foregoing reductions shall not be subject to Owner's approval, but the second ten (10) percentage points of the foregoing reductions shall be subject to Owner's approval, not to be unreasonably withheld. Agency package commissions, if any, shall be taken "off the top."

(2) As an advance against any Defined Contingent Compensation payable pursuant to subparagraph (1) above, Owner shall be entitled to receive twenty-five percent (25%) of one hundred percent (100%) of the Adjusted Defined Receipts ("ADR") (which term, as used herein, shall be defined according to ABC/BVT's standard definition of Adjusted Defined Receipts as set forth below) derived by ABC/BVT from the exploitation of the Series. Said participation

shall be reducible by up to five (5) percentage points by third party participations paid to non-creative third party participants, and shall be reducible by up to twelve and one-half (12 ½) percentage points by third party participations paid to creative third parties (including but not limited to writers, producers, executive producers, directors, actors), but in no event shall Owner be reduced below a floor of twelve and one-half percent (12 ½%) of one hundred percent (100%) of the ADR. The first seven and one-half (7 ½) percentage points of the foregoing reductions shall not be subject to Owner's approval, but the second five (5) percentage points of the foregoing reductions shall be subject to Owner's approval, not to be unreasonably withheld. Agency package commissions, if any, shall be taken "off the top."

(3) "Defined Contingent Compensation" and "Adjusted Defined Receipts" shall be defined, accounted for and distributed in accordance with ABC/BVT's standard definition, which is attached hereto as Exhibit "B," except that for the purpose of Adjusted Defined Receipts, the distribution fees set forth therein shall be capped at twelve and one-half percent (12 ½ %). In addition, ABC/BVT shall be entitled to deduct one hundred percent (100%) of the unrecouped Option Guarantee and Option Extension Guarantee (if any), which shall be deemed a "Development and Production Cost" of the Series, as defined in paragraph 4 of Exhibit "B" hereto, and allocated on an equal basis over all produced episodes (including any Pilot). Notwithstanding the specifics of such definitions, the parties have agreed that:

(i) merchandising shall be a separate "pot" (i.e., costs and revenues in connection with merchandising shall not be cross-collateralized with costs and revenues relating to the production of the Pilot and/or Series);

(ii) ~~If ABC/BVT does not meaningfully exploit any merchandising rights with respect to the Series within one year of the initial broadcast of the first Series episode~~ ~~[or, if there is no initial broadcast, prior to the end of the Term]~~ (which must be confirmed in writing by and between ABC/BVT and Owner), then the exclusive right to exploit such rights shall revert to Owner; provided that ABC/BVT shall be entitled to the same participation in such exploitation, including but not limited to the same ADR advances, to which Owner would be entitled in connection with ABC/BVT's exploitation of such rights as set forth herein. In connection with the foregoing, and solely in the event that the merchandising rights revert to Owner as prescribed above, Owner warrants, and based upon such warranty ABC/BVT acknowledges, that Owner is, by virtue of a pre-existing contract, obligated to pay a total of 45% of Owner's net profits to the co-

but in any event no later than 2 years after delivery of the first Series episode

creators of the Property in connection with any merchandising revenues earned by Owner ("Co-Creator Participation"); accordingly, in the event the merchandising rights revert to Owner hereunder, then ABC/BVT shall be deemed fully reduced hereunder by virtue of such Co-Creator Participation (i.e., to the 25% limit) and shall not be subject to any further reduction by other participants. In the event merchandising rights are retained by ABC/BVT pursuant to the terms hereof, then the Co-Creator Participation shall be borne solely by Owner and shall not affect ABC/BVT's share. Notwithstanding the foregoing, no third party participation, including but not limited to the Co-Creator Participation shall reduce ABC/BVT's share of board game merchandising revenues, as set forth in subparagraph (iii) below;

(iii) As between ABC/BVT and Owner, Owner shall exclusively retain all worldwide rights to merchandise board games (excluding interactive, on-line or other computer games) relating to the Property and the Series; provided, however, that if Owner uses the Series logo or any other element created by ABC/BVT and original to the Pilot and/or Series produced hereunder, e.g., music, sets, graphics, names or likenesses of host(s), or other new game elements ("Original Elements") (any such use of which shall be subject to prior approval by ABC/BVT, not to be unreasonably withheld, and subject to full indemnification by Owner and Artist of ABC/BVT in connection with such use) in connection with such board game merchandising, then ABC/BVT shall be entitled to an advance of Five Percent (5%) of One Hundred Percent (100%) of the ADR against a Defined Contingent Compensation participation of Ten Percent (10%) of One Hundred Percent (100%) of Defined Contingent Compensation derived from all forms of exploitation of such board games. The foregoing amounts payable to ABC/BVT shall not be subject to reduction for any third party participations, including but not limited to the Co-Creator Participation. In the event that Owner uses, with ABC/BVT's approval, any Original Element of the Series in connection with board game merchandising as set forth herein, then ABC/BVT shall warrant to Owner that ABC/BVT has the right to grant Owner permission to use such Original Element, and further shall fully indemnify Owner in connection with any claim arising out of the breach of such warranty;

(iv) there shall be no distribution fee charged on the initial National Network sale of the Pilot and Series Programs (including the initial National Network exhibition and first repeat exhibition), if any;

(v) there shall be no overhead charged on interest nor interest charged on overhead;

(vi) the word "directly" shall be inserted into paragraph 2 of Exhibit "B" between the words "expenses" and "related"; and

(vii) Other than the overhead fee set forth in paragraph 4 of Exhibit "B," there shall not be any separate production services fee payable to ABC/BVT included in the Development and Production Costs of the Pilot and/or Series;

(viii) any review of BVT's books and records permitted pursuant to the audit provisions of Exhibit "B" shall be made pursuant to audit procedures to be negotiated between the parties in good faith within customary parameters.

C. Artist and Owner acknowledge that the fixed compensation provided to be paid hereunder is by itself fair, reasonable and sufficient compensation for all services rendered by Artist and Owner hereunder and for all rights granted to ABC/BVT by Artist and Owner hereunder whether or not any Contingent Compensation under subparagraph 3.B. ever becomes payable by ABC/BVT hereunder.

D. ABC/BVT shall have the right at all times during the Term, at different times during the Term or simultaneously, to produce both National Network and non-National Network versions of the Series or episodes thereof, subject to the applicable terms of this paragraph 3 (including but not limited to the payment of both applicable National Network and non-National Network fees to Owner, if both versions are produced simultaneously).

4. TERM/REVERSION.

A. In the event that the Option is exercised pursuant to paragraph 1 hereof, the term of this Agreement ("Term") shall expire upon the occurrence of either of the following conditions:

(1) In the event that ABC/BVT fails to order six (6) episodes of the Series (including the Pilot, if any) prior to the expiration of the Option Period (or, if the Option is extended, the Option Extension Period), then the Term shall end upon the expiration of such Option Period (or Option Extension Period, if applicable); or

(2) If ABC/BVT orders at least six (6) episodes of the Series (including the Pilot, if any) prior to the expiration of the Option Period (or, if the Option is

extended, the Option Extension Period), then the Term shall end upon the expiration of a three (3) year period commencing upon the completion of production of the last Series episode based on the Property ordered hereunder; provided, however, that at the conclusion of each year during the Term that passes without ABC/BVT's ordering production of the applicable minimum number of Series episodes set forth in paragraph 3.A. above, Owner shall be entitled to a fee of Twenty-Five Thousand Dollars ($25,000) ("Term Extension Fee") in consideration for the continued exclusivity of the Property to ABC/BVT. Notwithstanding the foregoing, solely in the event that ABC/BVT orders exactly six (6) (no more, no less) Series episodes (including the Pilot) to production, then during the second and third years of the Term Extension Period, in addition to the Term Extension Fee payable for such year, ABC/BVT must engage in some meaningful development, redevelopment or production activity with respect to the Series in order for the Term to continue as set forth in this subparagraph. Without limitation of the foregoing, in the event ABC/BVT has set up a project based on the Property in development at a National Network or other television exhibition service or other third party financier, such shall be deemed to be meaningful development activity for so long as such project is set up.

B. If ABC/BVT produces Series episodes hereunder, then Artist shall commence services on a date designated by ABC/BVT, and shall be "locked" to the Series for the life of the Series, subject to the terms hereof.

C. ABC/BVT, at all times prior to the expiration of the Term, shall have the right to produce additional Pilot(s) and/or Series episodes subject to the terms hereof.

D. Upon the expiration of the Term of this Agreement (as set forth in paragraph 4.A. hereof), the Property and the rights therein shall revert to Owner; provided, however, that ABC/BVT shall retain the rights, as set forth in paragraph 11 hereof, in and to the Pilot(s) and Series episodes theretofore produced, including but not limited to the copyrights therein, and shall retain the exclusive right to continue to exploit such Pilot(s) and Series episodes pursuant to this Agreement, subject only to the contingent compensation payment obligations set forth herein.

5. TERRITORY. "Territory," as used herein, shall be defined as North America, including but not limited to the United States, its territories and possessions, including Puerto Rico and Saipan, Bermuda, Canada, Mexico, and the Disney cruise ships.

6. SERVICES. Artist's executive producer services to be rendered hereunder shall be real, non-exclusive executive producer services, and shall include all services customarily rendered by persons engaged in similar positions in the network television industry. Artist at all times shall render services in accordance with and under the direction and control of ABC/BVT,

whose decisions on all matters with respect to the development and production hereunder shall be controlling. ABC/BVT acknowledge that as of the date hereof, Artist resides in London. Accordingly, Artist's services need not be rendered in person. In the event of Artist's incapacity, disability or death, or in the event Artist's employment relationship with Owner is terminated for any reason, Owner may designate an appointee to render the services required of Artist hereunder (subject to ABC/BVT's approval, not to be unreasonably withheld), provided that in such case, Owner shall remain primarily liable for all obligations, representations and warranties, and grants of rights hereunder.

7. TRAVEL. If at ABC/BVT's request, Artist is required to travel outside of the London metropolitan area in connection with Artist's services hereunder, then subject to ABC/BVT's prior approval in writing and subject to audit, Artist also shall be reimbursed for reasonable first class (if available and if used) travel expenses (Virgin Airways only, if available), in accordance with ABC/BVT's standard travel expense reimbursement policies, and a per diem of $350 per day (all in).

8. CREDIT. Owner shall receive a production company logo credit (which may be animated, subject to time constraints and/or network credit policies) on each episode of the Series (including the Pilot[s]) produced. In addition, Artist shall receive an executive producer credit, separate card, in no less than second position among all executive producer credits and no less favorable in size and type than that of any other executive producer, for each Series episode on which Artist renders executive producer services. Other than as set forth above, the form, size, prominence, placement, boldness and other characteristics of such credits shall be at ABC/BVT's discretion.

9. CREATIVE AND BUSINESS CONTROL. ABC/BVT shall control all business and creative decisions with respect to the Pilot and Series. Notwithstanding the foregoing, Artist shall have meaningful consultation rights, as requested by Artist, in connection with creative matters relating to production of the Pilot and Series, subject to production exigencies and subject to Artist's availability.

10. ASSIGNMENT. ABC/BVT has the right to assign this Agreement in whole or in part (including but not limited to the right to utilize and exploit the results and proceeds of the services of Owner and Artist hereunder) to any assignee for purposes of production and exploitation of any Property/Pilot/Series. Except for the right to receive payment hereunder and the right to sublicense any merchandising rights granted (or reverted) to Owner under paragraph 3.B.(3)(ii) or (iii) hereunder, and except as provided in paragraph 6 hereof, neither Artist nor Owner may assign its obligations under this Agreement; provided, however, that if Owner is purchased by a third party that guarantees the obligations of Owner hereunder, then this provision shall not prevent assignment to such purchaser. Without limitation of the foregoing, ABC may freely assign any project hereunder to BVT, and vice versa, at any time, and in the event of such an assignment, the terms of this agreement applicable to such assignee shall take effect immediately upon such assignment.

11. RESULTS AND PROCEEDS.

A. As between ABC/BVT and Owner and Artist, the Pilot and Series, if any, and all material pertaining thereto (which will include without limitation all material produced, suggested, composed, written, performed or furnished to ABC/BVT by Artist or Owner and all material owned or controlled by Artist and Owner which is incorporated or used in connection with the Pilot and Series, if any), all results and proceeds of Artist's and Owner's services hereunder (which Artist and Owner acknowledge have been and/or will be rendered in collaboration with others) and all copyrights pertaining thereto and extensions and renewals thereof, are and will be the sole and exclusive property of ABC/BVT in perpetuity and in all languages throughout the universe and will constitute "works-made-for-hire" specially ordered or commissioned by ABC/BVT. To the extent such results and proceeds may ever be determined by a court of competent jurisdiction not to be a "work-made-for-hire," Artist and Owner hereby irrevocably and exclusively assign and/or grant to ABC/BVT, in consideration for the compensation provided hereunder, all right, title and interest thereto including without limitation all exclusive exploitation rights and copyright and associated rights therein and all extensions and renewals thereof throughout the universe in perpetuity. As between Artist and Owner and ABC/BVT, except for rights expressly excluded hereunder, ABC/BVT will exclusively own all now known or hereafter existing rights of every kind throughout the universe, in perpetuity and in all languages, pertaining to the Pilot and Series, if any, and any portion or element thereof (either alone or combined with other material), and any sequel, prequel, remake or spin-off thereof, including without limitation the copyrights therein and any renewals or extensions thereof, for all now known or hereafter existing uses, media, forms, means and methods including without limitation all television (including without limitation digitalized television), motion picture, literary, dramatic, musical, stage play, theme park, publishing, merchandising, recording, mechanical, radio, video cassette and video and laser disc, video and computer games, any computer-assisted media (including without limitation CD-ROM, CD-I and similar disc systems, interactive media and multi-media and any other devices and/or methods now existing or hereafter devised), and all allied, ancillary and subsidiary rights and uses thereof, and the foregoing is inclusive of a full assignment to ABC/BVT thereof. The termination of this Agreement for any reason shall not affect ABC/BVT's ownership of the results and proceeds of Owner's and Artist's services hereunder or alter any warranty, representation, covenant, or undertaking on the part of ABC/BVT, Owner or Artists hereunder. Owner and Artist and ABC/BVT are aware and hereby acknowledge that new rights to the Results and Proceeds may come into being and/or be recognized in the future, under the law and/or in equity (hereafter the "New Exploitation Rights"), and Owner and Artist intend to and do hereby grant and convey to ABC/BVT any and all such New Exploitation Rights to the Results and Proceeds purchased hereunder from Owner and Artist. Owner and Artist and ABC/BVT are also aware and do hereby acknowledge that new (or changed) (1) technology, (2) uses, (3) media, (4) formats,

(5) modes of transmission, and (6) methods of distribution, dissemination, exhibition or performance (hereafter the "New Exploitation Methods") are being and will inevitably continue to be developed in the future, which would offer new opportunities for exploiting the Results and Proceeds. Owner and Artist intend to and do hereby grant and convey to ABC/BVT any and all rights to such New Exploitation Methods with respect to the Results and Proceeds. Owner and Artist hereby agree to execute any document ABC/BVT deems in its interest to confirm the existence of the preceding and to effectuate its purpose to convey such rights to ABC/BVT, including without limitation the New Exploitation Rights and any and all rights to the New Exploitation Methods. Owner and Artist further hereby agree that neither Owner nor Artist will seek (1) to challenge, through the courts, administrative governmental bodies, private organizations, or in any other manner the rights of ABC/BVT to exploit the Results and Proceeds by any means whatsoever or (2) to thwart, hinder or subvert the intent of the preceding grants and conveyances to ABC/BVT and/or the collection by ABC/BVT of any proceeds relating to the rights conveyed hereunder. Notwithstanding anything in this subparagraph A., ABC/BVT's exploitation rights in all cases shall be limited to the Territory as defined herein.

B. Notwithstanding anything in subparagraph A. above, upon expiration of the Term hereof, all rights in the original Property, including all sequel, remake and spinoff rights relating thereto, shall revert exclusively to Owner (i.e., Owner shall not be restricted from exploiting the Property in the Territory following the expiration of the Term); provided that (i) ABC/BVT shall retain the non-exclusive rights in the Property to the extent the Property is embodied in the the Pilot and Series episodes produced hereunder, and shall not be restricted from continuing to exploit the Pilot and Series episodes in the Territory in a manner consistent with subparagraph A. above; and (ii) ABC/BVT shall not be restricted from creating a sequel, remake or spinoff based solely on elements of the Pilot and Series which are not derivative of the original Property.

12. REPRESENTATIONS AND WARRANTIES. Owner and Artist represent and warrant that Owner and Artist have exclusive rights to the services provided hereunder and that Owner and Artist have the exclusive right to grant all the rights and to perform all services referred to herein. Owner and Artist agree to indemnify and hold ABC/BVT harmless for breach of any of the representations and warranties set forth herein.

13. SEVERABILITY. Any provision of this Agreement which is invalid, illegal, or unenforceable in any jurisdiction shall, solely as to that jurisdiction, be ineffective to the extent of such invalidity, illegality or unenforceability, without affecting in any way the remaining provisions hereof in such jurisdiction or rendering that or any other provisions of this Agreement invalid, illegal or unenforceable in any other jurisdiction.

14. GOVERNING LAW. The validity of this Agreement, its construction, interpretation and enforcement, and the rights of the parties hereto, shall be determined under, governed by and

construed in accordance with the internal laws of the State of California, without regard to principles of conflicts of law. The parties hereto agree that all actions or proceedings arising in connection with this Agreement shall be tried and determined only in the State and Federal courts located in the State of California.

15. NO PARTNERSHIP/JOINT VENTURE. Nothing herein contained shall constitute or give rise to a partnership between, or joint venture of, the parties hereto or constitute either party the agent of the other. Neither party shall hold itself out contrary to the terms of this paragraph, and neither party shall become liable for the representation, act or omission of the other contrary to the provisions hereof.

16. All other terms shall be ABC/BVT's standard terms and conditions for agreements of this nature, a copy of which is attached hereto as Exhibit "A" and incorporated by this reference. In the event of a conflict between the main agreement and the standard terms and conditions, the main agreement shall control.

The parties hereto may enter into a more formal agreement incorporating the foregoing terms and conditions and such other provisions consistent therewith as are customary in ABC/BVT agreements of this type. Until such time, if any, as a more formal agreement is executed, this Agreement, when signed in the space provided below, shall constitute a valid and binding agreement between the parties.

AGREED TO AND ACCEPTED:

AMERICAN BROADCASTING COMPANIES, INC.

By: _____

LEE W. RIERSON

Its: ~~SR. PROGRAM ATTORNEY~~

BUSINESS AFFAIRS & CONTRACTS

BUENA VISTA TELEVISION

By: _____

Its: VP, Business Affairs

CELADOR PRODUCTIONS

By: _____

Its: DIRECTOR OF BUSINESS & LEGAL AFFAIRS

DIRECTOR OF BUSINESS & LEGAL AFFAIRS

CONSENT OF PAUL SMITH

I have read the foregoing Agreement (including its Exhibits) and consent to the execution thereof and hereby ratify and confirm all representations, warranties, and Agreements of Celador Productions ("Owner") contained therein to the extent I have knowledge or control thereof. Without limiting the generality of the foregoing, I hereby confirm that Owner has the full

right and authority to grant all rights granted therein, and I hereby agree to be bound by all of the terms thereof and to render all services required of me pursuant thereto whether or not Owner performs its obligations under its employment contract with me and whether or not such contract remains in effect. I further agree to look solely to Owner for any and all compensation to which I may be entitled by reason of the foregoing Agreement or any services rendered by me pursuant thereto. In the event my employment relationship with Owner is terminated for any reason, then I acknowledge and agree that I shall have no further rights hereunder with respect to ABC/BVT and that ABC/BVT shall have no further obligation to me hereunder. Notwithstanding the foregoing, solely for purposes of any and all Workers' Compensation statutes, laws or regulations ("Workers' Compensation"), I acknowledge that an employment relationship exists between ABC/BVT and me, ABC/BVT being my special employer under the foregoing Agreement. Accordingly, I acknowledge that in the event of my injury, illness, disability or death falling within the purview of Workers' Compensation, my rights and remedies (and those of my heirs, executor, administrators, successors and assigns) against ABC/BVT or ABC/BVT's affiliated companies and their respective officers, agents and employees (including without limitation any other special employee and any corporation or other entity furnishing to ABC/BVT or an affiliated company the services of any such other special employee) will be governed by and limited to those provided by Workers' Compensation.

x Paul Smith

Paul Smith

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ADDENDUM B - RIGHTS AGREEMENT

EXHIBIT "A" TO AGREEMENT -- STANDARD TERMS AND CONDITIONS

1. PUBLICITY. Any publicity, paid advertisements, press notices or other information with respect to this agreement and any of the projects and terms referred to herein shall be under the sole control of ABC/BVT. Except for incidental, non- derogatory mention, neither Artist nor Owner shall not consent to and/or authorize any person or entity to release such information without the express prior written approval of ABC/BVT. Artist and Owner hereby grants ABC/BVT, or any subsidiary, affiliate or assignee of any of the above, the right to use Artist's and Owner's names, approved likenesses, and/or approved photographs to advertise or publicize the Property in any and all media now known or hereinafter devised throughout the universe in perpetuity for no additional compensation to Owner or Artist.

2. PAY OR PLAY. Nothing herein shall require ABC/BVT to use the services of Owner or Artist in any manner and ABC/BVT shall have fully discharged its obligations hereunder by the payment to Artist or Owner of the applicable cash and contingent compensation hereunder.

3. WARRANTIES. Owner and Artist represent and warrant that:

(a) Owner and Artist are free to enter into and fully perform this Agreement;

(b) If, per the terms of this Agreement, Artist or Owner is to create original material to be utilized by ABC/BVT (the "Material"), then such Material shall be Artist's or Owner's sole creation (except as otherwise indicated) and that nothing contained therein violates the rights of any third party;

(c) Owner and Artist exclusively own and/or otherwise control all rights in and to the Property granted herein and all Material created by Owner and Artist;

(d) Owner and Artist have the exclusive unencumbered right and authority to enter into this Agreement and to sell and assign all of the rights, title, interest and benefits sold and assigned hereunder;

(e) Neither Owner nor Artist has heretofore granted, assigned, mortgaged, pledged or hypothecated any right, title or interest which Owner or Artist has in and to the Property or the Material which conflicts with the rights granted to ABC/BVT hereunder, and will not do so at any time during or after the effective term of the Agreement;

(f) To the best of Owner's and Artist's knowledge after the exercise of due diligence, there are no adverse claims nor is there pending any litigation or threat of litigation in, against or concerning the Property or Material which would interfere with the rights granted hereunder by or through Artist or Owner, by any person, firm or corporation.

(g) Neither Artist nor Owner has heretofore produced or authorized the production of any television project or other motion picture based in whole or in part on the Property, or granted any other television rights in the Property to any third party, in the Territory, and will not do so during the Term of this Agreement; and

(h) There is no other contract or assignment affecting Owner's or Artist's rights in and to the Property or the Material which may be inconsistent with or interfere with the rights granted hereunder.

(i) With regard to the Property, Owner warrants that it shall perform all acts required to maintain and protect its copyright in the Property and shall not perform any act or make any omission that might result in the rights to the Property being jeopardized or injected into the public domain.

(j) Other than as provided herein, Artist and/or Owner shall be solely responsible for all royalties or payments due to third party rights holders in connection with the rights to the Project granted herein.

(k) ABC/BVT acknowledges that Artist and Owner make no warranties with respect to the clearance of the title "Who Wants To Be A Millionaire" for use in the Territory.

4. INDEMNITY. Owner and Artist agree to indemnify, defend and hold harmless ABC/BVT, and their parent, subsidiary, affiliated and related companies from and against any and all claims, demands, liabilities and expenses (including reasonable outside attorney's fees) arising out of or resulting from any breach by Owner or Artist of any of the warranties and representations set forth herein, or any of the terms, covenants and conditions contained in this Agreement and ABC/BVT similarly indemnifies Owner for any breach of this Agreement by ABC/BVT.

5. COMPUTATION OF TIME PERIOD; MANNER OF DELIVERY; APPLICABLE LAW. The time in which any act provided by this Agreement is to be done shall be computed by excluding the first day and including the last, unless the last day is a Saturday, Sunday, or legal holiday, in which case such day shall also be excluded. All payments and notices shall be deemed delivered upon faxing or hand delivery, or one (1) day following posting via overnight mail, or three (3) days following posting as first-class mail in the United States mail, postage prepaid, and addressed to the respective party upon whom it is to be delivered. This Agreement shall be construed and enforced in accordance with the internal law of the State of California applicable to contracts negotiated, executed and fully performed within said State.

6. AGREEMENT TO EXECUTE AND DELIVER ALL DOCUMENTS REQUIRED. Owner agrees to execute and deliver to ABC/BVT any and all documents which ABC/BVT shall deem desirable or necessary to effectuate the purposes of this Agreement. In case of Owner's refusal or failure to so execute or deliver, or cause to be so executed and delivered, any assignment or other instrument herein provided for, then in such event, Owner hereby nominates, constitutes and appoints ABC/BVT and ABC/BVT shall therefore be deemed to be Owner's true and lawful attorney-in-fact, irrevocably, to execute and deliver all of such documents, instruments and assignments in Owner's name and on Owner's behalf. ABC/BVT shall send Owner a copy of any documents so executed.

7. NO OBLIGATION TO PRODUCE. It is understood and agreed that ABC/BVT shall have no obligation to produce, complete, release, distribute, advertise or exploit any

program, and Owner releases ABC/BVT from any liability for any loss or damage Owner may suffer by reason of ABC/BVT's failure to produce, complete, release, distribute, advertise or exploit any of such program. In the event that Owner's services in fields other than television, should in ABC/BVT's opinion, materially interfere with Owner's services to ABC/BVT, ABC/BVT shall have the right to suspend and extend the Agreement for the duration of any such interference in addition to any and all rights ABC/BVT may have at law or in equity.

8. FORCE MAJEURE. In the event of the occurrence of an event of force majeure (as that term is understood in the television industry), ABC/BVT shall have the right to suspend or terminate Artist's services hereunder and shall have the right, but not the obligation, to extend the Term of the Agreement by the length of any such suspension.

9. INCAPACITY. If, by reason of mental or physical disability, Artist shall be incapacitated from performing or complying with any of the material terms or conditions hereof ("Artist's Incapacity"), then:

(a) Suspension: ABC/BVT shall have the additional right upon notice to Artist to suspend the rendition of services by Artist and the running of time hereunder so long as Artist's Incapacity shall continue

(b) Termination: ABC/BVT shall have the right, at its discretion, to terminate this Agreement, or Artist's services hereunder, upon written notice to Artist if such Artist's Incapacity shall continue for more than one continuous week or two weeks in the aggregate.

10. COMMUNICATIONS ACT. Artist and Owner warrant and represent that neither Artist nor Owner has paid or agreed to pay, or will pay or agree to pay, any money, service or other valuable consideration as defined in Section 507 of the Federal Communications Act of 1934, as amended, for the inclusion of any matter in any television program produced hereunder, and that neither Artist nor Owner has accepted nor will accept or agree to accept any money, service or other valuable consideration (other than payment to Artist and Owner hereunder) for the inclusion of any matter in any such television program. Artist is aware that any violation of the foregoing shall be a material breach and cause for dismissal.

10. IMMIGRATION REFORM AND CONTROL ACT OF 1986. Artist acknowledges that any offer of employment hereunder is subject to and contingent upon Artist's ability to prove Artist's identity and employment eligibility as required by the Immigration Reform and Control Act of 1986. Accordingly, Artist hereby agrees (a) to complete and execute Section 1 ("Employee Information and Verification") of an Employment Eligibility Verification ("Form I-9") at the time of Artist's execution of this agreement or commencement of services, whichever is earlier, and (b) to deliver, in person, to ABC/BVT said Form I-9, together with documentation of Artist's employment eligibility, within three business days of Artist's execution of this agreement or commencement of services, whichever is earlier. If Artist fails to complete and deliver the Form I-9 as provided above, ABC/BVT shall have the right, by notice to such effect given to Artist and/or Owner, to terminate this Agreement and/or Artist's employment hereunder and, in such case, the Agreement or the relevant portion thereof shall cease and terminate and neither party shall have any right, duty or obligation to the other under the Agreement or such relevant portion thereof except such as shall have accrued prior to the effective date of termination.

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ADDENDUM B - RIGHTS AGREEMENT

11. FORMAL CONTRACT. Subject to good faith negotiation, the above terms and such other incidental and ancillary provisions as are customary in more formal agreements of this type with ABC/BVT (e.g., relating to suspension and termination due to disability and default; equitable relief, no right to rescission or injunction by Owner or Artist, severability, etc.) which are incorporated herein by reference, will constitute a binding agreement between the parties. In due course a more formal agreement may be prepared but the failure of the parties to prepare and/or execute such formal agreement shall not affect their rights as set forth in this Agreement, which shall in any event be binding upon them.

END OF EXHIBIT "A"

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EXHIBIT "B"

BVT DEFINED CONTINGENT COMPENSATION DEFINITION

Producer shall be entitled to _____ Percent (__%) of One Hundred Percent (100%) of Defined Contingent Compensation derived from all sources from exploitation of episodes of the Series produced by Producer. Defined Contingent Compensation shall be defined as those receipts remaining from Defined Receipts after deduction, in the following order, of:

1. BVT's normal distribution fees: Thirty-Five Percent (35%) domestic syndication, excluding pay television and cable television; Forty Percent (40%) foreign television, excluding foreign pay television and cable television; Fifteen Percent (15%) U.S. network (ABC, CBS, NBC, FOX); Fifty Percent (50%) domestic merchandising; Sixty-Five Percent (65%) foreign merchandising; Thirty-Five Percent (35%) worldwide pay television and cable television; Fifteen Percent (15%) worldwide audio visual cassette, video disc or any similar device embodying the Series ("Video Device"); Twenty-Five (25%) administration of music; Fifty Percent (50%) worldwide non-theatrical exhibition, book publishing and for any form of exploitation not set forth above;

2. Out-of-pocket advertising, promotion and distribution expenses related to the Pilot and/or Series, as defined and reported in BVT's customary manner (including residuals and taxes, but excluding corporate income taxes);

3. Interest on monies expended in developing, producing and distributing the Pilot and/or Series calculated at One and One-half Percent (1 1/2%) over prime; and

4. Development and Production Costs of the Pilot and/or Series (including an overhead fee calculated at Ten Percent [10%] of Production Costs).

5. Agency package fee, if any.

For purposes of this Agreement, "Defined Receipts" shall be defined as all sums actually received by, or credited to, BVT from all sources worldwide from the exploitation of the episodes of the Series and ancillary and subsidiary rights, less security deposits, advances, and other sums received but not yet earned or forfeited, and amounts received and thereafter refunded. Notwithstanding the foregoing, Defined Receipts from Video Device exploitation shall be defined as (i) all royalties received by BVT from and as accounted thereto by any third party from the manufacture and distribution of Video Devices, less royalties payable to third parties, or (ii) to the extent BVT grants to its affiliated company the right to manufacture and distribute such Video Devices, a royalty in an amount equal to Twenty Percent (20%) of the sums actually received by such affiliated company (less taxes, credits and returns) from its distribution thereof.

BVT will issue semi-annual accounting statements, commencing with the second broadcast season of the Series and continuing for so long as Series episodes are being produced. Subsequent statements will be issued on an annual basis for two (2) years. Thereafter, statements will be issued annually; provided, however, if no payments are due Producer, statements will be issued on a request basis (but not more frequently than once each year). Statements will be delivered to Producer, accompanied by payments due, if any, ninety (90) days after the close of each accounting period.

Statements will be deemed conclusive, incontestable and final twenty-four (24) months after delivery, unless BVT has received specific, detailed objections from Producer within the specified period. The foregoing does not limit BVT's right to make corrections or amendments to statements at any time. BVT's books and records, to the extent they have not become incontestable, may be examined at Producer's expense not more frequently than once in each twelve (12) month period, by a reputable accounting firm.

Producer as a participant in Defined Contingent Compensation ("Participant") acknowledges and agrees that the definition, computation, accounting and payment (if any, pursuant to the terms hereof) of speculative contingent compensation have been specifically negotiated by Participant's representatives and Participant has a full understanding of the terms of the agreement and Defined Contingent Compensation and that no representations whatsoever have been made to Participant to the contrary, other than those which may have been set forth in writing

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ADDENDUM B - RIGHTS AGREEMENT

and executed by all the parties to this agreement. For purposes of Defined Contingent Compensation, Participant agrees that words and terms used in connection with Participant's contingent participation, if any, are used solely for the convenience of drafting and are intended to be understood and applied only as defined and used in the agreement and are not intended to correspond to any conventional understanding or dictionary definition of such words and terms, whether used in the entertainment industry or any other industry or business and are not intended to correspond in any way to generally accepted accounting principles ("GAAP"), or any other meanings thereof, which may be associated with the practices of accounting or auditing. Participant acknowledges and agrees that there is no guarantee whatsoever that any sums will be generated and/or become payable to Participant in connection with Participant's contingent participation as provided in the agreement and defined herein, regardless of the level of income, revenues, profits and/or receipts, if any, that BVT or any distributor or exhibitor realizes from the exploitation of the Series. Rather, the parties specifically agree that Participant shall be entitled only to such sums, if any, as may become payable in accordance with the terms hereof.

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ADDENDUM C – Statutes & Rules

FEDERAL RULES OF EVIDENCE

Rule 102—Purpose and Construction

These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.

Rule 402—Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

Rule 403—Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Rule 801—Definitions [excerpted]

The following definitions apply under this article:

(a) Statement.

A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

(b) Declarant.

A "declarant" is a person who makes a statement.

(c) Hearsay.

"Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

Rule 805—Hearsay Within Hearsay

Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules.

Rule 901—Requirement of Authentication or Identification [excerpted]

(a) General provision.

The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

CALIFORNIA STATUTES

Civil Code § 1641

The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other.

Civil Code § 1643

A contract must receive such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect, if it can be done without violating the intention of the parties.

Civil Code § 1647

A contract may be explained by reference to the circumstances under which it was made, and the matter to which it relates.

Civil Code § 1649

If the terms of a promise are in any respect ambiguous or uncertain, it must be interpreted in the sense in which the promisor believed, at the time of making it, that the promisee understood it.

Civil Code § 1650

Particular clauses of a contract are subordinate to its general intent.

Civil Code § 1651

Where a contract is partly written and partly printed, or where part of it is written or printed under the special directions of the parties, and with a special view to their intention, and the remainder is copied from a form originally prepared without special reference to the particular parties and the particular contract in question, the written parts control the printed parts, and the parts which are purely original control those which are copied from a form. And if the two are absolutely repugnant, the latter must be so far disregarded.

Code of Civil Procedure § 1862

When an instrument consists partly of written words and partly of a printed form, and the two are inconsistent, the former controls the latter.

Code of Civil Procedure § 1864

When the terms of an agreement have been intended in a different sense by the different parties to it, that sense is to prevail against either party in which he supposed the other understood it, and when different constructions of a provision are otherwise equally proper, that is to be taken which is most favorable to the party in whose favor the provision was made.

CERTIFICATE OF COMPLIANCE

Circuit Rule 32-1

1. This brief (including Addendum A, Cast of Characters) complies with the type-volume limitation of Fed. R. App. Proc. 28.1(e)(2)(B)(i) and Ninth Circuit Rule 32-1, as modified by this Court's August 10, 2011 Order in this case that "[t]he second brief on cross-appeal, [is] not to exceed 20,000 words" because, excluding parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), it contains **19,914** words, as automatically calculated by the WordPerfect, version X4, word processing program.

2. This brief (excluding Addendum B, which is a trial exhibit copy) complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in proportionally spaced typeface using WordPerfect, version X4, Times Roman, 14 point font.

DATE: September 30, 2011

/s/ Robin Meadow
Robin Meadow

STATEMENT OF RELATED CASES

Circuit Rule 28-2.6

Counsel is aware of no case related to the current appeal and cross-appeal.

DATE: September 30, 2011

/s/ Robin Meadow
Robin Meadow

CERTIFICATE OF SERVICE

I hereby certify that on September 30, 2011, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Signature /S/ Robin Meadow
Robin Meadow