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

CROSS-APPELLANT'S REPLY BRIEF (FOURTH BRIEF ON CROSS-APPEAL)

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INTRODUCTION

Absent from defendants' response to Celador's fraud cross-appeal is any explanation of why, if ABC never promised a direct deal to share its profits with Celador, ABC is a party to the Rights Agreement.

But there is an explanation, although defendants ignore it: According to BVT Vice President Don Loughery, ABC signed the Rights Agreement because, from the beginning, Celador insisted on making a deal with ABC. ER1173-74. A direct deal is what ABC promised, it's what William Morris and Celador negotiated, and it's what Celador got—but it's what ABC never intended to honor.

There's plenty of evidence that ABC promised that *it* would enter into a *direct* deal with Celador and would share *its* profits with Celador—not least the Rights Agreement itself, which ABC's employees negotiated and drafted and which ABC signed as a party. Yet even though ABC's name is all over the Rights Agreement's promises, defendants claim that all along ABC never intended to be bound by or to perform under the contract—in effect, that it could unilaterally excise the letters "ABC" from the contract language. A jury could easily find that ABC acted as BVT's shill in a classic bait-and-switch: ABC promised Celador a direct network (ABC) deal, but supposedly only agreed to a distribution company (BVT) deal.

Defendants respond with the same implausible arguments they make in response to Celador's express contract and implied covenant claims. They argue that Celador could not have reasonably believed or relied on ABC's promises and

the contract's language because, according to defendants, ABC, BVT and WMA all supposedly knew that ABC never would share its profits with Celador no matter what the contract said. And they argue that even though ABC aggressively pursued Celador, and notwithstanding Celador's months of direct negotiations with ABC, all Celador might ever be entitled to share as "Defined Contingent Compensation" was BVT's speculative syndication profits in the distant future.

The test for judgment as a matter of law is whether, viewing the evidence favorably to Celador, there is substantial evidence of fraud. Without question, there is.

ARGUMENT

I.

DEFENDANTS CONTINUE TO IGNORE THE APPLICABLE STANDARD OF REVIEW AND THE RELEVANT FACTUAL RECORD THAT MUST BE VIEWED FAVORABLY TO CELADOR'S FRAUD CLAIM.

As with their other briefing, defendants ignore fundamental rules that govern how the Court must view the record.

Because the cross-appeal is from an order granting judgment as a matter of law, all evidence and inferences must be construed in Celador's favor, *Torres v. City of L.A.*, 548 F.3d 1197, 1205-06 (9th Cir. 2008), and "'[i]f conflicting inferences may be drawn from the facts, the case must go to the jury,'" *Redman v. County of San Diego*, 942 F.2d 1435, 1439 (9th Cir. 1991) (en banc) (citation omitted). Defendants never acknowledge this standard, much less set out *all* of the evidence, credibility determinations, and inferences that support Celador's claim. That failure accounts for much of the brevity of ABC's cross-appeal response—and it would fully justify this Court in ignoring that response. Rather, defendants' cross-appeal response mirrors their reply to Celador's appellee's brief: Defendants cherry-pick limited aspects of Celador's arguments, recast them into arguments that Celador hasn't made, mischaracterize the record, and then, by measuring the recast arguments against a mischaracterized record, triumphantly declare that they have defeated Celador's arguments.

The Court should not be distracted. The record still says what it says, and the record is clear. Construing it most favorably to Celador, the key facts are:

• From the outset, ABC's Davies told Celador that an ABC deal would be the "cleanest relationship"—that is, a "direct relationship" "between . . . Celador on the one hand and ABC on the other," "[m]eaning that there wouldn't be other companies or individuals as part of the entire relationship." ER528-30. Davies conveyed to both Celador's Smith and WMA's Silverman "that ABC, if it got the show, would maximize profits *for all concerned*." ER530-31 (emphasis added).

• Celador specifically communicated that it required a network deal. RB8;[1] 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," that regardless of BVT's involvement, Celador "was quite specific that [it] wanted a network deal").[2]

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[1] We use the following abbreviations: APB—Appellants' Principal Brief (1st Brief); RB—Appellee's Responding And Cross Appellant's Opening Brief (2nd Brief); RRB—Appellants' Reply And Cross-Responding Brief (3rd Brief).

[2] Defendants claim that the concept of a "network deal" is a Celador post-judgment concoction. RRB 64. Nonsense. Regardless of whether this short-hand term was used in the pleadings, there was never any question about what Celador claimed it bargained for. *E.g.*, ER519 (Silverman: "He [Smith] wanted to be in business with a network"), 652 (Smith testifying that from the very first conversations with Davies, "We said we wanted to make a deal with a network"), 2762 (Celador closing argument, referring to Smith's testimony about

(continued...)

• The offer, as communicated by ABC's representatives, was to share in *ABC's profits* from *Millionaire*, not simply to put the show on the network. ER535, 538 (Silverman's notes reflect deal structure "offered *by ABC* to Celador" reflecting "initial idea . . . to put the show on the network" *and* "to share *profits* between Celador *and ABC* on a 50/50 basis . . .") (emphases added), 540 (Rights Agreement matched Silverman's understanding that discussion was that *ABC's profits* to be shared), 921-23 (Lipstone describing "proposal being made by ABC" "about sharing in profits," which "could be from a number of sources" including "sharing profits in the event that the program aired . . . on a network"), 928 (Lipstone: the profit-sharing promise was "between Celador and whoever the deal was being made with," either ABC or possibly ABC and BVT), 3149 (Lipstone's notes), 3289 (Silverman's summary).[3]

It is bizarre for defendants to claim that Celador seeks to "rewrite" the Rights Agreement by using the plain-English term "profits" to describe what ABC promised to share instead of the contract term "Defined Contingent Compensation" or "DCC." RRB1, 5. Defendants well understand that DCC *means* profits—the opening sentence of their opening brief describes this case as "a contract dispute over the *profits* from [*Millionaire*]." APB1 (emphasis added).

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[2] (...continued)
wanting "a network deal with a company like ABC"), 2833 (same); *see also* ER3149 (Lipstone: "*Profits* - Syndication/Cable/*Network*") (emphases added), 3151 (Silverman: same), 3156 (Bartlett: "Network side . . . Disney 50/50 3rd off the top").

[3] Although a reference to "BVTV" appears in early negotiation notes, *see* RRB19, that reference disappears in later deal notes, ER3152-57.

Indeed, *ABC's own negotiator*, Bartlett, testified that DCC and "profits" were interchangeable terms. ER2972.[4]

- The contract was expressly *with ABC*. ER3085. The Rights Agreement defined ABC *and* BVT as the contracting parties—"*collectively*, 'ABC/BVT.'" ER3085 (emphasis added).[5] Although ABC/BVT, collectively, had discretion to have either ABC or BVT produce *Millionaire*, ER3086 ¶ 2, neither could exercise that discretion in a way that undermined Celador's profit-sharing rights. *See Ladd v. Warner Bros. Entertainment, Inc.*, 184 Cal. App. 4th 1298, 1306 (2010) (discretionary power has to be exercised so as not to interfere with other party's rights); *Locke v. Warner Bros., Inc.*, 57 Cal. App. 4th 354, 363-64 (1997) (same). That ABC/BVT reallocated responsibilities between themselves and affiliated Disney entities could not and did not change their obligations to Celador. ABC was a separate, independent party to the Rights Agreement, just as bound to its obligations as BVT was.

- What ABC promised to share—without ever actually intending to do so—was *its own* profits, not BVT's. The DCC/profits definition is not limited to BVT; the Rights Agreement itself describes it as "***ABC***/BVT's standard

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[4] *See also* ER982-83 (Defense counsel: "[W]hen we talked about share of the profits, in some agreements, it's called 'defined contingent compensation'"); APB32 ("it is undisputed that DCC was meant to be a measure of *profits*, not gross revenues") (emphasis added).

[5] The parties knew how to delineate ABC and BVT separately in the Rights Agreement when they wanted to do so. *See* ER3086 ¶¶ 1(B), 2. The use of the collective term "ABC/BVT" was therefore deliberate, and it must have meaning.

definition" for profits "derived by ***ABC***/BVT from the exploitation of any Pilot and Series produced herein." ER3088 ¶ 3.B(1) (emphases added).

- When the fundamental deal points—including a 50/50 profits split—were reached in December 1998, only ABC was in the deal, and its negotiating in-house lawyer "was making the deal for ABC," *not* BVT. ER2987 (Bartlett); *see* ER2984-85 (deal terms closed in December 1998, before Bartlett left); *see also* ER1051-52 (Rierson, the ABC lawyer who drafted the Rights Agreement, did so solely representing ABC and did not represent BVT). WMA's Silverman reached the same conclusion: The 50/50 deal "was a rich and favorable deal for Celador"; "that's what *ABC and Disney* were willing to agree to." ER541-42 (emphasis added).

- Participating in ABC's profits was an important part of the deal for Celador. Among other things, Celador agreed to substantially reduce its merchandising percentage share because, in return, it was to receive a 50/50 share from exploiting the program itself. ER448-50, 467-68; *see* ER456 (the offer conveyed from ABC to Smith was that if *Millionaire* were broadcast on network, Celador "would share in the profits *equally with* ABC") (emphasis added).[6]

[6] Defendants argue that "Lipstone testified that the network-run input to DCC would be 'the license fee that a network like ABC would pay to BVT' [citations], not ABC's receipts." RRB15. This is mostly inference, not testimony, and therefore contrary to the standard of review. In any case, as Celador's expert explained, the license fee flowed from the spot ad rate *revenue* ABC receives from advertisers. ER1900, 1905-08.

According to defendants, "Plaintiff does not dispute that no network in television history had ever agreed to share its profits with a participant." RRB20. Apart from being untrue, *see* ER1864-65 (Celador's expert detailing means and examples of networks sharing profits), it ignores facts that a jury could properly consider in assessing fraud. These include that there was *no* industry custom for a deal like this in 1998-1999, RB38-39, and that even if there were an industry custom, it would not override ABC's direct contractual promise to share with Celador profits "derived by ***ABC***/BVT [that is, ABC and BVT, *collectively*] from the exploitation" of *Millionaire*, ER3088 ¶ 3.B(1) (emphasis added); *see* ER3085. Whatever networks "normally" do or did, in *this* deal, *this* network promised to enter into a direct contractual relationship to share *its* profits.[7]

- ABC *admits* that it never intended to honor its promise to share its success in exploiting *Millionaire*. From the outset ABC had a secret plan to convey all rights to BVT for no consideration and then to license back the previously-conveyed broadcast rights from BVT for a guaranteed-no-profits, license-fee-equals-production-costs arrangement. The various undisclosed, unnecessary, unsigned, undocumented rights transfers and assignments between

[7] The $89 million in "Network Prime Time" receipts defendants reported on the first profit participation statement in December 2000, ER3107, confirmed Celador's understanding that there were network prime-time receipts from which Celador might ultimately receive profits. That they equaled the reported "costs of production" did not suggest otherwise. At the time—December 2000—Celador knew nothing of the alleged (but undocumented) license-fee-equals-production-costs deal between ABC and BVT or of the intra-company transfers through which defendants tried to ensure that ABC alone would keep all network broadcast profits.

ABC, BVT and related Disney entities BVP and Valleycrest, combined with the perpetual license, the license-fee-equals-production-costs deal, and the failure to renegotiate *Millionaire's* license fee upon success, *see* RB13-16, all evidence a course of conduct from which a jury could easily infer fraudulent intent.

Once again ignoring the standard of review, defendants argue that this secret deal was actually all out in the open, for everyone to see. But it wasn't. For example, after erroneously telling Celador's auditors for two years pre-suit that the license-fee-equals-production-costs agreement was in an unsigned ABC/Valleycrest agreement, defendants now contend that the deal was in an ABC/BV*P* agreement for per-episode fees with unspecified "add-on" costs (evidence which never appeared at trial). A jury could surely conclude that such incongruous claims by defendants support a finding of fraud.

* * *

Properly viewed—in the light most favorable to Celador—the evidence easily supports Celador's fraud claim. Defendants' failure to properly summarize that evidence is reason enough to reverse the judgment as a matter of law. As we next demonstrate, defendants have offered no meaningful response to Celador's arguments for reversal.

II.

NONE OF DEFENDANTS' ARGUMENTS UNDERCUTS THE VIABILITY OF CELADOR'S FRAUD CLAIM.

A. Far From Being Mere Puffery, ABC's Promise To Share Its Profits Was The Essential Inducement For Celador To Enter Into The Rights Agreement.

1. ABC's statements taken together constituted a concrete promise of a network deal with a corresponding obligation to share profits.

Defendants claim that none of ABC's individual representations amounted to more than puffery. But Celador's claim is not about isolated statements—it is about defendants' overall deception. *See Williams v. Gerber Prods. Co.*, 552 F.3d 934, 939 n.3 (9th Cir. 2008) (whether statements are "puffery" has to be evaluated in the context of the deception as a whole); *Casella v. Webb*, 883 F.2d 805, 807-08 (9th Cir. 1989) (representation that investment was "a sure thing" was not necessarily puffing when considered in context).

Defendants' argument that none of ABC's individual representations is separately actionable contrasts with their position in the district court that the four alleged statements "taken together" were what constituted Celador's fraud claim. ER3356. Regardless, defendants do not dispute, because they cannot, that if ABC made promises that it never intended to carry out, it can be liable for fraud. Defendants do not dispute that bait-and-switch—promise a direct, profit-sharing

deal with ABC, then claim that the deal is solely to share BVT's illusory profits—is fraud. Defendants do not dispute that *Locke v. Warner Bros., Inc.*, 57 Cal. App. 4th 354, provides the governing standard: A promise, even one involving the promisor's discretion, made with no intent to ever carry it out is fraud. Promises of a direct deal with ABC and of shared ABC network-run profits were not "puffing"—they were the essence of the deal.

California has long followed "the trend toward narrowing the scope of 'puffing' . . . ." *Hauter v. Zogarts* (1975) 14 Cal. 3d 104, 112 (manufacturer's representation of safety of its golf training device). The "puffing" label is really nothing more than a conclusion that the statements taken together are so immaterial or unbelievable that no reasonable person could rely on them. Puffery requires "outrageous generalized statements, not making specific claims, that are so exaggerated as to preclude reliance by consumers." *Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv.*, 911 F.2d 242, 246 (9th Cir. 1990) (quotations omitted); *see Hoxworth v. Blinder, Robinson & Co.*, 903 F.2d 186, 200-01 (3d Cir. 1990) ("To say that a statement is mere 'puffing' is, in essence, to say that it is immaterial, either because it is so exaggerated ('You cannot lose.') or so vague ('This bond is marvelous.') that a reasonable investor would not rely on it in considering the "'total mix" of available information'" (quoting *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976)) (assertion that stocks were recommended by broker's "research department" that consisted of only one individual who did no research but simply recommended stocks underwritten by broker was not "puffing").

Under California law, a representation that becomes "part of the basis of the bargain" is not puffing. *Keith v. Buchanan*, 173 Cal. App. 3d 13, 21-22 (1985) (applying California Uniform Commercial Code). It was not "puffery" for ABC to say that it would enter into a *direct* contract relationship and that it would maximize *joint* profits when it planned to disavow any direct obligation and to never share any of its profits. Celador presented ample evidence that ABC's promises of a direct, profit-sharing relationship with Celador were among the essential bases of the bargain—a bargain that *ABC* sought out, negotiated, and documented and that *ABC*, through its own direct promises, caused to come to fruition.

Schonfeld v. City of Vallejo, 50 Cal. App. 3d 401 (1975), *disapproved on other grounds by Morehart v. County of Santa Barbara*, 7 Cal. 4th 725, 743 (1994), cited at RRB64, is not contrary. As relevant here, *Schonfeld* held that a city manager's representations to a developer that a marina was a "first class harbor" and the "best berthing facility" for small boats in Northern California were classic opinions, and that in any case "the evidence indicate[d] that [the developer] regarded them as statements of opinion." *Id.* at 412-13. That's a far cry from ABC's false promises of a direct, ABC-Celador profit-maximizing relationship and a specific contractual profit-sharing commitment. ER528-29, 530-31.

ABC's representations taken as a whole were neither unbelievable nor vague. Consistent with these representations, the Rights Agreement calls for Celador to share in profits from ***ABC***/BVT's exploitation of *Millionaire*. There's no "puffery" here.

2. A network deal was essential from the outset, and Celador justifiably relied on ABC's promises that this would be a network deal.

ABC asserts that "no reasonable juror could conclude that [Celador] would justifiably rely on a vague impression" of a promised network deal. RRB64. But there was nothing vague about ABC's promises. A network deal was not some "vague impression" or a tangential consideration—it was at the heart of the negotiations. Celador negotiated a 50/50 profits split *with ABC*, arriving at that basic deal point before BVT was even in the deal. Even after ABC added BVT as a party, Celador continued to finalize the deal *with ABC*'s officers and agents. Celador had no reason to be concerned that BVT was *also* signing the contract, so long as ABC remained on the deal—as it did. *See* ER482-83 (Celador understood that ABC would not actually produce the program, but also understood that this fact did not relieve ABC of its financial obligations under the Rights Agreement).

Defendants also suggest that Celador should not have expected to make any money from *Millionaire*'s network run because "[f]rom the producer's perspective, the network run is not an independent source of profit." RRB12. That's no response to a fraud claim. Celador was not the show's producer (nor for that matter was BVT). Celador was a rights grantor and profit participant, pure and simple. It could justifiably expect to share in *any* exploitation of *Millionaire*.[8]

[8] Exhibit B doesn't identify a "Producer." Nevertheless, defendants suggest that it can be inferred from the Rights Agreement that Celador was meant to be

(continued...)

After all, the Rights Agreements says that "ABC/BVT" will share with Celador 50% of 100% of profits "derived by ABC/BVT from the exploitation of any Pilot and Series produced hereunder." ER 3088 ¶ 3.B(1).

Defendants also claim that, as a matter of law, Celador's only reasonable contingent profit-sharing expectation would have been from foreign or syndication sales. But foreign rights were irrelevant to *this* deal because ABC was not going to exploit foreign rights on Celador's behalf. As for syndication, the very structure of the deal—BVT's overarching 35% distribution fee on top of all production costs plus 10%, ER2145, 2555-56, 3102—underscores that Celador reasonably had to rely on network-run profits as its primary source of contingent compensation.[9] *See* ER2345 (reruns were never even discussed as a significant income source). The jury could conclude that the opportunity for network-run

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[8] (...continued)
"the producer" for purposes of Exhibit B, RRB12, even though it is undisputed that Celador did not undertake that role. Defendants' attempt to infer Celador into Exhibit B as "producer" sharply contrasts with their position that ABC cannot be inferred into the Exhibit B formula.

[9] It's just not true that *Millionaire* has been a syndication failure, as defendants claim. RRB12, 49. As of the time of trial, *Millionaire* was entering its ninth year on the air, and it continues in syndication today. ER2553. It had generated over $280 *million* in syndication revenues for BVT, which enjoyed a 23% profit margin on those revenues (roughly $64 million). ER2555, 2557. But thanks to BVT's 35% distribution fee, plus overhead and interest charges, Celador has yet to share in BVT's syndication profits. *See* ER2145, 2555-56.

contingent compensation is why WMA viewed this as a "rich" deal affording Celador a "large share for not any financial risk." ER541-42.[10]

3. The claim of "puffery" cannot negate defendants' concealment of the secret ABC-BVT license-fee-equals-production-costs deal that destroyed any possibility of network-run profits.

There's another problem with defendants' "puffery" position: It fails to account for the fact that ABC and BVT kept secret their pre-arranged, profits-stripping assignment/license-back scheme. By definition, concealment cannot be puffery. *See Apollo Capital Fund, LLC v. Roth Capital Partners, LLC*, 158 Cal. App. 4th 226, 256 (2007). But it certainly can be fraud. *E.g.*, Cal. Civ. Code, § 1710; *Jones v. ConocoPhillips*, 198 Cal. App. 4th 1187, 1198 (2011); *see* RER21 (Celador argues concealment in opposition to JMOL motion).

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[10] There is no basis for ABC's suggestion that the $21 million in fixed compensation is at all relevant to Celador's profits claim. *See* RRB1, 26. Those were separately-negotiated fixed payments. *See* ER3087 ¶ 3.A. They do not diminish defendants' profit-sharing promises nor excuse their breach of the Rights Agreement's profit-sharing provisions. Had fixed compensation been the sole compensation element of the deal, they undoubtedly would have been much higher.

B. Celador Was Amply Justified In Relying On ABC's Promise To Share Its Profits Regardless Of Whether BVT Was Also A Party To The Contract.

1. ABC, not just BVT, was a party to the Rights Agreement.

Defendants devote just six lines to arguing that Celador couldn't have reasonably relied on a promise that it would have a network deal with ABC because it "knowingly signed a contract with ABC *and* BVT." RRB64 (original emphasis).

Yes, it could and yes, it did. But that just brings us back to the still-unanswered question: If ABC promised nothing to Celador, why did it remain a party to the contract? The jury could readily conclude that the reason was to induce Celador into signing the contract after Celador made quite clear that it was not interested in BVT *replacing* ABC. *See* ER481-83, 654-55. *Both* BVT *and* ABC were contracting parties, but ABC disavows the express profit-sharing obligation.

Defendants mischaracterize Celador's contention to be that Celador expected a deal *only* with ABC. That's not Celador's claim. The jury could conclude that Celador believed that ABC brought BVT into the deal solely to produce *Millionaire*—not to strip Celador of its rights against ABC. ER480, 483. The jury could also conclude that Celador couldn't have known that once BVT became a party, ABC would act as if it had exited the deal. That's because neither

ABC nor BVT disclosed their secret deal, and ABC remained a party to the contract—just as it always promised.

Exhibit B doesn't change any of this. It contains "key" language only under defendants' myopic view that although incomplete and miscast (*e.g.*, blank names and percentages, the incongruous reference to "Producer"), Exhibit B somehow supersedes the rest of the Rights Agreement—a view that ignores the Rights Agreement's many, many references to ABC and ignores the description of Exhibit B as "***ABC***/BVT's standard definition," for sharing profits "derived by ***ABC***/BVT from the exploitation of" *Millionaire*. ER3088 ¶ 3.B(1) (emphases added).[11] It also ignores Exhibit B's express direction that "words and terms used in connection with Participant's contingent participation, if any, . . . are intended to be understood and applied *only as defined and used in the agreement*." ER 3103 (emphasis added).

2. No supposed WMA understanding of industry custom could negate Celador's reliance on a network deal.

According to defendants, Celador could not have relied on ABC's promises because the WMA witnesses all knew that the deal would include a license-fee-equals-production-costs arrangement and would never include ABC profits, and

[11] By our count, there are some 75 references in the Rights Agreement and its Exhibit A to "ABC/BVT." But according to defendants' theory, a handful of naked BVT references in Exhibit B trumps the Rights Agreement's other myriad "ABC/BVT" references, including in the very provision adopting the Exhibit B formula.

the district court was required to impute this supposed knowledge to Celador as a matter of law. The argument fails at every step.

a. The WMA employees were not disinterested witnesses whose testimony a jury would have to accept.

Defendants assert that the jury, the district court, and this Court *must* accept as true any "uncontradicted" testimony by a "disinterested" witness, claiming that WMA's witnesses have that status. RRB15. Even if the principle were correct, it does not apply here.

"[I]t has long been held that a jury may properly refuse to credit even uncontradicted testimony." *Guy v. City of San Diego*, 608 F.3d 582, 588 (9th Cir. 2010) (rejecting argument that jury had to credit uncontradicted testimony). "Long been held" means for at least the last 120 years. The United States Supreme Court observed in *Quock Ting v. United States*, 140 U.S. 417, 420-21 (1891), the supposed uncontradicted-testimony rule "admits of many exceptions":

- "There may be such an inherent improbability in the statements of a witness as to induce the court or jury to disregard his evidence, even in the absence of any direct conflicting testimony."
- "He may be contradicted by the facts he states as completely as by direct adverse testimony; and there may be so many omissions in his account of particular transactions, or of his own conduct, as to discredit his whole story."

- "His manner, too, of testifying may give rise to doubts of his sincerity, and create the impression that he is giving a wrong coloring to material facts."
- "All these things may properly be considered in determining the weight which should be given to his statements, although there be no adverse verbal testimony adduced."

Id.; *see also Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 150 (2000) ("'*Credibility determinations*, the weighing of the evidence, *and the drawing of legitimate inferences* from the facts are jury functions, not those of a judge'") (emphases added) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *S.E.C. v. Koracorp Indus., Inc.*, 575 F.2d 692, 699 (9th Cir. 1978) ("Only after an evidentiary hearing or a full trial can these credibility issues be appropriately resolved"; summary judgment reversed where outstanding credibility issue).

As this Court has recognized, "[j]urors may reject uncontradicted testimony when cross examination, other evidence, or their own common sense and ordinary experience convince them the testimony is probably false." *United States v. Sandoval-Mendoza*, 472 F.3d 645, 649 (9th Cir. 2006); *see Chesapeake & Ohio Ry. Co. v. Martin*, 283 U.S. 209, 219-20 (1931) (internally inconsistent testimony); *Factor v. C.I.R.*, 281 F.2d 100, 111 (9th Cir. 1960) (the fact-finder "may disregard testimony which, although uncontradicted, is nevertheless inherently improbable").

Under governing California law, too, contract interpretation is a jury question where the answer depends on the *credibility* of extrinsic evidence, not just on resolving conflicting extrinsic evidence:

> "This rule—that the jury may interpret an agreement when construction turns on *the credibility of* extrinsic evidence—is well established in our case law."

City of Hope Nat. Med. Ctr. v. Genentech, Inc., 43 Cal. 4th 375, 395 (2008) (emphasis added); *see Warner Constr. Corp. v. City of Los Angeles*, 2 Cal. 3d 285, 291 (1970) ("The trial court properly relegated that question of credibility for decision by the jury" where contract interpretation turned on expert witness's testimony as to phrase's meaning in industry); *see also Burch v. George*, 7 Cal. 4th 246, 254 (1994) ("The interpretation of a will or trust instrument presents a question of law unless interpretation turns on the credibility of extrinsic evidence or a conflict therein."); *Sunniland Fruit v. Verni*, 233 Cal. App. 3d 892, 898 (1991) ("When [written instrument's] interpretation turns on a credibility determination, interpretation becomes a question of fact").

Here, the WMA evidence was at times inconsistent, though generally supportive of Celador. *E.g., compare* ER921-23 (Lipstone describing "proposal being made by ABC" "about sharing in profits," which "could be from a number of sources" including "sharing profits in the event that the program aired . . . on a network"), 928 (profit-sharing was to be "between Celador and whoever the deal was being made with," *i.e.*, ABC or both BVT *and* ABC), 937-42 (Lipstone did not learn of the profits-negating license-fee-equals-production-costs arrangement

until after the contract was signed), 3149 (Lipstone's notes showing "Profits - Syndication/Cable/*Network*") (emphasis added), 3289 (Silverman's notes of 50/50 network deal), SER339 (Silverman "shocked" that *Millionaire* would be running at a loss) *with* ER1011 (Lipstone expected a negative network-run amount), 2386 (Petillo didn't think "back end" included network ad revenue). It was up to the jury to evaluate the credibility of these witnesses. A jury could find that there was no uniform WMA understanding of a network-run-loss industry practice, so none could be imputed to Celador. In fact, as to the key elements of Celador's case, most WMA witness testimony is entirely consistent with and supports Celador's claims.

Moreover, the WMA witnesses were not "disinterested." They were beholden to the industry, *see* RB34-35, ER913-14 (agents are assigned to cover specific networks; Lipstone covered ABC); they had a financial interest adverse to Celador, RB17 (ABC directly compensated WMA with a higher commission, at Celador's expense, without telling Celador), ER3102 (agency package fee deducted from profits/DCC); and their close involvement in the deal and the industry meant there was a web of relationships that negated any one-size-fits-all determination of "disinterest." That left credibility issues open for the jury, as the district court recognized: After observing the witnesses' demeanor and credibility directly, it ruled: "The jury is free to disbelieve the testimony of these [WMA] witnesses, particularly given their interest (a financial one) in the outcome of the litigation." ER201.

b. The WMA witnesses did not unequivocally and uniformly testify that they knew Celador would never share in ABC network-run profits.

Defendants' reliance on the WMA testimony necessarily presupposes uniform and unequivocal WMA testimony that was consistent with defendants' vision of the case—otherwise there would be no way to know what knowledge to impute to Celador. The record negates any such possibility.

As just shown, abundant evidence supports the conclusion that WMA did not know that *Millionaire* would operate at a guaranteed loss or that Celador would not share in ABC's profits. WMA's Lipstone testified that he did not know that ABC would act to make its profit-sharing promise worthless, ER962, and that if he had known it, the deal wouldn't have been made, ER1029. What he knew was that the deal was with ABC and that ABC offered to split *its* profits. ER919-22, 3149. And while he testified that there could be an initial license-fee-equals-production-costs deal, ER986, he also testified that license fees are re-set on success even for perpetual licenses and that the single most important factor in doing so is a show's success, ER 2345-46, 1027. And Silverman was "shocked" that *Millionaire* showed no profits at the network run stage. SER339.

A jury would be entitled to consider the *totality* of WMA's knowledge, and certainly could not be required to accept just selected defense-favorable snippets or broad characterizations of "how the industry works." On review of judgment as a matter of law, the Court is required to presume that a jury would accept the

testimony *favorable* to Celador and disregard that opposed. That requirement eliminates any possibility of imputing, as a matter of law, any supposed WMA understanding that defendants claim favors them.

c. WMA's generic understanding of supposed industry custom cannot negate what Celador actually knew—that it had a direct deal with ABC to share in ABC's profits.

Just as the jury would be entitled to consider the totality of WMA's supposed understanding and not just the portions defendants would like to emphasize, so would it also be entitled to consider the totality of *Celador*'s actual knowledge—not just that which WMA might be presumed to have shared with it, but also that which it obtained directly.

Defendants seem to assume that whatever WMA supposedly understood about generic industry custom (which, as just shown, is itself subject to debate) negates anything that Celador actually knew through its direct experience. That's simply not true. That an agent shares what it knows with a principal is a presumption, not a straightjacket. *Mutual Life Ins. Co. v. Hilton-Green*, 241 U.S. 613, 622-23 (1916). "The rule is intended to protect those who exercise good faith, and not as a shield for unfair dealings." *Id.* at 623; *see Sands v. Eagle Oil & Refining Co.*, 83 Cal. App. 2d 312, 319 (1948) (agent's knowledge not held against the principal where "the agent and the third party act in collusion against the principal" or "when the third party knows that the agent will not advise the

principal"). A third party cannot tell an agent one thing and the principal another and claim that what it said to the agent is the only thing that counts.

Here, from the outset, Celador negotiated directly with ABC. Celador communicated directly that it wanted a network deal; and ABC responded directly with a network deal offer. ER652. And Celador continued to negotiate directly with ABC—and only ABC—through the signing of the Rights Agreement. Indeed, the final negotiations occurred directly between ABC's Winograde and Rierson and Celador's Smith and Gregson. ER2263-64; SER225. The final Rights Agreement directly promised Celador 50% of profits ("Defined Contingent Compensation") "derived by ABC/BVT from the exploitation of" *Millionaire* in North America, with "ABC/BVT" defined "collectively" as *both* ABC and BVT. ER3085, 3088 ¶ 3.B(1).

A jury need not discount or disregard Celador's direct knowledge in deference to any understanding of supposed industry custom that WMA might be presumed to have shared with Celador. The jury could well conclude that defendants knew—both from their direct dealings with Celador and from their convoluted efforts to hide the various transactions by which they claimed there were no profits for Celador to share— that Celador did *not* know about or suspect a no-network-profits arrangement, regardless of what anyone at WMA supposedly understood.

d. Not even the inadmissible spreadsheet would have defeated Celador's fraud claim.

Nor could the alleged WMA spreadsheet, even were it admissible, suffice to establish knowledge by Celador sufficient to defeat its fraud claim.[12] There is no presumed shared knowledge when an agent's "interest is opposed to that of the [principal], and the presumption is, not that he will communicate his knowledge . . . but that he will conceal it." *McDonald v. Randall*, 139 Cal. 246, 251 (1903); *see Janssen v. Gordon*, 35 Cal. App. 2d 410, 413 (1939) (real estate agent's knowledge of offer not imputed because agent was simultaneously representing adverse interest).

The uncontested evidence established that the spreadsheet was prepared by unknown persons long after the Rights Agreement was signed, during WMA's negotiations with ABC for higher commissions *for itself*, at Celador's expense. RB62-63; *see* RB59-62 (no one knows who prepared the spreadsheet or what the basis for its data and calculations was). Even defendants admit that the spreadsheet was "likely prepared in connection with WMA's negotiations with ABC over its package commission," APB63—*i.e.*, for WMA's benefit at

[12] Contrary to defendants' claim, RRB45, Celador did raise multi-level hearsay objections in the district court. *See* Dk.395 at 10 (raising double hearsay problem), Dk.422 at 12 n.6 (same), Dk.514 at 11 (same). In any event, the district court's evidentiary ruling must be upheld if it was correct on any basis.

Celador's expense, as any increased package commission reduced Celador's profit share. *See* ER3102 ("agency package fee" deducted in profits/DCC formula).[13]

There is no basis for imputing to Celador, at the time it was negotiating the Rights Agreement, knowledge of the contents of a document that was created months later for the purpose of furthering WMA's interests, but not Celador's.

C. Celador's Fraud Claim Is Not New.

The record flatly contradicts defendants' contention that Celador did not adequately raise its fraud claim in the district court and so waived it.

- According to *defendants*' characterization in the Pre-Trial Order, the fraud claim consisted of "the four alleged statements *taken together*." ER3356 (emphasis added); *see* ER3352 (Celador's description of the fraud elements: "ABC and/or BVT made false representations to Celador prior to and during negotiation of the Agreement"). ABC thus recognized that the whole of its promises *taken together* could well support a fraud claim where the individual statements might not. That's just what the cross-appeal asserts.

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[13] Consistent with the authorities cited above, the district court ruled only that WMA acted as Celador's agent during the contract negotiations. ER205; *see* ER122. That Celador settled the package commission dispute with WMA in 2001, *see* RRB40 n.14, only confirms that WMA was acting adverse to Celador in 1999. Nor did Celador "authorize[]" WMA's negotiation of a package commission, as defendants claim. RRB39. Celador didn't understand, and didn't learn about, WMA's package commissions until 2001. ER436-41, 3002.

- According to *defendants*' characterization in the Pre-Trial Order, the claim is for "promissory fraud"—that is, that "ABC and BVT did not intend to perform their promises when they made them." ER3356-57. Again, that's exactly what the cross-appeal argues. Besides, defendants *admit* that ABC never intended to share its profits with Celador in any way, shape, or form, and that ABC effectuated this intent, among other things, by a license-fee-equals-production-costs deal with BVT that guaranteed there would *never* be any network-run profits for Celador to share.

- The Pre-Trial Order recites the various negotiations and the ABC-BVT assignment/licensing scheme; it acknowledges Celador's claim that "[t]hese transactions evidence Defendants' fraudulent intent in inducing Celador and Smith to convey to ABC/BVT jointly the North American format rights in the Series with no intention of sharing the profits derived from the exploitation of those rights 50/50 as called for under the Agreement. These transactions also evidence that Defendants never intended to deliver on the promises they made to Plaintiffs." ER3365; *see* ER3358 (single summary of evidence supporting contract and fraud claims), 3363 ("Although the Agreement states that Celador is entitled to receive 50% of 100% of the profits 'derived by ABC/BVT from the exploitation of any Pilot and Series produced hereunder,' Defendants interpreted Celador's profit participation rights under the DCC provision of the Agreement to be limited to 50% of *only* BVT's profits") (original emphasis); *see also* RER21 (Celador argues concealment of the "secret deal" between ABC and BVT as fraud in opposing judgment as a matter of law).

But once Celador presented evidence that the statements taken together evidenced a fraudulent scheme, defendants changed tack. They convinced the district court to dissect particular statements, arguing that Celador could prove fraud only by statements that were each individually fraudulent. SER2-4. That's not the law.

In any event, it doesn't matter whether the fraud claim was argued in the district court in precisely the same terms as on appeal. As long as the *facts* presented at trial supported *any* fraud argument, it was error to grant judgment as a matter of law—it is enough that Celador made the *claim* in the district court. "[T]he Supreme Court has made clear [that] it is *claims* that are deemed waived or forfeited, not *arguments*." *Weissburg v. Lancaster Sch. Dist.*, 591 F.3d 1255, 1259 n.3 (9th Cir. 2010) (emphases added, internal quotation marks omitted) (citing *Yee v. City of Escondido*, 503 U.S. 519, 534-35 (1992) (federal takings claim properly raised in state court could be supported in Supreme Court by argument even if argument not raised below) and quoting *United States v. Pallares-Galan*, 359 F.3d 1088, 1095 (9th Cir. 2004)).

The district court may not dismiss a claim unless there is no possibility that it can be supported by the evidence presented. That is not even close to being true here: The evidence strongly supported Celador's claim that ABC promised a network deal in which *ABC* would share network-run profits with Celador but that ABC never intended to honor that promise. That's fraud. The claim should have gone to the jury.

CONCLUSION

The judgment should be affirmed as is. But if it is not, the Court should direct the district court to try the fraud claim.

Dated: December 30, 2011

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Circuit Rule 32-1

1. This brief complies with the type-volume limitation of Fed. R. App. Proc. 28.1(e)(2)(C) and Ninth Circuit Rule 32-1, excluding parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), it contains **6,618** words, as automatically calculated by the WordPerfect, version X4, word processing program.

2. This brief 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: December 30, 2011

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I hereby certify that on December 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.

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