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Mandatory Arbitration Provisions Involving Talent and Studios and Proposed Areas for Improvement

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I. INTRODUCTION

We have litigated many cases in Superior Court where a prominent television show creator/showrunner sued a major television studio¹ for his or her share of the profits and/or to vindicate some other contractual right in a television series. Lawsuits in public courthouses between talent and major studios, however, are becoming increasingly rare as more and more contracts include mandatory arbitration clauses.

As we have learned from our own litigation practice and from transactional lawyers on the talent side, major television studios are increasingly insisting that their new contracts with talent include a mandatory arbitration provision and that one particular arbitration provider, JAMS², be the forum that will arbitrate all disputes. Major studios are taking the position that these two provisions are non-negotiable and that talent has no option but to assent to the studios’ insistence on them. Furthermore, since nearly all of the major studios now insist on these provisions, there is no opportunity to negotiate a different position at another major studio. In effect, the talent’s real world choice is limited to agreeing to these provisions or not working for a major studio.

Much has been written about the perceived unfairness of large companies increasingly insisting on mandatory arbitration in their contracts with consumers and employees.³ This subject, however, has received less attention in the context of tal-

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¹ For purposes of this article, we are considering the major television studios to be CBS/Paramount, Disney/ABC, Fox, NBCUniversal, Sony and Warner Bros.

² “JAMS is the largest private alternative dispute resolution (ADR) provider in the world. With its panel of neutrals, JAMS specializes in mediating and arbitrating complex, multi-party, business/commercial cases—those in which the choice of neutral is crucial.” See JAMS, www.jamsadr.com (last visited Mar. 3, 2015).

³ See, e.g., Theodore Eisenberg, Geoffrey P. Miller & Emily Sherwin, Arbitration’s Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts, 41 U. MICH. J. L. REFORM 871 (2008); Martin H. Malin, The Arbitration Fairness Act: It Need Not and Should Not Be an All or Nothing Proposition, 87 IND. L.J. 289, 312-313 (2012); Jean R. Sternlight, Creeping Mandatory

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ent versus studio litigation. While talent, often wealthy and well represented individuals, are a far cry from the classic consumer/employee, who is not represented and may not even be aware of the presence of an arbitration provision in the boilerplate of a contract he or she is signing, there is concern among many on the talent side as to “repeat provider bias” and “repeat player bias” in talent versus major studio arbitrations:

Arbitration critics frequently discuss a phenomenon known as the “repeat provider” problem. . . . Obviously, once [an arbitration] company is named as the provider, financial benefits accrue to that company. . . . Thus, charge the critics, providers have a financial incentive to make sure that the company is pleased with the results in arbitration. If the [disputant company that effectively chooses the arbitration provider] is displeased with the results secured through a particular provider it may well switch providers. Needless to say, providers and arbitrators vehemently deny the charge that they are biased. Providers urge that they have no direct influence over their arbitrators. Yet, critics maintain that, consciously or unconsciously, arbitrators may slant the result in companies’ favor.

A related purported phenomenon is known as the “repeat player” bias. Whereas a given [disputant] company will tend to arbitrate many consumer disputes, a given consumer will typically arbitrate, at most, one. Thus, the companies have far greater experience with and exposure to the arbitration process than do the consumers. There is some limited empirical evidence that the repeat player does somewhat better in arbitration than the non-repeat player.4

Similarly, Professor Schwartz of the University of Wisconsin Law School wrote:

[T]he repeat player studies seem to miss the broader point that arbitration is a service sold by arbitration vendors to putative defendants. That means the “aim to please” comes not only from individual arbitrators, but also from vendors—like AAA—who compile the panels of potential arbitrators from which the parties choose. AAA, for example, not only maintains an accredited list of arbitrators, but in a given case, will send the parties a short list from which the arbitrator in that case will be selected. In other words, arbitration vendors play a significant role in arbitrator selection; individual arbitrators have to be responsive to the vendors who keep them on “the list,” and vendors must be responsive to their customer-defendants. Repeat player analysis, then, should give way to a more holistic customer bias analysis that looks more carefully at such factors as the size of the defendant company, and the process of arbitrator selection—for example, scrutinizing the relationship between an arbitrator’s award-making behavior and the frequency with which that arbitrator is nominated for short lists by the vendor.5

There is also considerable academic research on hidden or subconscious biases of which a person, such as an arbitrator, are not even consciously aware.6 Even the

4 Sternlight, supra note 3, at 1650-51.
6 See generally MAHZARIN R. BANAI & ANTHONY G. GREENWALD, BLIND SPOT: HIDDEN BIASES OF GOOD
most fair minded arbitrators can at least subconsciously be aware that if he or she rules against a major studio, particularly in a large dollar value case, he or she will not be picked by at least that major studio in the future. In contrast, a public judge does not face these same economic pressures and realities.

Transactional lawyers and litigators who represent talent have become increasingly concerned about repeat provider/player bias in talent versus major studio arbitrations. These concerns are based in part on anecdotal stories of arbitrator bias in favor of the major studios as well as economic reasons arbitrators have to favor repeat studio player over non-repeat player talent. Indeed, many on the talent side believe that the choice of arbitrating versus litigating in a public courtroom is the single most important factor—perhaps even more important than the merits—in determining the outcome. This concern is heightened in large dollar value arbitrations since there is less perceived risk that an arbitrator will unduly favor a major studio in a small dollar value arbitration.\(^7\) Simply, losing a small dollar value arbitration may be tolerable and viewed as a cost of doing business to the studios; losing a case worth tens or hundreds of millions of dollars is not similarly tolerable to the studios.

It is certainly the arbitration providers’ and major studios’ position that there is no repeat provider/player bias and that arbitrators in each case rule solely on the merits.\(^8\) The providers also point to both their arbitrators’ reputations as neutrals and the institutional safeguards in their own rules, including talents’ participation in the arbitration selection process, as factors that counter any potential repeat provider/player bias. Joel Grossman, a well-respected JAMS neutral, stated:

“Individuals and smaller companies may have this idea about some arbitrator, ‘He’s pretty smart, he knows where his bread is buttered, and he knows he’ll have maybe 100 cases from Paramount, for example, and he wants that repeat business,’” he said. “I think it’s just something people tell themselves when they lose cases.”\(^9\)

While there are two competing narratives, neither side’s belief can be tested since talent versus studio arbitrations are invariably covered by confidentiality provisions and arbitration providers do not report the results of the arbitrations in this area. Thus, there is no way to determine whether the major studios have won 90%, or say, only 30% of talent versus studio arbitrations before a particular provider or a particular arbitrator.

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\(^7\) This concern comes from our intuition, experience and common sense. It is a “concern” not a proven fact.

\(^8\) This is the position that Richard Chernick and Joel Grossman, two JAMS neutrals, took in their discussions with us. See notes [29] and [30] and the accompanying text. We have also discussed this position with studio lawyers over the years.

We also agree that the generalizations that can be made from anecdotal experiences are imperfect because they involve confidential arbitrations where outside parties cannot independently determine if the arbitrator(s) were biased and ruled correctly. We submit, however, that whether or not the providers and their arbitrators are, in fact, influenced by repeat provider/player bias, the perception of such bias by many on the talent side is real. It is therefore in the providers’ and their neutrals’ interest to address this perception on the merits.

In the sections that follow, we discuss the trend towards designating arbitration in talent-major studio contracts, the fact that JAMS has become the major studios’ almost exclusive provider of choice, and how the arbitrator selection process can favor the studios. Further, we examine the California legislatures and Congress’ response to the repeat provider/player issue, including why many, if not most, talent versus studio arbitrations should be considered “consumer arbitrations” where enhanced disclosures must be made. Finally, we explain why litigation challenges to arbitration provisions in talent-studio agreements are challenging at best under the current case law and propose improvements to the current system for the benefit of all.

We welcome responses to this article. It is our hope that this article will catalyze a real sharing of information and a dialogue in which the providers, arbitrators, the major studios and talent can participate. We hope the system will improve for everyone as a result.

II. JAMS IS THE STUDIOS’ CURRENT PROVIDER OF CHOICE

In 2013, we asked several talent lawyers to send us dispute resolution provisions from recent contracts between their talent clients and the major television studios. We received dispute resolution provisions from 26 contracts entered into between 2011 and 2013. This set included at least four contracts from each of the six major studios.

Of the 26 provisions we reviewed, 22 of them required mandatory arbitration, with 21 of the 22 designating JAMS as the provider. Of the four provisions that did not require mandatory arbitration, two required a confidential non-jury reference to a retired federal or state judge and two allowed for litigation in the public court system. We analyzed the provisions for each major studio and found:

1. Five dispute resolution provisions in contracts involving CBS/Paramount and their affiliates. All of these contracts have mandatory JAMS arbitration provisions.

2. Four dispute resolution provisions in contracts involving Disney/ABC and their affiliates. Of the two that were entered into in 2012, one had a mandatory

10 Under California Code of Civil Procedure Section 638, the parties can agree to have disputes decided by a court-appointed judicial reference or “referee,” generally a retired judge. See Cal. Civ. Proc. Code § 640 (2013) (outlining the procedure for referee selection). While talent still gives up the valuable right to a jury trial, there are advantages to a reference over arbitration. They can include appeal rights, a neutral who must follow the rules of court and make decisions based on the law, and a neutral that is less subject to repeat provider/player bias when he or she is not dependent on referrals from one side, namely the studios, e.g., picked by the parties or the court post-dispute. See Cal. Civ. Proc. Code § 645 (West 2014); Cal. Rules of Court § 3.904; Cal. Civ. Proc. Code § 663 (West 2014).
American Arbitration Association ("AAA")\(^{11}\) arbitration provision and the other had no mandatory arbitration provision. The two entered into in 2013 required a confidential non-jury reference to a retired judge.

3. Four dispute resolution provisions in contracts involving Fox and its affiliates. Three of these contracts have mandatory JAMS’ arbitration provisions. One agreement had no mandatory arbitration provision.

4. Five dispute resolution provisions in contracts involving NBC/Universal and their affiliates. All of these contracts have mandatory JAMS’ arbitration provisions.

5. Four dispute resolution provisions in contracts involving Sony and its affiliates. All of these contracts have mandatory JAMS’ arbitration provisions.

6. Four dispute resolution provisions in contracts involving Warner Bros. and its affiliates. All of these contracts have mandatory JAMS’ arbitration provisions.

JAMS has stated that it is surprised by the fact that the studios are almost all now uniformly designating it as the provider in their contracts. JAMS Practice Development Manager Theresa DeLoach stated:

“We’re always shocked and surprised when we see that we’re in a certain studio’s clause, because we don’t make that kind of effort, especially in the entertainment context . . . I think it’s really driven by the marketplace.”\(^{12}\)

This article particularly focuses on JAMS because it now has a controlling position as the provider in talent-major studio contracts—not because it and its neutrals are inherently more prone to repeat provider/player bias than other providers and/or neutrals. Similar complaints have been made against other providers when they held a controlling position in other areas or industries.\(^{13}\)

Representatives from other providers including ADR Services, Inc. ("ADR")\(^{14}\) and AAA, the latter of which was previously the provider most often written into the arbitration clauses of talent-studio contracts, have told us that they want to become more significant players in the talent-versus-studio arbitration space. We think greater competition among providers, with no one provider holding a controlling position—particularly one whose controlling position is dictated by the studios—would be a welcomed change. But the bottom line, as discussed further herein, is that greater transparency and other reforms are the only way to restore confidence in the arbitration system in this area.

\(^{11}\) AAA is a not-for-profit organization that provides alternative dispute resolution services to individuals and organizations who wish to resolve conflicts out of court. See American Arbitration Association, https://www.adr.org (last visited Mar. 24, 2015).

\(^{12}\) Phillips, supra note 9.


\(^{14}\) ADR provides neutral mediators, including attorneys and retired judges, to resolves disputes. See ADR Services, Inc., https://www.adrservices.org (last visited Mar. 31, 2015).
III. TRENDS TOWARDS ARBITRATION IN GENERAL

We know from our own experience that until about fifteen years ago, the studios rarely included mandatory arbitration provisions in their talent contracts. The situation has dramatically changed since then. The studios’ increasing insistence on mandatory arbitration is directly related to the sunset of the Network Financial Interest and Syndication Rules (“Fin-Syn”) in the 1990s, which prohibited broadcast networks from owning their primetime programming. The repeal of the Fin-Syn Rules in 1995 led to the beefing up of in-house television studios of the major studios and the vertical integration of their broadcast networks, cable networks, and studios. As a result, talent brought numerous lawsuits alleging that the vertically integrated networks and studios agreed on license fees that were below market value, which hurt the profit participants and was a breach of the studios’ contract with them. The studios suffered losses, or are reputed to have settled for substantial amounts, in a number of these cases that were litigated in public courtrooms.

These negative experiences caused many on the studio side to conclude that juries tend to favor individual talent over big corporate studios. Additionally, studios were convinced that juries were often unfairly influenced by claims of creative “Hollywood accounting”:

“[s]tudio lawyers argue the clauses actually eliminated conditions favoring talent. Echoing the sentiments of many lawyers who regularly defend studios in court, the former studio lawyer argued that jurors often favor talent. It’s easy to be won over by their ‘star power,’ the lawyer said, whereas private arbitration can level that playing field.”

The studios also cite the delays, costs, and the public nature of court proceedings as reasons why they insist on mandatory arbitration.

Not surprisingly, the talent side has a different perspective. The talent believes the public court system—including judges and juries who are not beholden to the

16 See RONALD J. NESSIM, Profit Participation Claims, in ENTERTAINMENT LAW & LITIGATION 551, 557-58, (Charles J. Harder ed., 2014) (discussing several of these cases).
18 See Nessim, supra note 16, at 558-59 (explaining the economic motives of a vertically integrated entertainment company when it produces a television program and also airs it on its affiliate networks). With increased use of arbitration provisions, and clauses that virtually allow the studios to self-deal and license programs at less than fair market value with related networks, and other pro-studio provisions, this litigation may well have reached its high water mark in recent years. Id. at 560-61.
19 Phillips, supra note 9.
20 These reasons have been told to us by attorneys for studios and arbitrators in discussions we have had with them in connection with this article and over the years.
studios for repeat business—is a more fair forum for talent versus studio disputes. In contrast to the public court system, the talent fears that there is a repeat provider/player bias in arbitration that works in the studios’ favor. These fears are exacerbated by both the lack of transparency as to the results of prior arbitrations, as well as anecdotal stories of arbitrators favoring the repeat major studios.

IV. TREND TOWARDS SELECTING JAMS IN PARTICULAR

As discussed above, major studios almost uniformly now designate JAMS as the provider in their contracts. The reasons studios most commonly give for this selection are that JAMS has well-developed rules and procedures, JAMS’ neutrals, many of whom are retired judges, have excellent reputations, and many of JAMS’ neutrals have particular expertise in these types of disputes. Indeed, in a dispute between talent and a major studio, JAMS will select arbitrators from its Entertainment and Sports Group, which it formed in early 2010. This group currently consists of 37 experienced neutrals throughout the United States, including fourteen in Los Angeles County.

Many on the talent side believe there is more to the major studios’ preference for JAMS than the reasons they provide. Michael Plonsker, a prominent talent side litigator, asked: “Why would studios insist upon a specific tribunal [JAMS] unless they feel they gain an advantage?” The talent side’s skepticism about the repeated designation of JAMS stems from their fear of repeat provider/player bias, due to anecdotal stories of bad results for talent in talent versus studio JAMS’ arbitrations, the fact that major television studios dictate JAMS as the provider and appear to be acting nearly uniformly in doing so, and the reality that JAMS depends on the major studios for repeat business in this area.

JAMS does seem to be sensitive about being chosen as the provider in contracts written by large repeat player corporations, such as the major studios. It was

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21 We have discussed these beliefs and reasons with transactional lawyers and litigators on the talent side in connection with this article and over the years. We also share these beliefs based on our own experiences.


23 These reasons have been told to us by attorneys for studios and arbitrators in discussions we have had with them in connection with this article and over the years.


25 Id.

26 Phillips, supra note 9.

27 We have discussed these beliefs and reasons with transactional lawyers and litigators on the talent side in connection with this article and over the years. We also share these beliefs based on our own experiences.
reported in 2005 that JAMS reversed its previous policy of refusing to enforce arbitration provisions that prohibited all consumer and employee class actions:

After nearly four months of loud complaints from general counsel and defense attorneys, the arbitration service JAMS has reversed its policy of refusing to enforce contract clauses that prohibit consumer and employee class actions.

At least one large client, Citibank, wrote JAMS out of its contracts in response to the policy, [a JAMS spokesperson] confirmed. Discover Card also wrote out JAMS, according to the ADR Institute, which is sponsored by the National Arbitration Forum. Both plaintiff and defense attorneys said they knew other companies that had dropped JAMS, but they declined to name names. . . .

The decision infuriated plaintiff attorneys who had earlier applauded the JAMS policy.

‘If you’re not capable of withstanding the pressure and doing what you think is right, you shouldn’t be doing arbitrations,’ said Cliff Palefsky, a partner with McGuinn, Hillsman & Palefsky in San Francisco and a longtime opponent of mandatory ADR. . . .

In addition to public griping, he said, JAMS was also pressured by corporate clients’ decision to use arbitration services that would honor class action preclusions. ‘I do have clients who have written JAMS out of their contracts,’ said Kaplinsky, who declined to name them.28

JAMS’ reported behavior in at least this one instance is not surprising—JAMS’ conduct is the predictable action of any business that depends on repeat customers, here large companies, that choose to designate JAMS as the provider in its contracts. Similarly, if the major studios begin to write JAMS out of their contracts, JAMS’ business in the entertainment area, and the business of its neutrals in that area, would decline.

V. OUR ATTEMPTED STUDY

We began our study by soliciting the views of two prominent and well-respected members of the JAMS’ Entertainment Group in Los Angeles: Richard Chernick,29 who also serves as a Vice President of JAMS and is the Managing Director of the JAMS Arbitration Practice, and Joel Grossman30, also a respected JAMS neutral. They were both cooperative and helpful in these discussions.

Second, we talked to several arbitrators/mediators not affiliated with JAMS, as well as several practitioners in the field about (1) whether they perceive any repeat provider/player bias in talent versus studio arbitrations and (2) if so, ways the current

system can be improved. Many of the people we talked to provided helpful suggestions, many of which are incorporated in this article.

Third, in May 2013, we sent a questionnaire to JAMS in the hopes that we could move beyond anecdotal stories and personal beliefs.\(^3\) The questionnaire asked for information about arbitrations that have taken place in any of JAMS’ Los Angeles area offices and/or any of the neutrals in JAMS’ Entertainment Group, since January 1, 2008 where a “major studio” (as defined above) was a party. Specifically, for each arbitration, JAMS was asked to provide (1) the name of the studio parties, (2) if the non-studio parties could not be named for confidentiality reasons, a general description of who they were, e.g., individual talent and his/her loan out companies or some other class of person/entity, (3) the name of the counsel for each party, (4) the name of the arbitrator(s), (5) the general nature of the claim, (6) the date the claim commenced, (7) the results, including whether the case settled and/or the date of arbitration award, if any, (8) identification of the prevailing party (studio or talent) and (9) the amount of monetary damages awarded, if any.

The information we sought from JAMS was inspired by the California consumer arbitration regulatory scheme, discussed in Section H below, which provides for increased disclosures by the provider organization as a whole, and not just the selected arbitrator, in cases where the “consumer rules” apply.\(^3\) As also discussed in Section H, a strong argument can be made that the consumer arbitration rules apply in many, if not most, talent versus studio arbitrations.

Further, the questionnaire also sought (1) similar information for non-arbitration services, e.g., mediation, discovery referees and references, rendered in any of JAMS’ Los Angeles area offices where a major studio was a party, (2) information concerning the fees collected by JAMS and its arbitrators in Los Angeles for matters involving the major studios, (3) how JAMS’ arbitrators are compensated, (4) whether JAMS currently makes or did make attempts to cause the major television studios to designate JAMS as the provider in their contracts, (5) JAMS’ response to the talent side’s repeat provider/player concerns and (6) suggestions on ways to improve the system.

Unfortunately, we were unable to get any of the information we sought from JAMS. In July 2013, Mr. Chernick responded on behalf of JAMS, stating: “Unable to get consensus to gather requested data only some of which exists. Looks like you should proceed without JAMS stats.”\(^3\) Moreover, because JAMS arbitrations in this area are invariably subject to contractual confidentiality provisions, we were largely unable to otherwise collect the requested data.

In fairness to JAMS and other providers, even if the data were available and revealed that the studios won a high percentage of talent versus major studio arbitrations, this does not necessarily mean there was repeat player/provider bias or that the

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33 Email from Richard Chernick to Ronald Nessim (July 13, 2013) (on file with author).
cases were not correctly decided on the merits. Several law professors wrote about the lack of data in the analogous consumer arbitration context, concluding that even if the data were available, it would not be easy to draw conclusions from it:

Given the fierce controversy over mandatory consumer arbitration, one would hope that empirical studies could be used to evaluate the process. Unfortunately, researchers have found it very difficult to evaluate mandatory arbitration, for a number of reasons. First, to a large extent researchers cannot obtain access to the data they need to perform good studies. As we have seen, one of the fundamental traits of arbitration is that it is typically private. Thus, researchers can only obtain data on arbitration to the extent that disputants or arbitration providers make the data available, which they often do not. A second problem researchers face is that even if they had data regarding results of claims filed in arbitration and in court, it would be difficult to know how to compare that data. After all, the same case is never brought in both processes, and one cannot simply assume that claims brought in arbitration were otherwise identical to those brought in litigation.34

We believe, however, that more information and transparency, even if it is not dispositive, is better than the current system, in which there is virtually no information or transparency.

VI. RECOMMENDED ARBITRATION PROVISIONS, IMPORTANCE OF MAJOR STUDIOS AND ARBITRATOR COMPENSATION

JAMS, like other providers, offers sample arbitration provisions, which are directed at those who write the arbitration clauses into their contracts, such as the major studios. JAMS’ Clause Workbook states:

Planning is the key to avoiding the adverse effects of litigation. The optimal time for businesses to implement strategies for avoidance of those adverse effects is before any dispute arises. We at JAMS recommend, therefore, that whenever you negotiate or enter into a contract, you should carefully consider and decide on the procedures that will govern the resolution of any disputes that may arise in the course of the contractual relationship. . . .

JAMS offers sample dispute resolution clauses that may be inserted into a contract prior to any dispute ever arising. These sample dispute resolution clauses are set forth and, in some cases, briefly discussed inside.35

The standard arbitration clause for domestic commercial contracts in JAMS’ Clause Workbook states:

Any dispute, claim or controversy arising out of or relating to this Agreement or the breach termination enforcement interpretation or validity thereat including the determination of the scope or applicability of this agreement to arbitrate, shall be determined by arbitration in [insert the desired place of arbitration] before [one/three] arbitrator(s). The arbitration shall be administered by JAMS pursuant

34 Edward Brunet et al., Arbitration Law in America 151 (2006).
to its Comprehensive Arbitration Rules and Procedures [and in accordance with the Expedited Procedures in those Rules] [or pursuant to JAMS’ Streamlined Arbitration Rules and Procedures]. Judgment on the Award may be entered in any court having jurisdiction. This clause shall not preclude parties from seeking provisional remedies in aid of arbitration from a court of appropriate jurisdiction.36

This provision provides that JAMS, and not a court, will decide a dispute over arbitrability, namely whether the dispute should be submitted to arbitration, including a talent side challenge to JAMS and/or a particular JAMS arbitrator based on a claim of repeat provider/player bias. It is a change from the general rule that unless the parties have “clearly and unmistakably” provided otherwise in the arbitration agreement, the question of arbitrability is an issue for a court to decide.37

This provision also expressly incorporates JAMS’ Rules and Procedures which, similar to other providers, allow far narrower discovery than is allowed in the public court system.38 For example, the JAMS Rules limit each side to one deposition; while the arbitrator has discretion to allow more, the presumption is that it be limited to one.39 This is almost always to the benefit of the studios, as there are usually only a few potential percipient witnesses on the talent side to depose (the artist, his or her lawyer and his or her agent), while there may potentially be dozens on the studio side (multiple business affairs, contracts, production, distribution and accounting personnel spread across sometimes multiple companies within the vertically integrated enterprise). In our experience, depositions of such witnesses in public court proceedings have profoundly and positively impacted the results in those cases in favor of the talent side.

Further, the JAMS Clause Workbook includes clauses providing for confidentiality in the arbitration proceedings. The result of such a provision is that talent can find out very little as to how JAMS as a whole, and specific JAMS neutrals as individuals, have ruled in prior similar arbitrations. The selected arbitrator must disclose “all matters that could cause a person aware of the facts to reasonably entertain a doubt that the proposed neutral arbitrator would be able to be impartial.”40 This includes prospective employment, service as a dispute resolution neutral e.g., mediator, within the past two years involving the “parties” in that arbitration,41 and service as an arbitrator within the past five years involving the “parties” in that arbitration.42

36 Id. at 2.
38 JAMS rules are deemed incorporated if JAMS is designated as the provider even if its rules are not expressly incorporated in the arbitration provision: “The Parties shall be deemed to have made these Rules a part of their Arbitration agreement... whenever they have provided for Arbitration by JAMS under its Comprehensive Rules or for Arbitration by JAMS without specifying any particular JAMS Rules....” JAMS RULES & PROCEDURES, supra note 2, Rule 1.
39 Id.
40 CAL. CIV. PROC. CODE § 1281.9(a) (West 2003).
The required disclosures, however, will often be limited to the precise parties before the selected arbitrator; it will not include the many affiliates of a particular studio. This is because under one set of disclosures that apply to California arbitrators, a “party” is defined to include the “parent, subsidiary, or other legal affiliate of any entity that is a party and is involved in the transaction, contract, or facts that gave rise to the issues subject to the proceeding.” Therefore, only if a particular affiliate of the party studio was involved in the underlying dispute would disclosures need to be made for that affiliate. The disclosures under the Ethics Standards For Neutral Arbitrators In Contractual Arbitration define “party” narrowly and do not encompass affiliates or subsidiaries.

For example, if a Warner Bros. studio is a party to an arbitration and the selected JAMS arbitrator has not had an arbitration involving that particular Warner Bros. entity in the past five years, nothing needs to be disclosed, even if that arbitrator has ruled in the favor of other Warner Bros. affiliates, such as The CW Television Network or HBO, not involved in the underlying dispute, in nine out of ten prior arbitrations. Similarly, nothing needs to be disclosed by the provider (unless the consumer arbitration rules discussed in Section H apply) if other arbitrators in the JAMS Entertainment Group have had ten arbitrations involving the said Warner Bros. studio or any other Warner Bros. entities in the past five years and ruled for the studio in nine of them. Certainly, nothing needs to be disclosed by the arbitrator or the provider for arbitrations involving non Warner Bros. entities, e.g., if the selected arbitrator or other arbitrators affiliated with the provider ruled for NBC, CBS, Disney and Sony entities in nineteen out of twenty prior arbitrations. Obviously, this is all information that talent would want to know.

The JAMS Clause Workbook also includes provisions that prohibit punitive damages. Though most talent versus major studio cases only involve breach of contract claims, sometimes talent allege fraud, intentional interference with contract, and other intentional torts where punitive damages are potentially available. An arbitration clause taking away the possibility of punitive damages certainly favors the studio in these types of cases.

While JAMS declined to answer our written questions as to how lucrative its business with the major studios has been, and how it and its neutrals are compensated, we were able to determine some of this information from other sources. The

courts.ca.gov/documents/ethics_standards_neutral_arbitrators.pdf [hereinafter Ethics Standards].


44 See JAMS Clause Workbook, supra note 35, at 4-5.

45 In the Homicide: Life on the Streets and in the Will & Grace cases we litigated in Superior Court, we successfully asserted intentional torts against the studio that survived summary judgment. In the Homicide case, the case settled shortly before the start of trial where we would have sought punitive damages. In the Will & Grace case, the case settled after a two month jury trial and just before the jury was going to begin the punitive damages phase on the fraud claim we asserted. See Nessim, supra note 16, at 429-32.
major studios, including their vertically integrated sister companies, are among the largest employers in the Los Angeles area where most of these disputes are litigated. The Walt Disney Co., Warner Bros. Entertainment, Inc. and Sony Pictures Entertainment were all in the list of top twenty-five largest private-sector employers in Los Angeles County in 2011; NBCUniversal and Paramount Pictures were in the top fifty.47 As such, the major studios enter into literally thousands of contracts with talent and others each year.48 Talent versus major studio disputes concerning successful television series often involve tens of millions, if not hundreds of millions, of dollars in dispute.

Another potential factor in considering the repeat provider/player bias issue is how a provider and its neutrals are compensated and the fees they receive. The neutrals in JAMS’ Entertainment Group charge fees ranging from $500 to $900 per hour or $5,000 to $9,000 per day.49 Each arbitrator has his or her own arrangement with JAMS as to the sharing of the neutral’s fee between JAMS and the neutral.50 We are advised that each neutral, depending on his or her agreement with JAMS, receives between 40-70% of the amount paid.51 JAMS, as the provider organization, also charges an administrative fee of 10% of the neutral’s fee.52

Many JAMS neutrals are also “owners” of JAMS. To our knowledge, JAMS is the only major provider where many of its neutrals are also owners who have a profit interest in matters handled by other JAMS’ neutrals. As such, the “owners” receive not only a share of their own fees in the proceedings they act as neutral in, but also a share of JAMS’ overall profits.53

VII. JAMS’ ARBITRATOR SELECTION PROCESS

JAMS’ rules specify that if a contract provides for a JAMS arbitration and the parties have not agreed on a particular arbitrator, JAMS will send the parties a list of at least five arbitrator candidates where the contract calls for a single arbitrator, and at least ten arbitrator candidates where the contract calls for three arbitrators.54 If the arbitration involves a dispute between talent and a studio, the list will include

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48 Based on contracts we have seen and our discussions with other lawyers who practice in this area, we believe that the major studios insist on mandatory JAMS arbitrations in most of the contracts they enter into; they are not limited to talent contracts.
49 We obtained this information by calling JAMS on January 16, 2014 and asking for it.
50 Id.
51 Id.
52 The administrative fee is $400 for every 10 hours that the neutral works; after 30 hours, the administrative fee turns to 10%. We received this information, and the information cited in the text, in discussions with an independent neutral and neutrals associated with JAMS, ADR and AAA.
53 We have discussed with Messrs. Chernick and Grossman that they and other JAMS neutrals are “owners” of JAMS. We were told by several non-JAMS neutrals that we talked to that JAMS is unique among providers in this regard.
54 See JAMS RULES & PROCEDURES, supra note 22, Rule 15(b).
arbitrators from its Entertainment Group.\textsuperscript{55} No disclosures are made by the candidate arbitrators at this stage. Each side can then strike up to two names in the case of a single arbitrator arbitration, and three names in the case of a three arbitrator panel. This leaves at least one remaining name in the case of a single arbitrator arbitration, and four remaining names in the case of a three arbitrator panel.\textsuperscript{56}

JAMS then chooses the arbitrator(s) from the remaining names. Once the arbitrator(s) is selected, the arbitrator(s) then makes the disclosures required by law.\textsuperscript{57} A neutral arbitrator is required to disclose “all matters that could cause a person aware of the facts to reasonably entertain a doubt that the proposed neutral arbitrator would be able to be impartial.”\textsuperscript{58} The specific disclosures include any matter that would disqualify a public courtroom judge, including prospective employment or service as a dispute resolution neutral within the past two years involving a party in the arbitration.\textsuperscript{59} The Ethics Standards For Neutral Arbitrators In Contractual Arbitration require additional disclosures for the selected arbitrator(s), including (1) significant personal relationships with the parties involved in the arbitration, (2) prior arbitrations within the past five years involving the parties and (3) acting as a neutral in mediations or other non-arbitration proceedings involving the parties within the past two years.\textsuperscript{60} Unless the consumer arbitration rules apply, no disclosures are made by the provider.

JAMS believes that the above described arbitrator selection process provides adequate protections to talent and helps ensure the neutrality of the selected arbitrator(s).\textsuperscript{61} Indeed, several courts have relied on this process to help ensure the integrity of the proceeding.\textsuperscript{62} We submit, however, that this selection process (and those of other providers) lends less protection than it appears, and that it can be improved.

First, as Professor Malin of the Chicago-Kent College of Law discusses, there are ways a provider can slant the arbitrator selection process in favor of repeat players if it wishes to do so:

[R]eform should focus on the arbitrator appointing agencies and the arbitrator selection process. The employer unilaterally selects the arbitrator appointing agency when it designs the arbitration system. . . . The enormous importance of the identity and impartiality of the arbitrator appointing agency is obvious. AAA

\begin{thebibliography}{9}
\bibitem[55]{Id.}
\bibitem[56]{Id.}
\bibitem[57]{Id. at 17; \textsc{Cal. Code of Civ. Proc.} § 1281.9(a) (West 2003).}
\bibitem[60]{Ethics Standards, supra note 42, std. 3.}
\bibitem[61]{After receipt of the required disclosures, which must be updated continually throughout the arbitration process, any party may challenge the continued service of an arbitrator “for cause” within 15 calendar days for certain disclosures or at any time before the end of the proceeding on certain other grounds. \textsc{Cal. Civ. Proc. Code} § 1281.91 (West 2003); \textsc{Cal. Civ. Proc. Code} § 170.1 (West 2003). “For cause” challenges are limited to an arbitrator’s failure to make the required disclosures or the contents of the disclosures. \textsc{Cal. Civ. Proc. Code} § 1281.91(a-b) (West 2003). Per JAMS rules, JAMS itself decides whether a “for cause” challenge is valid. JAMS RULES & PROCEDURES, supra note 22, Rule 15(i).}
\end{thebibliography}
and other arbitration service providers actively market their services to employers. The desire to attract and retain employer business can have a negative effect on the way in which the arbitration appointing agency administers the arbitration system. For example, in the early development of the AAA Employment Disputes Panel, employers believed that labor arbitrators would favor employees and expressed strong preferences for excluding them from the panel. The initial AAA Employment Disputes Panel excluded most labor arbitrators. To its credit, AAA no longer does this, but more recently JAMS abandoned its refusal to administer arbitration agreements with class action waivers because of pressure from its business clients.

There are two ways in which an arbitrator appointing agency can slant the process to favor employers. First, the agency decides who it will list on its roster of arbitrators . . . .

The second way in which an agency can slant the process to favor employers is by controlling the composition of the specific panel of arbitrators given to the parties in a specific dispute. The desire for repeat business can be a powerful incentive for agencies to give their customers what the agencies think the customers want. In labor cases, for example, AAA tailors its panels in an effort to meet the needs of the parties in light of the particular dispute. Such tailoring may be appropriate where the agency has been selected mutually by the union and the employer. Like an arbitrator, the agency must curry favor with both adversaries to ensure their repeat business. Such tailoring is entirely inappropriate where the employer is the only party that controls whether the agency will see repeat business.

Random selection from the overall roster is a method of composing a specific panel that reduces a repeat player’s ability to select the same arbitrator for multiple cases.63

We have been told that the selection of the arbitrator candidates by JAMS and other providers is not necessarily random and is often influenced by subjective factors, including the expertise of the neutrals and even who the provider owes guarantees to.64 The fear on the talent side is that the selection may also be influenced, particularly in big dollar disputes, by a provider’s desire to offer candidates the studios will be happy with. Certainly, if enough individual neutrals affiliated with a particular provider rule against the studios, the provider has to know that there is at least a substantial risk that the studios will not continue to designate it as the provider in their contracts. If the number of arbitrators affiliated with a particular provider willing to rule against the major studios ever gets beyond the number of strikes the studios have, e.g., two strikes in a one arbitrator JAMS’ arbitration, the studios will presumably stop their current practice of designating that provider at the contract negotiation phase. Again, this would not be good for the provider’s business.

64 We received this information, and the information cited in the text, in discussions with independent neutrals and neutrals associated with JAMS, ADR and AAA. We promised these individuals that we would maintain their anonymity.
Talent also has concerns about the incentives and pressures faced by individual neutrals. Unlike a public judge, a private neutral, particularly one in JAMS’ Entertainment Group who seeks future business involving the major studios, has an economic incentive to keep the major studios happy or risk losing future business from them. While a neutral may state that he or she can rise above and ignore this economic reality, this reality, and the dangers of hidden or subconscious biases, are nonetheless still present.

Given the importance of the major television studios and their affiliates to the Los Angeles area economy, it is presumably important to JAMS, and particularly to its Entertainment Group neutrals, to keep the studio business. If a JAMS’ Entertainment Group neutral wants to be picked in future arbitrations involving individual artists and major studios, the neutral has to know—at least in the back of his or her mind—that if he or she rules against the studio, the studio might never again pick the arbitrator or his or her affiliated provider. Moreover, if word gets around within the small major studio legal community, other major studios and their affiliated companies might not also select that arbitrator or provider in future disputes.

JAMS maintains that if a neutral is perceived to be “pro studio,” the neutral’s perceived bias will become known, and that neutral will not be picked by talent in future cases. We submit this is often not the case, and even when it is, not picking a particular neutral is not a real solution to the underlying problem. First, due to the confidentiality provisions that govern talent versus studio arbitrations, the individual talent, who are not repeat players, have access to far less information about individual arbitrators than do the major studios. Furthermore, the disclosures JAMS provides at the arbitration selection stage have significant gaps, and JAMS does not currently provide information that directly addresses the repeat provider/player bias issues. The transactional attorneys and litigators for the talent also often come from smaller boutique firms with less access to information than the large law firms commonly retained by the major studios.65

Second, if the talent side is worried about repeat player bias and has concerns about more than two of the five arbitrator candidates proposed in a single arbitrator arbitration, the ability to strike two of them is hardly a solution. The problem is further compounded by the fact, as discussed above, that each JAMS’ Entertainment Group neutral must know, at least subconsciously, that if he or she rules against a major studio, particularly in a large dollar value case, that studio and its affiliated entities will almost certainly strike him or her from future arbitrations. The option to strike therefore has the potential adverse effect of chilling individual arbitrators from ruling against the major studios. Similarly, JAMS, which has its own institutional and financial interests to protect, would face pressures to stop putting such neutrals on its lists of potential arbitrators.

65 This generalization comes from our knowledge and experience with the transactional lawyers and litigators representing talent and the studios.
Third, although the selected arbitrator’s disclosures that are mandated by law reveal a fair amount of information concerning the selected arbitrator, such disclosures do not include significant information that is of critical interest to talent. In the previously discussed example, where the studio party is a Warner Bros. entity, the selected arbitrator may not need to disclose prior arbitrations with other Warner Bros. entities, let alone non-Warner Bros. major studio entities. In addition, unless the arbitration is deemed a consumer arbitration, which is discussed in the next section, the disclosures are limited to the selected arbitrator and do not extend to the provider organization and its other neutrals.

VIII. Many, If Not Most, Talent v. Studio Arbitrations Should Be Considered Consumer Arbitrations

A. California Consumer Arbitration Regulatory Scheme

In 2004, California enacted legislation providing for disclosures by providers in the case of “consumer arbitrations.” The consumer arbitration rules apply to all arbitrations where (1) “[t]he contract is with a consumer party,” (2) it “was drafted by or on behalf of the nonconsumer party,” and (3) “[t]he consumer party was required to accept the arbitration provision in the contract.” Furthermore, the term “consumer” is defined broadly to include “all employees,” including highly compensated employees.

The consumer arbitration rules were amended and strengthened in 2014 to add additional disclosure requirements, which are in italics below. The consumer arbitration rules require providers to publish the following information for each consumer arbitration on its website in a “searchable format” each quarter:

1. Whether arbitration was demanded pursuant to a pre-dispute arbitration clause and, if so, whether the pre-dispute arbitration clause designated the administering private arbitration company.

2. The name of the nonconsumer party, if the nonconsumer party is a corporation or other business entity, and whether the nonconsumer party was the initiating party or the responding party, if known.

3. The nature of the dispute. . . .

4. Whether the consumer or nonconsumer party was the prevailing party. As used in this section, “prevailing party” includes the party with a net monetary recovery or an award of injunctive relief.

5. The total number of occasions, if any, the nonconsumer party has previously been a party in an arbitration administered by the private arbitration company.

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66 See notes 40-44 and associated text above.
68 Ethics Standards, supra note 42, std. 3.
69 Id. at 4.
70 CAL. CIV. PROC. CODE § 1281.96 (West 2015).
(6) The total number of occasions, if any, the nonconsumer party has previously been a party in a mediation administered by the private arbitration company.

* * *

(9) The type of disposition of the dispute, if known, identified as one of the following: withdrawal, abandonment, settlement, award after hearing, award without hearing, default, or dismissal without hearing. If a case was administered in a hearing, indicate whether the hearing was conducted in person, by telephone or video conference, or by documents only.

(10) The amount of the claim, whether equitable relief was requested or awarded, the amount of any monetary award, the amount of any attorney’s fees awarded, and any other relief granted, if any.

(11) The name of the arbitrator, his or her total fees for the case, the percentage of the arbitrator’s fee allocated to each party, whether a waiver of any fees was granted, and, if so, the amount of the waiver.71

A strong argument can be made that many, if not most, talent versus studio arbitrations are “consumer arbitrations,” and that the enhanced provider disclosures must be made. Specifically, as to the elements triggering application of the consumer arbitration rules, (1) the talent is often an “employee” of the studio, (2) the arbitration clause was drafted by the major studio and (3) the talent was required to accept it.

As to the first “employee” element, while older contracts between talent and studios from the 1990s and earlier often expressly characterized talent as an “employee” of the studio, more recent contracts disavow an “employee” relationship and, at most, characterize the artist a “special employee” for worker’s compensation purposes.72 We are aware of no cases that discuss the issue of whether an individual artist would be considered an “employee” for purposes of applying the “consumer arbitration” rules where the contract disavows an employer-employee relationship. We believe, however, that if a particular artist, e.g., a show runner/executive producer, would be considered an “employee” under the common law test of employment versus independent contractor status,73 he or she should be considered an employee under the consumer arbitration rules.74

71 CAL. CIV. PROC. CODE § 1281.96 (West 2015).
72 We have seen newer contracts that have so provided and have been told this by talent transactional lawyers.
73 The common law test of an employment relationship is “whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired....” S.G. Borello & Sons v. Dept. of Ind. Relations, 48 Cal. 3d 341, 404 (1989) (citing Tieberg v. Unempl. Ins. App. Bd., 2 Cal. 3d 943, 946 (1970)). Borello also recognized secondary factors to be considered including whether the principle had the “right to discharge at will, without cause,” whether the “one performing services is engaged in a distinct occupation or business,” and “whether the principle or the worker supplies the instrumentalities, tools and the place of work....” Id. See also Von Beltz v. Stuntman, Inc., 207 Cal. App. 3d 1467, 1489 (1989) (noting that in Home Box Office v. Directors Guild of Am., the court held an entertainment company’s treatment of freelance directors as employees for tax purposes and reporting of their compensation on W-2 forms suggested that directors were employees of the company)(citing Home Box Office, 531 F. Supp. 578, 594 (S.D.N.Y. 1982)).
If talent is considered an “employee” and the consumer rules apply, the provider is obligated to collect and publicly disclose the information listed in the consumer arbitration statute. In addressing the confidentiality provisions in arbitration agreements, the statute further provides: “[a] private arbitration company shall not have any liability for collecting, publishing, or distributing the information required by this section.” In other words, the legislation trumps any conflicting contractual confidentiality provisions.

The legislative history of the recent amendment to the consumer arbitration rules indicates that the authors sought to address the “repeat player” concern:

In 2002, AB 2656 (Corbett, Ch. 1158, Stats. 2002) was introduced in response to skepticism about the fairness of such arbitrations and concerns with the “repeat player” problem in arbitrations, whereby a repeat defendant such as a corporate defendant may, conspicuously or not, receive preferential treatment or rulings from arbitrators who rely on being selected by the corporate defendant to earn a living as an arbitrator. The proponents of AB 2656 argued that, in contrast to public court proceedings, consumer arbitrations are conducted in secret because of arbitration clauses or rules of the designated provider that were designed to impose secrecy—not because there was something inherent in the nature of arbitration or the function of the arbitrator that requires such secrecy. Accordingly, AB 2656 sought to “address these concerns and reduce any bias that may exist in favor of corporate repeat-players in consumer arbitration” by mandating public reporting of certain information by private arbitration companies conducting consumer arbitrations.

Despite those provisions, the author notes that “the longstanding and pervasive issues of arbitration company compliance with the consumer data law appear to persist.”

A subsequent Committee Report states:

The use of mandatory arbitration clauses in consumer contracts has increased immeasurably in recent years and has been highly controversial for a variety of reasons, including issues surrounding concerns of “repeat players” whereby an arbitrator is inclined to rule in favor of corporations that return to them to arbitrate future matters. Concerns are particularly heightened as arbitrators do not have to follow the law, decisions cannot be appealed, and proceedings are often conducted without any opportunity for public scrutiny.

show *Lassie* were found to be employees because the “evidence [was] clearly sufficient to show that *Lassie* [Television] exercised considerable control over the manner and means by which a writer fabricated a teleplay from a story.” Even though several of the secondary factors of the common law test of an employment relationship suggested an independent contractor relationship, the court held such factors may be of “minute consequence” where there is “ample evidence” of the employer’s right to control. *Id.* at 953.

While earlier drafts of the 2014 amendment had several express enforcement mechanisms for violations of the disclosure obligations, these enforcement mechanisms were dropped from the final legislation. As discussed in Section I below, we believe, however, that in a talent versus studio arbitration in California, talent should be able to vacate an adverse award if the provider failed to make a disclosure required by the consumer arbitration rules.

We recommend that JAMS and other providers make the provider information set forth in the consumer arbitration rules publicly available in all talent versus studio arbitrations whether or not it is required. Such disclosures will provide greater transparency, improve the arbitrator selection process, and if the facts warrant it, provide evidence for a challenge to the selected provider and/or arbitrator as discussed in Section I below.

B. Proposed Federal Legislation

There is also pending federal legislation that, if passed, would be even more far reaching than the California legislation. Senator Al Franken introduced a bill in 2011 and 2013 that would prohibit all pre-dispute arbitration agreements “if it requires arbitration of an employment dispute, consumer dispute, antitrust dispute, or civil rights dispute.” If this legislation passes and talent is considered an “employee,” studios would no longer be able to require pre-dispute arbitration provisions in their talent contracts. Rather, arbitration could only be agreed upon post-dispute. In a letter supporting the legislation, a number of organizations, such as the American Civil Liberties Union (ACLU) and the National Association for the Advancement of Colored People (NAACP), discussing the litigation challenges posed by recent U.S. Supreme Court cases discussed in the next section of this article, stated in pertinent part:

Predispute binding mandatory (or forced) arbitration clauses are proliferating in employment contracts (including minimum wage-workers, whistleblowers, servicemembers, and executives), and in everyday consumer contracts.

A series of decisions by the U.S. Supreme Court have broadly interpreted the FAA [Federal Arbitration Act] to allow corporations to insert arbitration clauses in one-sided, non-negotiable contracts. The Court further expanded the FAA’s meaning to effectively overcome other federal laws, including those that exhibit
a clear congressional intent to preserve consumers’ rights, and make it significantly more difficult to challenge even the most abusive forced arbitration clauses . . . .

None of the safeguards of our civil justice system are guaranteed for persons attempting to enforce their employment, consumer, antitrust, and civil rights in forced arbitration. There is no impartial judge or jury, but rather arbitrators who rely on major corporations for repeat business. With nearly no oversight or accountability, businesses or their chosen arbitration firms set the rules for the secret proceedings, often limiting the procedural protections and remedies otherwise available to individuals in a court of law . . . .

The impact of recent Supreme Court precedent should add urgency for Congress to pass the AFA to enable individuals and small businesses to decide how to resolve disputes, after the dispute arises. The AFA does not seek to eliminate arbitration and other forms of alternative dispute resolution agreed to voluntarily after a dispute arises.83

Business interests, such as the wireless trade group CTIA and the Financial Services Roundtable, an advocacy organization for the U.S. financial services industry, oppose the bill as “a misguided effort to overturn a well-reasoned U.S. Supreme Court decision,”84 and the chances that it will be enacted into law anytime soon are considered minimal at best given the current Republican control of Congress.85 The bill was sent to a Congressional committee in May 2013, with no reported movement since.86

IX. Litigation Challenges to Mandatory Arbitration Provisions

A. Broad Challenges to Avoid Arbitration Altogether

As previously discussed, while the major television studios now almost universally insist on mandatory arbitration (regardless of whether they also insist on designating JAMS as the provider), talent almost universally prefers to litigate in court.87 Therefore, if there is a mandatory arbitration provision and a dispute develops, litigation counsel for talent should at least explore the possibility of avoiding arbitration altogether.

Contracts between talent and the major studios are subject to the Federal Arbitration Act ("FAA") because they involve interstate and/or foreign commerce.88 The

83 Letter from the Honorable Patrick J. Leahy, Chairman, and the Honorable Charles Grassley, Ranking Member, Chairman, U.S. Senate Committee on the Judiciary (Dec. 16, 2013).
84 David Lazarus, Bill Aims To Restore Consumers’ Right to Sue, L.A. TIMES, Oct. 18, 2011 (opposing the 2011 version of the bill).
85 According to govtrack.us, the bill has a 3% chance of being enacted. Govtrack.us, https://www.govtrack.us/congress/bills/113/s878 (last visited Oct. 24, 2014).
86 Id.
87 This is based on our knowledge, experience and discussions with talent and studio lawyers over the years, and in connection with the preparation of this article.
88 9 USC § 1 et seq.
FAA provides that any contract to settle a dispute by arbitration “shall be valid, irrevocable and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” 89 To assure uniform results as to arbitrability of disputes subject to the FAA, conflicting state law is preempted under the Supremacy Clause of the U.S. Constitution. 90

While an arbitration clause can still be invalidated in whole or in part under the FAA on the basis of contractual defenses such as unconscionability, such defenses “cannot justify invalidating an arbitration agreement if the defense applies ‘only to arbitration or [derives its] meaning from the fact that an agreement to arbitrate is at issue.’” 91 This means that the basis for unconscionability cannot be “uniquely applicable” to arbitration. 92 While it is beyond the scope of this article to discuss in any detail recent decisions upholding arbitration clauses under the FAA, the United States Supreme Court has made clear that this provision reflects both that arbitration is fundamentally a matter of contract, and Congress expressed a “liberal federal policy favoring arbitration.” 93 Arbitration agreements, therefore, must be placed on “equal footing with other contracts.” 94

A contractual clause is unenforceable if it is both procedurally and substantively unconscionable: 95

“Courts apply a sliding scale: ‘the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa.’ Still, ‘both [must] be present in order for a court to exercise its discretion to refuse to enforce a contract or clause under the doctrine of unconscionability.’” 96

As to the first component, procedural unconscionability:

“‘concerns the manner in which the contract was negotiated and the circumstances of the parties at that time. It focuses on factors of oppression and surprise. The oppression component arises from an inequality of bargaining power of the parties to the contract and an absence of real negotiation or a meaningful choice on the part of the weaker party.’ ‘The component of surprise arises when the challenged terms are ‘hidden in a prolix printed form drafted by the party seeking to enforce them. Where an adhesive contract is oppressive, surprise need not be shown.’” 97

As discussed above, in the typical talent-major studio negotiation, the arbitration clause is presented on a non-negotiable, “take it or leave it” basis. Therefore, oppression can

91 Chavarria v. Ralphs Grocery Co., 733 F.3d 916, 921 (9th Cir. 2013) (citations omitted).
92 Id.
94 AT&T Mobility LLC, 131 S. Ct. at 1745.
95 Davis v. O’Melveny & Myers, 485 F.3d 1066, 1072 (9th Cir. 2007) (citations omitted).
96 Id.
often be established. However, because talent is generally represented by counsel and the arbitration clause is not hidden, there is no “surprise.” Nevertheless, if the arbitration clause was non-negotiable, surprise is not needed to establish at least some degree of procedural unconscionability. Further, talent’s ability to negotiate provisions other than the arbitration clause in the contract does not bar a finding of procedural unconscionability if talent had no ability to negotiate the arbitration clause itself.

In contrast to procedural unconscionability, substantive unconscionability “focuses on the terms of the agreement and whether those terms are so one-sided as to shock the conscience.” Specifically, the fundamental factor in assessing substantive unconscionability is “mutuality”, namely whether the arbitration clause as a whole or in part is “unfairly one-sided.”

Given the procedural and substantive components of contract unconscionability analysis and the current state of the case law, a frontal challenge to the choice of private arbitration (as opposed to public litigation) will almost certainly fail. While counsel may be able to establish procedural unconscionability, the decision maker on the arbitrability question—whether a judge or an arbitrator—is very unlikely to find that arbitration is in and of itself substantively unconscionable in this context. Simply, such a challenge, which effectively argues that all arbitrations in the talent versus major studio context are inherently bad and “shock the conscience,” is unlikely to succeed especially in the current judicial climate favoring arbitration discussed above. In addition, the challenge also runs the risk of “disproportionately impacting arbitration” since it focuses solely on the arbitration clause.

B. Challenge Limited to the Particular Designated Provider

Since a frontal attack on arbitration itself is almost certain to fail, talent counsel should consider limiting the challenge to the designation of the particular arbitration provider dictated by the studio. Again, talent should be able to establish at least some level of procedural unconscionability if the provider designation was imposed by the studio. In addition, as to substantive unconscionability, as discussed in Section B above, whether acting in concert or not, nearly all of the major television studios are now insisting that JAMS be the provider and this additional fact does arguably tip the balance and “shock the conscience.”

As to whether the designation of a particular provider is substantively unconscionable, courts have held that an arbitration clause is substantively unconscionable

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98 Id. (holding that when an adhesive contract is oppressive, surprise does not need to be shown); see also Malone v. Superior Court, 226 Cal. App. 4th 1551, 1561 (2014).
99 Graham v. Scissor-Tail, Inc., 28 Cal. 3d 807, 818-19 (1981) (holding the agreement at issue was a “contract of adhesion” because the terms allegedly subject to negotiation were of “relatively minor significance” compared to the terms imposed by the defendant).
100 Nyulassy, 120 Cal. App. 4th at 1281 (citations omitted).
101 Id.
102 Chavarria, 733 F.3d at 921 (citing AT&T Mobility LLC, 131 S. Ct. at 1748); see also Malone v. Superior Court, 226 Cal. App. 4th 1551, 1559-71 (2014).
where it designates as the arbitrator someone so closely identified with one party that the clause is illusory. In one non-California case, *Nitro Distributing, Inc. v. Alticor*, the court held that defendant company’s arbitration agreement, which designated JAMS as the provider, was substantively unconscionable because the procedure to screen, train and hand-pick JAMS arbitrators did “not come close to passing any reasonable test of fairness and neutrality required for a legitimate arbitration proceeding.”103 The court also found it telling that with the exception of a few counterclaims, the defendant company never lost in any of its JAMS arbitrations, and that the arbitration process took much longer when the company was defending an arbitration as opposed to when it was the claimant.104

Further, in *Graham v. Scissors Tail*, a California case, the provider was found to be too closely affiliated with one of the parties.105 In *Graham*, a contract between a concert promoter and a music artist designated the artist’s labor union as the arbitrator. While there was no evidence that the labor union’s procedures prevented a party from fairly presenting its position, the court held that the contract that designated the artist’s union as arbitrator, which was aligned with its member on the dispute at issue, failed to achieve the “minimum levels of integrity,” and was thus unconscionable.106

Since JAMS and its neutrals are not formally affiliated with or trained by the major studios, and because JAMS has institutional rules designed to ensure the fairness of its arbitrations, the argument that was successfully made in *Nitro Distributing* and *Graham* will be more difficult to make against JAMS in this context. If there is a repeat provider/player bias, as we suspect, it is much more subtle. California courts have noted, however, that the “repeat player effect” can be a factor in rendering an arbitration provision substantively unconscionable and that various studies have shown that arbitration is “advantageous to employers . . . because it reduces the size of the award that an employee is likely to get, particularly if the employer is a ‘repeat player’ in the arbitration system.”107

The studios, however, have several strong responses to the repeat provider/player argument. First, the studios point to the fact that California courts have held that the “repeat player effect” does not *per se* render an arbitration agreement unconscionable and that “particularized evidence demonstrating” bias must be presented to support the claim.108 In the talent versus major studio context, the arbitrations are invariably con-

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104 Id.
105 Graham, 28 Cal. 3d 807.
106 Id. at 826-28.
107 Armendariz v. Found. Health Psychcare Servs., Inc., 24 Cal. 4th 83, 115 (2000). See generally Ovitz v. Schulman, 133 Cal. App. 4th 830, 839 (2005)(citation omitted)(citing a report that discussed concern for “bias, or appearance of bias, that may flow from one side in an arbitration being a source or potential source of additional employment, and thus additional income, for the arbitrator.”).
fidential, as dictated by the studios, and the provider typically does not voluntarily (or pursuant to the consumer arbitration rules discussed in Section H) disclose information relevant to the repeat provider/player bias issue. Thus, talent will likely be unable to present the required particularized evidence (even assuming that it exists). Second, the studios will point to both the reputation of JAMS and its neutrals, as well as the institutional safeguards in JAMS’ rules—such as talent’s participation in the arbitration selection process—as countering any potential repeat provider/player bias.109

While the studio’s arguments are strong, the talent side has valid counters. First, talent will argue that it often has no concrete proof of repeat provider/player bias (or again, in fairness, proof contradicting it) because the studios insist on confidentiality provisions in their arbitration clauses, and because JAMS (and the other providers) do not currently provide the information necessary to establish (or refute) such bias. As one court stated:

“In Ting v. AT&T, the Ninth Circuit found a confidentiality clause in an arbitration agreement substantively unconscionable, reasoning as follows: [C]onfidentiality provisions usually favor companies over individuals. In Cole [v. Burns Int’l Sec. Servs.], the D.C. Circuit recognized that because companies continually arbitrate the same claims, the arbitration process tends to favor the company. Yet because of plaintiffs’ lawyers and arbitration appointing agencies like the [AAA], who can scrutinize arbitration awards and accumulate a body of knowledge on a particular company, the court discounted the likelihood of any harm occurring from the ‘repeat player’ effect. We conclude, however, that if the company succeeds in imposing a gag order, plaintiffs are unable to mitigate the advantages inherent in being a repeat player.”110

Particularly, if talent asked for the extra disclosures in the contract negotiation stage and/or if JAMS declined to treat the arbitration as a consumer arbitration at the post-dispute stage, the lack of further proof of bias is not the talent’s fault. Defenders of mandatory arbitration often state that critics should have the burden of proving repeat provider/player bias.111 But because the defenders of mandatory arbitration, namely the providers and the major studios in the talent-major studio arena, control the information necessary to address this issue on an evidentiary, non-anecdotal basis, and have so far refused to provide it, an adverse inference should be drawn against them. Alternatively, defenders of arbitration should have the burden of showing that mandatory arbitration is fair in this context.112

“repeat player effect” did not per se render an arbitration agreement unconscionable).

109 Armendariz, 24 Cal. 4th at 111 (citing Cole v. Burns Int’l Sec. Servs., 105 F.3d 1465, 1485 (D.C. Cir. 1997)).

110 Davis v. O’Melveny & Myers, 485 F.3d 1066, 1078 (9th Cir. 2007).

111 Jean R. Sternlight, Fixing the Mandatory Arbitration Problem: We Need The Arbitration Fairness Act of 2009, DISPUTE RESOLUTION MAGAZINE, Fall 2009, at 5 (“Defenders of mandatory arbitration play a rhetorical game when they suggest critics should have the burden of proving the practice is unfair, instead of requiring defendants to prove the practice is fair.”).

112 See, e.g., Judicial Council of California Civil Jury Instructions (2014), CACI No. 203; CAL. EVID., CODE § 412 (West 1965); Largey v. Intrastate Radiotelephone, Inc., 136 Cal. App. 3d 660, 672 (1982) (predecessor of CACI No. 203 was properly given because “[a] jury could well find corporate records
Second, even without more evidence, the assertion of repeat provider/player bias in the context of a JAMS talent versus studio arbitration rests on more than just theoretical economic incentives. The studios’ current near universal designation (whether acting individually or collectively) of JAMS as the provider in their talent contracts, the studios’ size and influence in the Los Angeles business community, and the fact that many JAMS neutrals are also “owners” of JAMS are additional facts that suggest JAMS is too closely aligned with the studios. The argument can certainly be made that these facts, and the inferences that can be drawn from them, create at least an appearance of bias that would cause an informed reasonable person to doubt a JAMS’ arbitrator’s ability to be impartial. The relationship between JAMS and the studios is arguably akin to the relationship between JAMS and the defendant company in *Nitro Distributing*, and the relationship between the music artist and the artist’s labor union in *Graham*.

If the provider designation in the arbitration clause is ruled to be unconscionable, what happens next seems to depend on whether the arbitration clause in question provides that in the event the designated provider is stricken, another provider can be appointed in its place. If the clause provides that another provider can be appointed in its place, this alternative method can be followed.\footnote{Graham v. Scissor-Tail, Inc., 28 Cal. 3d 807, 831 (1981) (In *Graham*, the agreement did not appear to provide for an alternative method to pick an arbitrator but the court permitted the parties to agree on another arbitrator despite the arbitration provision being held unconscionable.)} In such a case, since the result of a successful challenge will still be an arbitration, albeit one where the provider was not dictated by the studio, such a challenge should not implicate the policies and the recent line of cases favoring and upholding arbitration provisions. Simply, there is no strong federal or state policy favoring one provider or arbitrator over another.

The question on what to do in the case of an unconscionable arbitration provision is more complex if there is no mechanism in the arbitration clause to pick an alternative arbitrator or provider. In a case where AAA was designated as the exclusive provider, but it refused to participate, one court ruled that it had no power concerning the date of a board meeting to be much stronger and more satisfactory than the recollection several years later of persons who attended such meeting.”); CACI No. 204; CAL. EVID. CODE § 413 (West 1965); Bihun v. AT&T Info. Sys., Inc., 13 Cal. App. 4th 976, 994 (1993) (in an action against an employer for sexual harassment, trial judge properly instructed jurors that if plaintiff’s personnel file was willfully suppressed, they could draw an inference that it contained something damaging to employer’s case), but see Lakin v. Watkins Associated Indus., 6 Cal. 4th 644, 664 (1993) (disapproving of *Bihun* on other grounds); Williamson v. Superior Court of L.A. Cnty., 21 Cal. 3d 829, 835 fn. 2 (1978) (“A defendant is not under a duty to produce testimony adverse to himself, but if he fails to produce evidence that would naturally have been produced he must take the risk that the trier of fact will infer, and properly so, that the evidence, had it been produced, would have been adverse.”); Thomas v. Lusk, 27 Cal. App. 4th 1709, 1717 (1994) (“[T]he burden of proving an element of a case is more appropriately borne by the party with greater access to information.”); see also Wolf v. Superior Court, 107 Cal. App. 4th 25, 36 (2003) (“In cases where the financial records essential to proving the contingent compensation owed are in the exclusive control of the defendant, fundamental fairness, the ‘lodestar’ for analysis under Evidence Code section 500, requires shifting the burden of proof to the defendant.”) (citation omitted).
C. Challenges to Particular Provisions in Arbitration Clauses

In addition to challenging the designation of a particular provider, talent counsel should determine whether other provisions in the arbitration clause are unconscionable. As previously mentioned, an unconscionable provision is one that lacks mutuality, unduly favors the studios, or is unduly one-sided. If a court or arbitrator deems an unconscionable provision “central” to the arbitration clause, the entire clause will be unenforceable;116 if the unconscionable provision is “collateral,” the provision will be severed, and the rest of the arbitration clause will be enforced.117

While the studio lawyers who invariably draft these provisions are smart lawyers who are aware of the case law and obviously seek to avoid such one-sided provisions, several provisions in historical contracts that we have seen stand out as possibilities for such a challenge. First, many arbitration clauses provide that “arbitrability disputes, including disputes over the formation, existence, validity, interpretation or scope of the agreement under which Arbitration is sought . . . shall be submitted to and ruled on by the Arbitrator.”118 Therefore, if talent claims this delegation is unconscionable, the provider will decide the issue. This commonplace delegation clause, found in JAMS and other providers’ rules, and most arbitration clauses we have examined, arguably raises, at minimum, a strong appearance of bias.119 Several California courts have held that such a delegation clause creates a conflict of interest for an arbitrator. For example, one court held that “an arbitrator who finds an arbitration agreement unconscionable would not only have nothing further to arbitrate, but could also reasonably expect to obtain less business in the future, at least from the provider in question.”120 A different court expressed a “genuine concern about the potential for the inequitable use of such arbitration provisions in areas, such as employment, where the parties are not at arm’s length and do not have equal bargaining power. In these repeat player situations, the arbitrator has a unique self-interest in deciding that a dispute is arbitrable.”121

Some courts disagree, however. A California appellate court held that the delegation clause at issue in that particular case would no longer be considered unconscionable in light of recently decided United States and California Supreme Court cases:122

115 Id.
116 Armendariz, 24 Cal. 4th at 124.
117 Id.
118 See JAMS RULES & PROCEDURES, supra note 22, Rule 11.
“[T]his case raises the issue of whether the application of the unconscionability doctrine to delegation clauses in Murphy, Bruni, and Ontiveros is preempted by the FAA. We are specifically concerned with that part of the analysis of those cases which concluded that delegation clauses are substantively unconscionable due to the financial interest of the arbitrators who would be deciding the delegated issues. That conclusion is based on a belief that an arbitrator would be more likely to rule in favor of enforceability, so that the arbitrator would then be paid to resolve the dispute on the merits. It is further based on a belief that an arbitrator would be more likely to rule on enforceability issues in favor of a “repeat player” who would have further business for an arbitrator who rules that its contract is enforceable. This analysis is nothing more than an expression of a judicial hostility to arbitration, based on the assumption that a paid decisionmaker cannot be unbiased, and it, therefore, is wholly barred by the FAA. Indeed, taken to its logical conclusion, this analysis of bias questions the objectivity of arbitrators as a whole, as the very same argument can be made that an arbitrator will tend to rule on the merits in favor of an employer who is a “repeat player,” as opposed to an employee who is not. It is not merely that we disagree with this negative view of arbitrators’ ability to set aside their financial interests and resolve cases without bias; the FAA prevents us from accepting that view, without any evidence that the specific arbitrator to whom the decision making is delegated is biased. The analysis discriminates against arbitration, putting agreements to arbitrate on a lesser footing than agreements to select any judicial forum for dispute resolution, and it is therefore preempted . . .

The only evidence of procedural unconscionability in the instant case is that the arbitration agreement was in a contract of adhesion. This is some evidence of procedural unconscionability, which must be accompanied by a high showing of substantive unconscionability in order to result in the conclusion that the delegation clause is unenforceable. The only evidence of substantive unconscionability is that the clause is outside the reasonable expectation of the parties. Even if this is true, it is not sufficient to establish unconscionability in the instant case. The delegation clause is not inherently unfair—it is not unilateral; it does not provide for a biased decisionmaker. . . . We are simply concerned with a clause which may have been outside the reasonable expectations of the party signing a contract of adhesion. This is not overly harsh or so one-sided as to shock the conscience.”

Even assuming the validity of this holding, and it is the trend in recently decided cases to overrule or at least criticize earlier cases that were more open to attacks on an arbitration clause, talent may support an unconscionability claim by showing potential bias in other ways, including a combination of factors. It is not just that the arbitration clause delegates to the arbitrator to decide disputes concerning arbitrability. As discussed, nearly all studios dictate JAMS as the provider in their contracts. These contracts also include confidentiality provisions, and JAMS generally re-

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125 Almost all of the talent-studio arbitration clauses we examined had strict confidentiality requirements. While a confidentiality provision is not per se unconscionable, an overly broad confidentiality
fuses to disclose prior results other than the selected arbitrator’s cases with the exact studio party (and non-party affiliates involved in the pending dispute) before him or her. Moreover, as discussed in Section F above, the major studios are among the largest employers in Los Angeles, and have a great amount of influence. Talent essentially has no choice but to accept these contracts on the studios’ terms. Therefore, the studios collectively dictating JAMS as the provider in light of these circumstances arguably shows one-sidedness, a lack of mutuality, and “shocks the conscience.”

In addition, some courts have held that discovery limitations—even if applied equally—can be unconscionable when one party, such as the studio, has access to the relevant documents and employs many of the witnesses.\textsuperscript{126} Allowing the arbitrator to order further discovery may still not be an “adequate safety valve” to remedy severely restrictive discovery limitations.\textsuperscript{127} Limits on damages, or provisions that unduly shorten the statute of limitations, may also still be unconscionable in certain circumstances.\textsuperscript{128}

Such challenges, however, will not be easy to prevail on, as not all instances of a lack of mutuality are substantively unconscionable. Indeed, more recent cases\textsuperscript{129} allow the party with superior bargaining power, the studios here, to impose some degree of lack of mutuality, particularly if it can be justified by legitimate business reasons:

“The \textit{Stirlen} court did not hold that all lack of mutuality in a contract of adhesion was invalid. “We agree a contract can provide a ‘margin of safety’ that provides the party with superior bargaining strength a type of extra protection for which it has a legitimate commercial need without being unconscionable. However, unless the ‘business realities’ that create the special need for such an advantage are explained in the contract itself, which is not the case here, it must be factually established.” The \textit{Stirlen} court found no “business reality” to justify the lack of mutuality, concluding that the terms of the arbitration clause were “‘so extreme as to appear unconscionable according to the mores and business practices of the time and place.”\textsuperscript{130}

Moreover, courts are starting to hold that case law prior to \textit{ATT Mobility}, which was decided in 2011, may well be preempted by the FAA.\textsuperscript{131} Therefore, unconscionability challenges are likely to continue to be an uphill battle for the talent side.

\textsuperscript{128} See Davis, 485 F.3d at 1066 (arbitration agreement held unconscionable because it was presented as “take-it or leave-it,” shortened the statute of limitations (one year), contained an overly broad confidentiality provision, lacked mutuality and prohibited administrative claims); Armendariz v. Found. Health Psychcare Servs., Inc., 24 Cal. 4th 83, 118 (2000); \textit{Stirlen} v. Supercuts, 51 Cal. App. 4th 1519 (1997); \textit{Martinez}, 118 Cal. App. 4th at 107 (arbitration agreement held unconscionable because it was a condition of employment, lacked mutuality, required parties to split the cost and post fees in advance, and shortened the statute of limitations (6 months)); Fitz, 118 Cal. App. 4th at 702 (arbitration agreement held unconscionable because it was presented as “take-it or leave-it,” lacked mutuality and had overly restricted discovery rights).

\textsuperscript{130} \textit{Armendariz}, 24 Cal. 4th at 117 (internal citation omitted).
\textsuperscript{131} See Malone v. Superior Court, 226 Cal. App. 4th 1551, 1568-70 (2014) (relying on Sonic-Calabasas
D. Procedural Issues and Who Decides the Challenge

Talent counsel must bring any litigation challenge to an arbitration clause at the earliest possible time in the proceeding after the basis for the challenge is known. If talent has “knowledge of facts possibly indicating bias or partiality on the part of an arbitrator,” but remains silent, he or she cannot “later object to the award of the arbitrators on that ground.” Thus, failure to raise a challenge may be considered a waiver of the claim.134

In addition, talent should file a complaint in a court of competent jurisdiction if talent believes that he or she has a defense to arbitrability and that a court, instead of an arbitrator, should decide that dispute. As previously discussed, the general rule is that defenses that go to the existence of an enforceable arbitration agreement are for the court and not for the arbitrator to decide.135 However, if an arbitration clause “clearly and unmistakably” empowers the arbitrator to decide what matters are arbitrable, such a delegation will generally be given effect.136 Thus, the studio will generally file a motion to compel arbitration. Talent counsel may then argue that the arbitration clause is substantively unconscionable; the court must decide whether or not to honor the delegation provision.137

Regardless of who decides the question of arbitrability, talent counsel should seek discovery on the repeat provider/player bias issues. Courts have ruled that a party must have “particularized evidence” of bias for a challenge on that basis to succeed. Courts and arbitrators certainly have discretion to allow such discovery before ruling on the bias claim.

E. Judicial Challenges to an Arbitration Award for Failure to Make the Required Disclosures

Under the FAA, an arbitration award may be challenged where “there is evident partiality or corruption in the arbitrators.” Courts have found “evident partiality” where an arbitrator failed to “disclose to the parties any dealings that might create an impression of possible bias.” Moreover, courts have held that a “reasonable im-
pression of bias sufficiently establishes evident partiality because the integrity of the process by which arbitrators are chosen is at issue in nondisclosure cases.”\(^{141}\) This statutory ground is construed narrowly.\(^{142}\)

Similarly, California law requires that an arbitration award be vacated if an arbitrator fails to “disclose within the time required for disclosure a ground for disqualification of which the arbitrator was then aware . . . .”\(^{143}\) Under California law, however, the party challenging the arbitration award does not have to show evident partiality. Instead, the party challenging the arbitration award must only establish that the arbitrator failed to make a required disclosure.\(^{144}\)

The FAA does not preempt California law in this area as the California statutory scheme “seeks to enhance both the appearance and reality of fairness in arbitration proceedings,” which serves the purpose of the FAA by instilling public confidence in arbitration.\(^{145}\) Therefore, in a talent versus major studio arbitration in California—even under the FAA—talent can vacate an adverse award if the arbitrator did not make a required disclosure, including disclosures under the consumer arbitration rules if they are deemed to apply.\(^{146}\)

X. THE PROVIDERS SHOULD FURTHER ADDRESS THE PERCEPTION OF REPEAT PROVIDER/PLAYER BIAS ON THE MERITS

We submit that the following facts without more, at minimum, create an appearance of bias in the case of a JAMS arbitration of a talent versus major studio dispute: almost all the major studios designate JAMS as the provider in their talent contracts; talent has no real option but to accede to this designation; the studios have great influence in the Los Angeles economy; certain JAMS’ neutrals increasingly depend on this business with the creation of its Entertainment Group; JAMS as a for-profit business, including “owner” neutrals, and JAMS’ lack of transparency in making available information on the prior results of arbitrations in this area. Some of these facts also apply to ADR, AAA and other providers, but they do not have the same controlling position as the studios’ designated provider as does JAMS.

Given the major studios’ power at the contract negotiation stage, as well as the current pro-arbitration rulings from the U.S. Supreme Court\(^{147}\) and other courts

\(^{141}\) Woods v. Saturn Distribution Corp., 78 F.3d 424, 427 (9th Cir. 1996).
\(^{144}\) Id.
\(^{146}\) Gray v. Chiu, 212 Cal. App. 4th 1355, 1364-66 (2013) (This case involved a consumer arbitration where counsel for the defendant was affiliated with the same provider organization as the arbitrator. The appellate court vacated the award because the arbitrator failed to disclose the relationship between defense counsel and the provider organization as required under the consumer arbitration rules.).
following its rulings,\textsuperscript{148} it will be difficult for a talent’s transactional attorney at the contract negotiation stage and its litigator once a dispute has developed, to avoid mandatory arbitration and/or a particular provider as dictated by the studio. Therefore, at least in the near term, improvements will likely have to come from the providers themselves.

Although JAMS declined to respond to our questionnaire, even where it had the requested information, we respectfully submit that it should reconsider for two key reasons. First, there is a certain responsibility that comes with being the controlling provider in the talent versus major studio arbitration arena. With this responsibility, JAMS as a provider and its neutrals as individuals should address the repeat provider/player bias concerns by many in the talent community on their merits as opposed to conclusorily dismissing them as sour grapes from the losing side. Second, if JAMS, other providers and neutrals do not address these perceptions on their own, it may get to the point where state or federal legislatures, the courts and/or the marketplace will force JAMS (and other providers) to do so and impose reforms on their own.

We recommend that JAMS and other providers take several voluntary steps to rebut the perception and improve the system. First, greater transparency will go a long way in addressing talents’ concerns. Each provider should publish how each of its neutrals, or at least those who regularly handle entertainment cases, have ruled in all prior arbitrations and other contested non-mediation proceedings involving the major studios, and their affiliates, for at least the past five years, which is the time limit provided by law for other required disclosures.\textsuperscript{149}

Similarly, rather than litigating in each talent versus studio arbitration whether talent is an “employee” of the studio so as to trigger the consumer arbitration disclosure rules, the providers should simply voluntarily treat them as such. This would reduce and potentially eliminate the time and expense of collateral litigation on whether the proper disclosures were made. It would also reduce the risk of the arbitrator making an incorrect determination on the employee issue and the provider not making the required consumer disclosures as a result, which could result in the judicial vacation of the arbitration award.

Our recommendations exist in practice and can be implemented. For example, the International Independent Film & Television Alliance (IFTA) has published summaries and results of all of its arbitration awards since 2007.\textsuperscript{150} Providers can also draw upon the experience of Major League Baseball (MLB) and its Basic Agreement which sets the rules for player salary arbitrations.\textsuperscript{151} While the MLB arbitrators are all drawn from a single provider, currently the AAA labor panel, the process self-corrects for

\textsuperscript{148} See, e.g., Sutherland v. Ernst & Young LLP, 726 F.3d 290 (2d Cir. 2013); Kilgore v. KeyBank, National Association, 673 F.3d 947 (9th Cir. 2012).

\textsuperscript{149} Cal. Civ. Proc. Code § 1281.9(a)(3), (a)(4), (d) (West 2003); see also Ethics Standards, supra note 42, std. 7(d)(4)(A)-(C).

\textsuperscript{150} Recent Awards, IFTA, http://www.ifta-online.org/recent-awards (last visited Feb. 27, 2015).

repeat provider/player bias since all of the awards are publicly disclosed and with this information there is a real ability for each side to strike arbitrators who they believe have demonstrated a bias for one side or the other. The MLB system therefore creates a system and an incentive for the provider and individual arbitrators to play it straight.

Furthermore, while JAMS and other providers may now be bound by the confidentiality provisions in the arbitration provisions of talent-studio contracts, they do not have to be. Providers can stipulate in their rules, as the IFTA does, that “notwithstanding any contrary provision in the parties’ contract, the Alliance may in its discretion, but shall not be required to, publicize in publications originating from it, information concerning arbitrations, parties to them, and awards which are made.”

Another option is for providers to follow the California consumer arbitration rules, which provide that “[a] private arbitration company shall not have any liability for collecting, publishing, or distributing the information required by this section.”

Even with our transparency recommendations, we believe that some confidentiality can still be maintained. For example, while the disclosures we requested in our questionnaire require the name of the studio party, the questions we asked did not require disclosure of the talent’s name or the program in dispute. If the provider would disclose the name of the studio party, the arbitrator(s), counsel for both sides, a brief description of the dispute and claims asserted, and a description of the award, talent would have enough information to intelligently select an arbitrator and make informed preliminary conclusions regarding any repeat provider/player bias concerns. In addition, if the disclosures reveal a factual basis for a bias or other challenge to the provider or selected arbitrator(s), the challenge can be decided based on the evidence and not denied on the basis of an absence of particularized evidence.

We believe that more information and greater transparency will have a significant impact on resolving talents’ repeat provider/player concerns. While collecting this information and making these disclosures will admittedly put a greater administrative burden on the providers, even apart from the fact that this collection and disclosure may be required by the consumer arbitration rules, we submit that the benefits far outweigh the costs. Such disclosures would allow parties to know, and not just speculate, whether a particular provider or arbitrator ruled in favor of the studio parties in a high percentage of prior cases. If the data show that the provider or arbitrator in question has not ruled in favor of the studios in a high percentage of prior cases, talent would have less concern over repeat provider/player bias. Disclosure would also keep the neutrals honest. Each neutral will know that if he or she rules in one sides’ favor in a high percentage of cases, he or she will likely be stricken in future arbitrations by the talent side; this will help to level the playing field.

Second, we believe there should be improvements in the arbitrator selection process. Like the public court system, the candidates proposed should be randomly selected among all available candidates affiliated with that provider. Arbitrator

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153 CAL. CIV. PROC. CODE § 1281.96(e) (2015).
selection should not be skewed by subjective selection factors. For example, the National Association of Securities Dealers (NASD) selects arbitrator candidates from a list created at random before allowing the parties to choose.\textsuperscript{154} A greater number of candidates than, for example, five for a single party arbitration and ten for a three-party arbitration currently used by JAMS, should be sent to the parties. Unless all the parties agree post-dispute, the candidates should also not be limited to the provider’s “entertainment group,” whose neutrals may be more influenced by repeat player bias. Generalist judges are the norm in the public court system; we believe that arbitrator selection should more closely resemble the public court system.

The parties should also receive the enhanced disclosures on each arbitrator candidate, so that the parties’ strikes can be more intelligently exercised. For example, the disclosures should include how the candidates have ruled in all prior arbitrations involving the major studio party and its affiliates and not just those involving the particular studio party involved in the pending arbitration. Moreover, these disclosures should be made at the arbitrator selection stage and not merely after the selection of the arbitrator, which is currently the case. Indeed, if the information on prior arbitration results is published in advance, as the consumer rules require, the enhanced disclosures are already in the public domain. After the parties exercise their strikes, the providers should choose from the remaining arbitrator candidates at random; the selection should not be skewed by subjective factors.

Third, we believe that JAMS and the other providers should participate in bar and other public forums where these issues are fairly discussed on the merits. For example, panels should be devoted specifically to the issues addressed in this article at the upcoming UCLA and USC Entertainment Law Symposia where representatives from JAMS, other providers and lawyers from the talent and studio sides can all fairly discuss the issues and possible improvements. Ideally, all participants will have the information on prior arbitration cases we requested in our questionnaire so that the discussion can move beyond anecdotes and the expressions of personal opinions, which the current debate is largely limited to, due to lack of information and transparency.

Fourth, if JAMS and the other providers in the talent versus major studio arbitration space make further disclosures and otherwise engage in the issues discussed in this article, they are not conceding that there is any repeat provider/player bias in the context of these arbitrations. Rather, they are showing concern about the appearance of bias to address these issues on their merits. As Justice Louis D. Brandeis famously wrote: “Sunlight is said to be the best of disinfectants.”\textsuperscript{155}


\textsuperscript{155} LOUIS D. BRANDEIS, OTHER PEOPLE’S MONEY AND HOW THE BANKERS USE IT 92 (Frederick A. Stokes Co. 1932) (1914) (stating “[p]ublicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman. . . .”).
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.

On Appeal from the United States District Court
for the Central District of California, No. 2:04-cv-03541-VAP
Before the Honorable Virginia A. Phillips

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CROSS-APPELLEES ABC, BVT, AND VALLEYCREST

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July 26, 2011
CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Defendants American Broadcasting Companies, Inc., Buena Vista Television, LLC, and Valleycrest Productions, Ltd. state the following:

1. Defendant American Broadcasting Companies, Inc. is a wholly owned subsidiary of ABC Holding Company Inc., which is a wholly owned subsidiary of ABC, Inc., which is a wholly owned subsidiary of ABC Enterprises, Inc., which is a wholly owned subsidiary of Disney Enterprises, Inc., which is a wholly owned subsidiary of The Walt Disney Company, a publicly traded corporation.

2. Defendant Buena Vista Television, LLC is a limited liability company whose sole member is BVTV Holdings, Inc., which is a wholly owned subsidiary of Disney Enterprises, Inc., which is a wholly owned subsidiary of The Walt Disney Company, a publicly traded corporation.

3. Defendant Valleycrest Productions, Ltd. is a wholly owned subsidiary of Disney Enterprises, Inc., which is a wholly owned subsidiary of The Walt Disney Company, a publicly traded corporation.

4. Defendants have no other parent corporations and no other publicly traded corporation owns more than 10 percent of the stock of any Defendant.
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PRELIMINARY STATEMENT

This is an appeal from a $319 million judgment in a contract dispute over the profits from the television game show *Who Wants To Be A Millionaire?* That judgment is astonishing not only because of its size, but also because of how it came about: The district court committed a cascading series of errors that yielded a verdict that radically transformed the parties’ carefully negotiated allocation of risks and rewards. Most fundamentally, the court allowed the jury to adopt an interpretation of the parties’ contract that is contrary to its plain text, the contemporaneous understanding of Plaintiff’s own negotiators, the parties’ course of performance, and established industry practice. That result violates basic principles of contract law, replacing the predictability essential to all agreements with the caprice of post-hoc judicial reassessment.

The contract at the heart of this case was signed in 1999 when Defendants the ABC television network (“ABC”) and Buena Vista Television, LLC (“BVT”), an affiliated producer, acquired the North American rights to *Millionaire* from Celador Productions, the show’s British creator. Celador Productions hired the industry-leading William Morris Agency (“WMA”) to negotiate the deal, and WMA secured a contract under which its client would retain the international rights to *Millionaire*, receive a generous up-front payment plus guaranteed fees for each episode aired, and be paid 50% of a contractually defined measure of BVT’s
profits from the show. Those fees and payments, which are still accruing, have totaled tens of millions of dollars.

*Millionaire* had a highly successful run on ABC from 2000 until 2002. During that time, Celador Productions reviewed detailed biannual accounting statements from BVT and never suggested that it should have been receiving more of the proceeds from *Millionaire*’s network success. But two years after the show moved from the network to syndication, where it performed less well, Plaintiff filed this suit asserting for the first time that either the express terms of the contract or the implied covenant of good faith and fair dealing entitled Celador Productions to an enormous share of the profits generated years earlier by the successful network run. Even then, however, Plaintiff failed to identify the contractual interpretation it ultimately presented to the jury until years into this litigation.

Plaintiff’s belated interpretation was that the contract entitled Celador Productions to 50% of the profits earned by both BVT and ABC, rather than BVT alone. That theory is contrary to the plain text of the contract, which defines Celador Productions’ profit-sharing rights based on only BVT’s revenues and costs—not ABC’s. It is also contrary to the understanding of Celador Productions’ experienced agent, who confirmed that when she negotiated the contract she understood that her client would not share in ABC’s profits because that “never”
happens. Indeed, Plaintiff could not identify any prior deal in television history in which a network had agreed to share any percentage of its profits in this fashion.

Thus, the contract interpretation the district court allowed Plaintiff to present to the jury was that Celador Productions secured a deal so favorable as to be wholly unprecedented, even though the actual negotiators did not realize it, the parties neglected to memorialize it in the relevant section of the contract, and no one complained while Defendants performed under a contrary interpretation for years. Submitting that untenable interpretation to the jury rather than rejecting it as a matter of law was reversible error.

The district court also allowed Plaintiff to stretch the implied covenant of good faith and fair dealing far beyond its limits. Plaintiff’s implied-covenant theory was that, in light of Millionaire’s network success, Defendants had an implied duty to triple or quadruple the per-episode license fee ABC paid to BVT so that BVT would have more profits to share with Celador Productions. Because there was no evidence that Defendants had acted in bad faith, the district court correctly held that Plaintiff could establish a breach of the implied covenant only if it proved that their conduct was “objectively unreasonable” in light of the purpose and express terms of the contract. But the license fee ABC actually paid BVT was entirely consistent with—if not better than—an established industry practice that was well known to Celador Productions’ agents when they negotiated the deal.
And absent evidence that a defendant acted in bad faith, violated industry norms, or otherwise upset the parties’ reasonable expectations, permitting recovery on an implied-covenant theory does not protect the parties’ original bargain—it allows the jury to rewrite it.

Because both of Plaintiff’s contract theories were unsound, Defendants were entitled to judgment as a matter of law. But the jury’s unsustainable verdict also resulted from a series of legal and evidentiary errors that allowed Plaintiff to paint a distorted and incomplete picture of the parties’ bargain. For example, the district court barred Defendants from introducing documents from WMA’s files confirming that Celador Productions’ agents shared Defendants’ interpretation of the contract and expected Defendants to perform exactly as they actually did. In addition, the court excluded key evidence about the financial structure of the parties’ agreement, allowed Plaintiff to present inflated damages calculations that had no basis in the record, and prevented Defendants from offering dispositive proof that Plaintiff has no right to recover at all because it is not even a party to the contract. At a minimum, Plaintiff should be required to try to prove its claims in a new trial free from these errors, which incurably tainted the first one.

**STATEMENT OF JURISDICTION**

The district court had jurisdiction under 28 U.S.C. § 1332(a)(3). This Court has jurisdiction under 28 U.S.C. § 1291 because the district court entered a final

STATEMENT OF ISSUES

This case involves two separate contract claims, each of which went to the jury on both express-contract and implied-covenant theories. Plaintiff’s principal claim was that Celador Productions should have received more of the money generated by Millionaire’s success on ABC (the “network-license” claim). In addition, Plaintiff separately claimed that BVT improperly deducted expenses when calculating payments due Celador Productions from the sale of Millionaire merchandise (the “merchandising” claim). The issues presented in this appeal are:

1. Whether Defendants are entitled to judgment as a matter of law or a new trial because of the legal insufficiency of Plaintiff’s theories supporting its network-license claim.

2. Whether Defendants are entitled to a new trial on the network-license claim because the district court improperly excluded two critical categories of evidence: (A) documents confirming that Celador Productions’ agents shared Defendants’ interpretation of the contract and expected Defendants to perform as they actually did; and (B) evidence revealing that the parties’ bargain was more favorable to Celador Productions than Plaintiff led the jury to believe.
3. Whether Defendants are entitled to a new trial on the network-license claim because the district court erroneously admitted expert testimony on a theory of damages that produced inflated numbers but had no basis in the record.

4. Whether Defendants are entitled to judgment as a matter of law because of the legal insufficiency of Plaintiff’s theories supporting its separate merchandising claim.

5. Whether a new trial is required on all claims because the district court erroneously excluded evidence establishing that Plaintiff Celador International cannot recover here because it was not even a party to the contract, which was signed by Celador Productions.

STATEMENT OF THE CASE

In 2004, Plaintiff filed a complaint alleging breach of contract and breach of the implied covenant. ER3802. On July 7, 2010, a jury awarded $269 million in damages, ER99, to which the district court added $50 million in stipulated prejudgment interest, ER55-57. The court denied Defendants’ motions seeking judgment as a matter of law and a new trial. ER1-54.
STATEMENT OF FACTS

I. **FACTUAL BACKGROUND**

A.  **The Structure Of The Television Industry**

Networks like ABC are in the business of transmitting television programming over the airwaves and selling advertising time during their broadcasts. ER1526; ER1898-1900. Rather than producing programs themselves, networks typically license them from producers like BVT, which physically make the shows and own the intellectual property rights. ER542-543; ER1044-1045. Producers sometimes acquire those rights directly from a show’s creator. ER1044. In other cases, a network will acquire the rights and convey them to a producer in a “layoff”: The network assigns the rights to the producer, and the producer grants a broadcast license back to the network in return. ER977; ER1044; ER1072; ER1212-1213.

When a network licenses a program, whether through a layoff or otherwise, it agrees to pay the producer a per-episode license fee. ER542; ER597. The amount of that fee typically depends on the kind of show. In “scripted” television—comedies and dramas—the license fee is usually between 50% and 70% of what it costs the producer to make each episode. ER2341; see ER597; ER982; ER1217. The cost of producing “unscripted” programs—including game shows like *Millionaire*—is typically lower, and fees for such programs generally
equal 100% of the producer’s costs. ER598; ER985-986; ER1217; ER1376-1377; ER1783; ER2341.

This structure means that producers do not make a profit on network license fees alone: Unscripted programs merely break even, and scripted programs actually lose money. ER1217; ER1349-1350; ER1376-1377. Instead, producers profit from their shows in other ways. First, they “syndicate” their programs by licensing them to be shown on local stations after the initial network run. ER2338-2339. “Off-network syndication” involves rebroadcasting episodes that were previously shown on the network (i.e., “reruns”). ER1156. “First-run syndication,” which is more common for game shows, involves producing original episodes for the syndication market. ER991-992; ER1156. Second, producers make money by distributing their shows internationally—for example, by licensing the show’s format for production in foreign markets. ER992-993; ER2339. Finally, producers license or sell related merchandise, such as DVDs and games. ER2340.

Third parties, such as a show’s creator or stars, often negotiate for a percentage of a contractually defined measure of the producer’s profits. Like the producers in whose profits they share, these third-party “participants” have an economic stake in syndication, foreign distribution, and merchandising. ER991-
A successful network run, of course, increases the likelihood that these downstream sources of revenue will materialize and prove profitable. But producers and participants profit from the downstream sources, not directly from the advertising revenue earned by the network. This structure entails financial risks for networks because they pay license fees for their programs with no guarantee that they will recoup their investment. The risk is substantial because “three out of four programs fail” and it is impossible to predict in advance which ones will be profitable. In scripted television, where license fees do not fully cover production costs, producers also bear some risk. Participants, in contrast, have the potential to gain if a show is sufficiently profitable for the producer, but bear no risk of loss if it fails.

**B. Celador Productions Develops Millionaire And Hires The William Morris Agency To Sell The U.S. Rights**

Plaintiff Celador International originally acquired the rights to the concept for Millionaire in 1996 and then transferred them to Celador Productions, which produced the show and licensed it to a U.K. network for broadcast. Both companies were controlled at the time by Paul Smith, an

\[^1\] At the time, Plaintiff was called “Entertainment Developments, Ltd.”
an experienced player in the U.K. and U.S. entertainment industries. ER816; see ER388-395. 2 Millionaire premiered in the U.K. in September 1998 and was immediately successful. ER416-417. The essence of the show was to allow contestants to win up to a million pounds—far more than the prizes on other game shows—by correctly answering a series of increasingly difficult multiple-choice questions. ER407.

After learning about Millionaire’s successful U.K. debut, ABC executive Michael Davies decided to pursue a U.S. version of the show. Davies contacted Ben Silverman, an agent working in London for the William Morris Agency (“WMA”), a leading talent agency. ER2902; ER509-514. Silverman was interested in representing Celador Productions in connection with Millionaire and had already contacted Smith, a former WMA client, about the show. ER423; ER511-512. Silverman communicated ABC’s interest to Smith, and WMA became Celador Productions’ agent for purposes of negotiating with ABC and other potential buyers of Millionaire’s North American rights. ER580-583. WMA continued to represent Celador Productions throughout the events relevant to this suit. ER555; ER832-833.

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2 A “cast of characters” is attached as Addendum C.
C. **WMA Negotiates The Contract With ABC And BVT**

On the ABC side, Davies asked BVT—a producer owned (like ABC) by The Walt Disney Company—to join in acquiring the rights to *Millionaire*. ABC would need a producer for the show, ER653, and Davies also wanted BVT to help fund the up-front payment to Celador Productions, ER1157-1158; ER1343; ER1420-1422; ER2537. Davies believed that as an experienced producer and distributor of syndicated programs, BVT was a logical partner because the long-term home for a game show like *Millionaire* would likely be in first-run syndication. ER2946-2947. As Davies explained, the “life cycle” of U.S. game shows was that “the successful ones had started on a network, and at a certain point moved into syndication” for the long term. ER2927. Indeed, in 1998, numerous game shows were highly successful in syndication, but none had appeared on primetime network television in decades. ER1043; ER2172.

BVT agreed to Davies’s proposal, and from early in the negotiations, ABC, BVT, and Celador Productions’ agents at WMA understood that after ABC and BVT acquired the rights to *Millionaire*, ABC would “lay off” the rights to BVT, which would then produce the show, license ABC to broadcast it, and exploit the syndication and merchandising rights. ER1021; ER1157-1163.

The broad terms of the deal were negotiated by WMA’s Greg Lipstone and ABC’s Vice President of Contracts, Lee Bartlett. ER593-594; ER2984. They
agreed that Celador Productions would grant ABC and BVT the North American rights to *Millionaire* in perpetuity in exchange for an up-front option payment and guaranteed per-episode fees. They further agreed that Celador Productions would become a participant entitled to 50% of a contractually defined measure of BVT’s profits from *Millionaire*. ER3289. Celador Productions refused BVT’s request to include the worldwide rights to *Millionaire* in the deal, retaining those rights for itself. ER1256; ER2539; ER2545-2547.

Once these principal deal points were set, the talks moved to the negotiation and drafting of the specific terms of the contract. On the ABC/BVT side, Lee Rierson, an ABC attorney, drafted the contract and negotiated the revisions with input from his counterparts at BVT. ER1041-1042; ER1048-1049; ER2180. Lipstone continued to lead the negotiations for Celador Productions and was joined by Angela Petillo, a WMA business affairs executive and lawyer, ER469-470, and Sarah Gregson, Celador Productions’ in-house counsel, ER2297-2298; ER3001; ER3005. At the same time, WMA continued to test the other major broadcast networks’ interest in the show, but ABC “was the only network of the four that showed interest.” ER588; see ER520; ER2168-2172; ER2907.

Between December 1998 and the final signing in March 1999, the parties exchanged at least five drafts and held numerous phone calls and meetings to refine the contract. See ER3166-3274. During these negotiations, WMA
improved the terms of the deal for Celador Productions by, among other things, substantially increasing its per-episode fees. ER1105-1106.

D. The Rights Agreement Gives Celador Productions Substantial Guaranteed Payments Plus Contingent Compensation

The final contract—the “Rights Agreement”—was signed on March 5, 1999. ER3085. In addition to an unusually large option payment of $250,000, ER1778; ER3085, it provided Celador Productions with two other forms of compensation.

First, Celador Productions received guaranteed fees of $35,000 for each hour-long episode of Millionaire aired on ABC and $15,000 for each week of half-hour episodes shown in first-run syndication, both subject to regular increases. ER3087-3088. These fees were the focus of substantial negotiation and were significantly larger than those paid in prior deals of this type. ER1779; ER2916. The parties expressly agreed that they were, without more, “fair, reasonable and sufficient compensation” for all the rights conveyed. ER3091.

Second, the Rights Agreement also made Celador Productions a participant entitled to 50% of a contractually defined measure of BVT’s profits from Millionaire, which the Agreement called Defined Contingent Compensation (“DCC”). ER3088. DCC was defined as “all sums actually received by, or

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3 As is customary, the Agreement referenced December 1, 1998 as the “as of” date on which the parties agreed to the principal deal points. ER2185; ER3085.
credited to, BVT from all sources worldwide from the exploitation” of the show, less five specified deductions including “BVT’s normal distribution fees,” BVT’s out-of-pocket costs, and interest and overhead charges on the money BVT spent producing the show. ER3102.

The Rights Agreement emphasized the contingent nature of DCC, stating that “there is no guarantee whatsoever that any [such] sums will be generated and/or become payable” to Celador Productions. ER3103.

WMA also negotiated a provision making Celador Productions’ right to DCC substantially more valuable. The Rights Agreement provided that “merchandising shall be a separate ‘pot,’” meaning that “costs and revenues in connection with merchandising shall not be cross-collateralized” with the other costs and revenues that go into the DCC calculation. ER3089. As a result, Celador Productions could share in merchandising DCC even if, as is common, the rest of the DCC calculation yielded a deficit. ER459-460; ER1206-1207; ER2340. Here, for example, Celador Productions’ agent Lipstone explained that based on Millionaire’s network run, Celador Productions could expect the non-merchandising DCC calculation to run a deficit roughly equal to 10% of the total

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4 Celador Productions was actually entitled to the larger of two contingent payments: 50% of DCC or an “advance” of 25% of “Adjusted Defined Receipts,” a sum calculated using an identical formula but with smaller deductions for BVT’s fees. ER1542; ER3088-3089; ER3102. For simplicity, this brief—like the district court’s post-trial opinion—refers to these payments collectively as “DCC.”
costs of producing the show. ER987-988. That is because producers of unscripted shows like Millionaire typically receive license fees equal to their production costs, and the Rights Agreement, like most similar contracts, defined DCC as BVT’s revenues less its costs and specified deductions, including a 10% overhead charge. ER986-988. The “separate pot” provision meant that, unlike a typical participant, Celador Productions could begin to share in the first dollar of merchandising DCC without waiting for the proceeds from syndication and merchandising to overcome this anticipated “network deficit.”

E. Millionaire Airs On ABC From 1999-2002 And Continues In Syndication Today

As the parties contemplated, ABC and BVT entered into a layoff: ABC assigned its rights in Millionaire to BVT, ER3284-3285, and BVT licensed the network broadcast rights back to ABC, ER3284-3288. Like the Rights Agreement itself, both the assignment and the network license were perpetual, so ABC ended up with the same network broadcast rights it had originally obtained from Celador Productions. In accordance with industry practice for unscripted programs, ABC agreed to pay a license fee equal to 100% of BVT’s production costs.5

5 The license agreement set a base fee equal to BVT’s anticipated production budget. Compare ER3338 (budget), with ER3287 (license agreement); see ER1218-1223. Because of considerable uncertainty about the cost of prizes and other variables, ABC also agreed to pay any approved “add ons.” ER3287; see ER1235.
Millionaire was produced by BVT and its sister company, Defendant Valleycrest. The show premiered on ABC in August 1999, hosted by Regis Philbin. ER928-929; ER937. Because WMA represented both Philbin and Celador Productions, it negotiated for a “package commission” paid directly by Defendants rather than taking a percentage of the money received by each of its clients. ER580-582.

Millionaire was immediately successful, attracting large audiences for ABC. ER1499-1500; ER2917-2918. The show initially aired every night during two-week special events and then switched to a regular schedule, airing multiple nights per week until ABC cancelled it in 2002. ER2917-2918; ER2942. Around the same time, BVT began producing a version of the show for first-run syndication. That version is still aired daily by local stations around the country. ER2553.

Millionaire has been profitable for all of the parties to the Rights Agreement. ABC earned substantial advertising revenues and, based in part on Millionaire’s popularity, became the most-watched network for a period. ER2945-2946. By the time of trial, BVT had made roughly $64 million from first-run syndication, ER2555-2558, and its affiliates earned substantial profits on Millionaire merchandise. Celador Productions also profited handsomely, earning a total of $21 million in per-episode fees—$14 million during the network run and $7 million in
syndication through the 2009-2010 season. ER2552-2553; ER3346. In addition, Celador Productions was paid more than $5 million in DCC from the merchandising “pot.” ER2099. And, of course, the international format licensing rights retained by Celador Productions—whose significance was recently highlighted by Paul Smith’s blockbuster movie *Slumdog Millionaire*, ER394-395—grew in value due to *Millionaire*’s high-profile success on ABC. But one potential source of income from the Rights Agreement did not materialize: Celador Productions has not earned, and likely will not earn, any DCC from the non-merchandising pot.

As is typical, the non-merchandising pot showed a deficit after the network run because the license fees earned by BVT exactly equaled its production costs and the Rights Agreement provided an additional 10% deduction for overhead. Thus, like other participants, Celador Productions’ ability to earn DCC depended on BVT’s profits from other sources. But because Celador Productions negotiated for merchandising to be accounted for separately and retained all of the foreign rights for itself, the only significant source of profits available was domestic syndication. ER2337-2340. And *Millionaire*’s performance in syndication has not matched its network success: The show has earned a profit, but the margin has

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6 These payments came due under the “Adjusted Defined Receipts” calculation. See *supra* n.4.
been too low to cover the BVT distribution fee for syndication specified in the Rights Agreement, ER3102, let alone make up the deficit from the network run, ER2083-2084; ER2144-2145; ER2555-2556.

II. **Plaintiff’s Suit**

A. **Celador Productions Initially Objects Only To The Amount Of The Deductions For Merchandising Expenses**

In December 2000, Celador Productions and WMA received the first “participation statements”—documents from BVT/Valleycrest calculating DCC and determining Celador Productions’ share. ER3104-3111; see ER568-571. As shown below, those statements followed the structure the parties contemplated when the deal was made: They included only sums earned by BVT, not ABC, and the $89,058,755 that ABC paid to BVT in license fees (listed on the statement as “Network Prime Time—U.S.”) equaled BVT’s “Cost of Production” to the dollar. ER3108; see ER622; ER1012-1013.

Thus, after deducting BVT’s costs, overhead, and other contractually specified charges, the non-merchandising DCC calculation showed a deficit of approximately $9.7 million—a little more than 10% of BVT’s production costs:
## VALLEYCREST PRODUCTIONS LTD.
### PARTICIPATION STATEMENT
**PERIOD ENDED: SEPTEMBER 30, 2000**

**PICTURE TITLE:** Who Wants To Be A Millionaire? (1-49 Episodes)

**INITIAL TELECAST:** August 16, 1999

**PARTICIPANT:** Cedara Productions

L.s.o. Paul Smith

**Statement #1**

**Defined Contingent Compensation**

<table>
<thead>
<tr>
<th>Network Prime Time - U.S.</th>
<th>89,050,755</th>
</tr>
</thead>
<tbody>
<tr>
<td>Network Non-Prime Time - U.S.</td>
<td>320,739</td>
</tr>
<tr>
<td>Domestic Syndication</td>
<td>0</td>
</tr>
<tr>
<td>Domestic Basic Cable</td>
<td>0</td>
</tr>
<tr>
<td>Foreign Syndication</td>
<td>0</td>
</tr>
<tr>
<td>Foreign Basic Cable</td>
<td>0</td>
</tr>
<tr>
<td>Pay Television</td>
<td>0</td>
</tr>
<tr>
<td>Home Video</td>
<td>0</td>
</tr>
<tr>
<td>Theatrical/Non-Theatrical</td>
<td>0</td>
</tr>
<tr>
<td>Other</td>
<td>0</td>
</tr>
</tbody>
</table>

**TOTAL DEFINED RECEIPTS**

89,379,494

**LESS: DISTRIBUTION FEES (Schedule A)**

112,259

**DEFINED RECEIPTS AFTER DISTRIBUTION FEES**

89,267,235

**LESS: DISTRIBUTION COSTS (Schedule B)**

Advertising and Publicity | 31,415
Checking, Collections, Conversion, etc. | 0
Other Versions | 0
Residuals | 0
Trade Dues | 0
Taxes, Licenses, Insurance | 47,267
Prizes | 31,743
Transportation | 0
Miscellaneous | 699
William Morris Package Commission | 16,027

**TOTAL DISTRIBUTION COSTS**

127,162

**DEFINED RECEIPTS (LOSS) AFTER DISTRIBUTION FEES AND COSTS**

89,140,073

**LESS: NEGATIVE COST**

<table>
<thead>
<tr>
<th>Cost of Production</th>
<th>85,050,755</th>
</tr>
</thead>
<tbody>
<tr>
<td>Overhead @ 10.0%</td>
<td>8,905,876</td>
</tr>
<tr>
<td>Interest</td>
<td>854,105</td>
</tr>
</tbody>
</table>

**TOTAL NEGATIVE COST**

86,810,736

**LESS: THIRD PARTY PARTICIPATIONS**

0

**DEFINED CONTINGENT COMPENSATION (LOSS) - This Period**

(678,641)

**DEFINED CONTINGENT COMPENSATION (LOSS) - Prior Period**

0

**DEFINED CONTINGENT COMPENSATION (LOSS)**

(678,641)

**PARTICIPANT SHARE: 50%**

3 0

**LESS: ADVANCE**

0

**LESS: PREVIOUSLY PAID**

0

**LESS: PREVIOUSLY UNRECOUPED**

0

**CURRENT AMOUNT DUE (UNRECOUPED)**

3 0
ER3108. Because merchandising was accounted for separately, however, Celador Productions earned approximately $3.5 million in merchandising DCC during the period despite this deficit in the non-merchandising pot. ER3105.

Although Smith personally reviewed these participation statements, ER663-664, neither he nor anyone else at Celador Productions protested the absence of ABC’s revenues from the DCC calculation or the fact that ABC paid BVT a license fee equal to BVT’s production costs. Smith also did not object to the existence of a deduction for merchandising expenses—the issue that would become the basis for Plaintiff’s merchandising claim at trial. Instead, his only complaint about Defendants’ performance concerned the amount of those expenses. ER573-575; ER663-665; ER1012-1014; ER3277.

In response to Smith’s concerns, David Leffin—WMA’s Vice President of Participations, ER2406—reviewed the statements and, after consulting with the WMA agents who negotiated the Rights Agreement for Celador Productions, confirmed to Smith that “the structure of the statements appears to comply with the terms of [the] contract, and, based on the figures provided, appear to be fairly calculated.” ER3299; see ER2414-2416; ER3295-3297. Leffin recommended an audit of BVT to address Smith’s concern about the amount of the merchandising expenses and to confirm that the reported figures were accurate, but like Smith, he raised no concerns whatsoever about what would become the three disputed issues
at trial: the exclusion of ABC’s revenues; the fact that the network license fee exactly equaled BVT’s cost of production; and the fact that BVT deducted out-of-pocket merchandising expenses. ER2460-2461.

Celador Productions invoked its right to audit the BVT participation statements in 2001. ER1539. In addition to checking the reported figures, Leffin instructed the auditors to take the position—contrary to his own original view—that merchandising expenses were not deductible in calculating DCC. ER2430-2434; ER3301. Even though Smith was already contemplating this lawsuit, however, ER3342, the audit did not raise any suggestion that ABC’s advertising revenues belonged in the DCC calculation or that ABC should have paid a license fee higher than BVT’s production costs. During the audit, in fact, Smith and his agents specifically considered, but “dismissed quickly,” the idea of challenging the license fee paid to BVT. ER2452-2454; ER3279.

B. Plaintiff’s Contract Theory Evolves In Litigation

Plaintiff Celador International filed this suit in 2004.7 Plaintiff was not a signatory to the Rights Agreement, but its complaint alleged that it was suing as the “successor-in-interest to Celador Productions.” ER3803. The complaint also

7 Smith has also considered suing WMA for inadequately representing Celador Productions during the negotiations. ER837-838. But because Smith and his lawyers preferred to seek a recovery from ABC and BVT first, Celador Productions has entered into tolling agreements with WMA preserving those claims until after this litigation. ER696-697; ER907-908.
claimed, for the first time, that ABC and BVT had breached the Rights Agreement and the implied covenant of good faith and fair dealing by failing to pay Celador Productions non-merchandising DCC. But the express-contract theories in Plaintiff’s complaint bore little resemblance to the theory on which it ultimately prevailed at trial. See ER3804-3805; see also ER3800-3801 (second amended complaint). Indeed, the interpretation the jury accepted—that the Rights Agreement required that ABC’s revenues be included in the DCC calculation—did not emerge until five years into this litigation, on the eve of the original trial date. ER3795.

C. Plaintiff’s “Network-License” And “Merchandising” Claims Go To The Jury

This case was initially assigned to Judge Cooper, who decided the parties’ motions for summary judgment and most of their motions in limine. After Judge Cooper’s death, it was reassigned to Judge Phillips. ER3381.

Although Plaintiff initially raised a host of other claims, only two went to the jury: First, Plaintiff’s “network-license” claim alleged that Celador Productions should have received non-merchandising DCC, either because the express terms of the Rights Agreement required that ABC’s advertising revenues be included in the DCC calculation or because the implied covenant required ABC to pay a larger license fee to BVT. Second, Plaintiff’s “merchandising” claim
alleged that BVT breached both the express contract and the implied covenant by deducting out-of-pocket expenses in calculating merchandising DCC.

The district court’s ruling on Defendants’ mid-trial Rule 50 motion further narrowed the issues for the jury. First, the court held as a matter of law that WMA was Celador Productions’ agent, ER204-205, meaning that its knowledge was imputed to Celador Productions, ER121. Second, the court ruled that there was no evidence that Defendants had acted in bad faith. ER201. Accordingly, Plaintiff could establish a breach of the implied covenant only if it proved that Defendants’ actions had been “objectively unreasonable.” ER118.

D. The Verdict And Post-Trial Motions

The jury adopted Plaintiff’s interpretations of the disputed provisions of the Rights Agreement and found that Defendants had breached both the express contract and the implied covenant. ER86-97. It awarded approximately $260 million on Plaintiff’s network-license claim and $9 million on Plaintiff’s merchandising claim. ER99. The district court added $50 million in stipulated prejudgment interest, ER55-57, and denied Defendants’ post-trial motions seeking judgment as a matter of law and a new trial, ER1-54.

SUMMARY OF ARGUMENT

This case involves two separate contract claims, each of which went to the jury on both express-contract and implied-covenant theories. All of these theories
were legally foreclosed, unsupported by sufficient evidence, or both, entitling Defendants to judgment as a matter of law. In the alternative, a series of evidentiary and other legal errors requires a new trial.

First, the legal insufficiency of Plaintiff’s network-license theories requires judgment as a matter of law or, at a minimum, a new trial. With respect to Plaintiff’s express-contract theory, the district court abdicated its responsibility to interpret as a matter of law a written contract that is not reasonably susceptible to Plaintiff’s novel—indeed, revolutionary—interpretation. Moreover, there was insufficient evidence to support the verdict because Plaintiff failed to present any proof of the damages caused by Defendants’ alleged breach. See infra Part I.A.

Plaintiff’s implied-covenant theory also failed as a matter of law because of insufficient evidence. As the district court held, there was no indication that Defendants acted in bad faith. And there was also no evidence to support a finding that Defendants’ actions were objectively unreasonable: Their conduct was not only consistent with—or better than—industry practice, but also within both the reasonable and actual contemplation of Plaintiff’s agents when the contract was signed. See infra Part I.B.

Even if Plaintiff’s implied-covenant theory did not fail as a matter of law, the district court’s erroneous submission of the express-contract theory would still require a new trial because the jury’s acceptance of Plaintiff’s contract
interpretation necessarily tainted its consideration of the implied covenant. Moreover, the verdict form does not foreclose the possibility that the jury’s network-license award rested on the unsound express-contract theory alone. See infra Part I.C.

At a minimum, Defendants are entitled to a new trial because the district court failed to instruct the jury that two key aspects of Plaintiff’s case were legally barred. Plaintiff’s express-contract theory relied on evidence of Celador Productions’ undisclosed, subjective understanding of the Rights Agreement, and its implied-covenant theory focused on the argument that ABC and BVT had a duty to renegotiate the network license fee after *Millionaire* became a success. Although the district court acknowledged that a party’s undisclosed understanding of a contract is legally irrelevant and that the implied covenant cannot impose a duty to renegotiate, it refused Defendants’ requests to so instruct the jury. See infra Part I.D.

Second, several evidentiary errors independently require a new trial on the network-license claim. Most important, Defendants sought to introduce documents created by Celador Productions’ agent WMA confirming that it shared Defendants’ interpretation of the Rights Agreement and expected that Defendants would do exactly what they actually did. The court excluded these critical documents on authenticity, Rule 403, and hearsay grounds, but each of those holdings rested on
clear legal errors. *See infra* Part II.A. The court further erred in excluding evidence about the structure of the parties’ bargain and *Millionaire*’s financial performance, including the value of the highly lucrative foreign rights to the show, which ordinarily would have contributed to DCC but which Celador Productions kept for itself. *See infra* Part II.B.

*Third*, Defendants are entitled to a new trial on the network-license claim because the district court erroneously allowed one of Plaintiff’s experts to present grossly inflated damages calculations lacking any basis in the record. Plaintiff sought to prove damages by establishing the amount of DCC that would have been due Celador Productions if ABC and BVT had renegotiated *Millionaire*’s per-episode license fee once the show became a hit. In estimating these renegotiated fees, Plaintiff’s experts cautioned that they would apply only *prospectively* from the point of the hypothetical renegotiation forward. Yet the court allowed Plaintiff to use a different expert to present damages scenarios that applied those same estimated fees *retroactively*, back to *Millionaire*’s first episode. This “back-to-inception” theory, which featured prominently in Plaintiff’s presentation to the jury, should have been excluded as utterly lacking in factual support. *See infra* Part III.

*Fourth*, Defendants are entitled to judgment as a matter of law on Plaintiff’s separate merchandising claim. Plaintiff claimed that Defendants breached the
express terms of the contract and the implied covenant by deducting out-of-pocket expenses when calculating merchandising DCC. With respect to the express contract, however, Plaintiff’s interpretation is contrary to both the plain text and the undisputed extrinsic evidence, including the understanding of Celador Productions’ own agents. Accordingly, the district court should have rejected that interpretation as a matter of law. See infra Part IV.A. Plaintiff’s implied-covenant theory likewise fails as a matter of law because it is contrary to the contract’s express terms. See infra Part IV.B.

Finally, Defendants are entitled to a new trial on all claims because of a critical evidentiary error on a threshold issue. Defendants’ contract is with Celador Productions; the Plaintiff here is Celador International, a separate corporate entity now under distinct ownership. In its complaint, Plaintiff alleged that it was suing as Celador Productions’ successor in interest. That turned out to be false, so at trial Plaintiff claimed that it was actually a party to the original contract because Celador Productions had signed as its “undisclosed agent.” This newly minted theory was equally false, and Defendants had a document from Plaintiff’s own files to prove it. Remarkably, the court excluded that document as irrelevant even while acknowledging that it would have impeached the self-serving testimony that was Plaintiff’s only evidence on this crucial issue. See infra Part V.
STANDARD OF REVIEW

This Court reviews questions of law, including matters of contract interpretation, de novo. See First Nat’l Mortgage Co. v. Federal Realty Inv. Trust, 631 F.3d 1058, 1064 (9th Cir. 2011). This Court also reviews de novo the denial of a motion for judgment as a matter of law based on the sufficiency of the evidence, and must uphold a verdict “if it is supported by substantial evidence, ‘even if it is also possible to draw a contrary conclusion.’” Id. at 1067. The district court’s evidentiary rulings and its formulation of the jury instructions are reviewed for abuse of discretion. See General Electric Co. v. Joiner, 522 U.S. 136, 141 (1997); Jones v. Williams, 297 F.3d 930, 934 (9th Cir. 2002).

ARGUMENT

I. THE LEGAL INSUFFICIENCY OF PLAINTIFF’S NETWORK-LICENSE THEORIES REQUIRES JUDGMENT AS A MATTER OF LAW OR A NEW TRIAL

A. Plaintiff’s Express-Contract Theory Failed As A Matter Of Law

Plaintiff’s interpretation of the Rights Agreement—that Celador Productions was entitled to DCC calculated based on the revenues earned by both BVT and ABC, rather than BVT alone—is contradicted by the text of the contract and the undisputed extrinsic evidence. The district court had a duty to interpret the contract itself and reject Plaintiff’s interpretation as a matter of law, and it committed a fundamental legal error when it abdicated that responsibility to the jury. Moreover, Plaintiff’s express-contract theory also failed for the independent
reason that Plaintiff introduced no evidence of ABC’s revenues or costs, leaving
the jury with no basis for determining the damages caused by Defendants’ failure
to include them in the DCC calculation.

1. **The district court should have rejected Plaintiff’s interpretation as a matter of law**

Contract law seeks “to give effect to the mutual intention of the parties as it
existed at the time of contracting.” Cal. Civ. Code § 1636; *see Bank of the West v.
Superior Ct.*, 833 P.2d 545, 552 (Cal. 1992).⑧ That mutual intention “is determined
by objective manifestations of the parties’ intent.” *Morey v. Vannucci*, 64 Cal.
App. 4th 904, 912 (1998). “When a contract is reduced to writing, the intention of
the parties is to be ascertained from the writing alone, if possible.” Cal. Civ. Code
§ 1639. If, however, a written contract is reasonably susceptible to multiple
interpretations, it is also proper to consider “extrinsic evidence of such objective
matters as the surrounding circumstances under which the parties negotiated” and
their “subsequent conduct.” *Morey*, 64 Cal. App. 4th at 912.

The district court must make the threshold legal determination whether a
contract is reasonably susceptible to the parties’ competing interpretations. In so
doing, it must consider not only the text of the contract but also, on a provisional
basis, the relevant extrinsic evidence. *See U.S. Cellular Inv. Co. v. GTE Mobilnet,*

⑧ The Rights Agreement specifies that California law applies. ER3095-3096.
Inc., 281 F.3d 929, 938 (9th Cir. 2002); Pacific Gas & Electric Co. v. G.W. Thomas Drayage & Rigging Co., 442 P.2d 641, 644 (Cal. 1968). If the court determines that the contract is not reasonably susceptible to one of the two competing interpretations, it must adopt the other as a matter of law. See F.B.T. Prods., LLC v. Aftermath Records, 621 F.3d 958, 964 (9th Cir. 2010); Dore v. Arnold Worldwide, Inc., 139 P.3d 56, 61 (Cal. 2006). And even if the contract is reasonably susceptible to more than one reading, the resolution of that ambiguity remains a question of law for the court unless there is a “material conflict in the extrinsic evidence.” Wolf v. Walt Disney Pictures & Television, 162 Cal. App. 4th 1107, 1126 (2008). “This is true even when conflicting inferences may be drawn from the undisputed extrinsic evidence.” Id.; accord Cachil Dehe Band v. California, 618 F.3d 1066, 1077 (9th Cir. 2010); City of Hope Nat’l Med. Ctr. v. Genentech, Inc., 181 P.3d 142, 156 (Cal. 2008).

Because these threshold determinations all present questions of law, they are “reviewed de novo” by this Court. Brinderson-Newberg Joint Venture v. Pacific Erectors, Inc., 971 F.2d 272, 277 (9th Cir. 1992); accord F.B.T. Prods., 621 F.3d at 963. Here, the district court erred by failing to reject Plaintiff’s untenable reading of the Rights Agreement as a matter of law. Plaintiff claimed that Celador Productions’ DCC calculation should have included revenues earned by both BVT and ABC—in other words, that for the first time in television history, a network
had agreed to share a percentage of its profits with a participant. That extraordinary claim is contradicted by both the text of the contract and the undisputed extrinsic evidence, including industry custom, the parties’ performance, and the testimony of Celador Productions’ own agents. Accordingly, the Rights Agreement is not “reasonably susceptible” to Plaintiff’s interpretation—and even if it were, the district court still should have rejected Plaintiff’s interpretation as a matter of law because there is no material conflict in the extrinsic evidence, which only confirms Defendants’ reading.9

a. The text

The Rights Agreement provides that Celador Productions is entitled to DCC “as defined” in Exhibit B to the contract. ER3088. Exhibit B, in turn, expressly limits DCC to “all sums actually received by, or credited to, BVT,” and makes no reference to ABC’s revenues. ER3102 (emphasis added). Plaintiff nonetheless

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9 While it addressed the argument on the merits, the district court also stated that Defendants’ post-trial Rule 50 motion waived the claim that the Rights Agreement is not reasonably susceptible to Plaintiff’s interpretation. ER20. That is baffling: Defendants urged the court to “reject Plaintiff’s interpretation as a matter of law” because “the contract is clear and there is no conflict in the competent extrinsic evidence.” ER282-283; see ER290-291. In any event, a party claiming a contract is not reasonably susceptible to multiple interpretations preserves that claim for appeal so long as it raises the issue “at some point before the judge submit[s] the case to the jury.” F.B.T. Prods., 621 F.3d at 962-963; accord First Nat’l Mortgage Co., 631 F.3d at 1064-1065. Defendants repeatedly did so here. ER142-157; ER178-179; ER293-300; ER307; ER2672-2674.
asserted that all of ABC’s revenues from Millionaire must be included in the DCC calculation because of the following sentence in the body of the Rights Agreement:

[Celador Productions] 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.

ER3088. The district court held that the phrase “derived by ABC/BVT” creates an ambiguity as to whether ABC’s revenues are included in the DCC calculation. That conclusion cannot withstand even passing scrutiny.

First, the dispute at issue concerns the inputs to the DCC calculation, and the very sentence on which Plaintiff relies makes clear that DCC is a “defined” term and that the definition is “set forth in Exhibit ‘B.’” ER3088. As explained above, Exhibit B clearly provides that only BVT’s revenues are included. The district court could thus find the Rights Agreement reasonably susceptible to Plaintiff’s interpretation only by concluding that Exhibit B “represents only a partial definition of the DCC calculation” and that this alleged incompleteness “permits an inference that other provisions of Exhibit B, including the sources of the compensation (i.e., ABC’s profits and revenues), are not fully articulated.” ER21.

Even setting aside the implausibility of the suggestion that the parties could have failed to “fully articulate[]” such an important and unprecedented agreement, the district court’s statement that Exhibit B is an “incomplete” definition of DCC is
wrong. The court relied on the fact that Exhibit B does not identify Celador Productions as the party entitled to receive DCC or specify the percentage of DCC that it would receive. ER21. But those matters are not part of the definition of DCC and are spelled out in the body of the Rights Agreement. With respect to the definition—i.e., the inputs and deductions that go into the DCC calculation—the Rights Agreement makes clear that DCC is “defined” in Exhibit B and then expressly states that “notwithstanding” that definition, the parties have agreed to certain specific clarifications or changes. ER3089-3091. Those specific modifications foreclose any claim that the parties also intended another, unexpressed modification, particularly one so fundamental—indeed, revolutionary—as the inclusion of ABC’s revenues would have been.

Second, Exhibit B’s definition of DCC would be nonsensical if applied to a network like ABC. Exhibit B states that DCC is calculated by making five deductions from BVT’s gross revenue. Those deductions describe the fees charged and the costs incurred by a company that, like BVT, produces and distributes television shows. The deductions include “BVT’s normal distribution fees,” “[o]ut-of-pocket advertising, promotion, and distribution expenses,” and the “[d]evelopment and production costs” of the show. ER3102 (emphases added). They do not include any of the expenses incurred by a network like ABC, and the DCC formula thus could not be a measure of ABC’s profits. But it is undisputed
that DCC was meant to be a measure of profits, not gross revenues.  ER620-621; ER999.

Third, both the body of the Rights Agreement and Exhibit B grant Celador Productions the right to audit “BVT’s books and records” to ensure that DCC is being fairly calculated, but no similar right to audit ABC.  ER3091; ER3102.  That limitation makes sense only if Celador Productions’ right to DCC was tied to BVT alone, as the contract in fact provides.

b. The extrinsic evidence

Nothing in the extrinsic evidence reveals any latent ambiguity in the contract.  To the contrary, that evidence establishes that the contract would not be reasonably susceptible to Plaintiff’s reading even if the text alone were unclear.

First, the people who actually negotiated the Rights Agreement—including Celador Productions’ own agents—fully understood that Celador Productions would not share in ABC’s revenues.  WMA’s Petillo confirmed that she “did not believe that the network’s ad revenue would go into the back-end pot” because it “never goes in,” and that she believed her counterpart at ABC shared that understanding.  ER2386.  WMA’s Lipstone likewise testified that the input to DCC from the network run of the show “would be the license fee that a network like ABC would pay” to BVT—not ABC’s advertising revenues.  ER2337-2338; see also ER987-988.  Because Lipstone and Petillo were Celador Productions’ agents,
their knowledge on this point is imputed to Celador Productions as a matter of law. See ER121 (jury instruction). And witnesses from ABC and BVT confirmed that this understanding was shared by all parties. ER1069-1070; ER1080-1083; ER1180.

The district court disregarded this evidence about the mutual understanding of the people who negotiated the contract. Instead, it relied on “exhibits and testimony from Paul Smith and Ben Silverman demonstrating that … Plaintiff believed it was entitled to a portion of ABC’s profits.” ER22 (emphasis added). But the cited testimony and exhibits suggest, at best, only a subjective understanding of the Rights Agreement that was never communicated to Defendants. Smith testified that—apart from his conversations with Davies about the creative aspects of the show—he “never had any direct contact with ABC.” ER663. Instead, Lipstone—whose understanding on this point was the same as Defendants’—“was the intermediary between [Smith], or Celador, and ABC.” ER466; see also ER450. Silverman likewise “left [the negotiations] to Greg Lipstone and Angela Petillo.” ER602-603; see also ER441-442; ER593-594.

10 In fact, much of the evidence cited by the district court establishes that the contract was to include a 50/50 sharing of profits, but is irrelevant here because it does not specify which company’s revenues were to be included in the contractual definition of profits. ER466-467; ER540-542; ER637; ER919-928; ER3148-3152; ER3289-3290.

Second, the parties’ performance of the Rights Agreement confirms that they did not agree to include ABC’s revenues in the DCC calculation. “The law is well settled that the construction of a contract as shown by the acts and conduct of the parties prior to the controversy as to its meaning, is entitled to great weight.” *Automobile Salesmen’s Union, Local 1095 v. Eastbay Motor Car Dealers, Inc.*, 10 Cal. App. 3d 419, 424 (1970); accord *Warner Constr. Corp. v. City of L.A.*, 466 P.2d 996, 1003 (Cal. 1970). Here, the parties performed under Defendants’ interpretation for years. Beginning in December 2000, BVT sent Celador Productions biannual participation statements that made unmistakably clear that only BVT’s revenues were included in the DCC calculation: The only entry for
the network run is the amount of the license fees that BVT received from ABC, and there is no entry for ABC’s revenues at all. ER3108; ER3118; ER3130.

Although they raised other objections before and after demanding an audit, neither Celador Productions nor its agents protested the omission of ABC’s revenues from the DCC calculation. When it exercised its audit rights, moreover, Celador Productions did not seek to audit ABC. ER3280-3283. Indeed, Plaintiff did not assert that ABC’s revenues should have gone into the DCC calculation until January 2009—five years into this litigation. ER3795. It is inconceivable that Celador Productions, its agents, and its auditors simply failed to notice the omission of ABC’s substantial revenues. It is equally unimaginable that they would have acquiesced for so long if that omission actually violated the contract. To the contrary, a party’s “failure, for five years, to protest” a calculation that is “obvious” from regular payment notices sent by its contracting partner is powerful evidence that the calculation complies with their agreement. Oceanside 84, Ltd. v. Fidelity Fed. Bank, 56 Cal. App. 4th 1441, 1450-1451 (1997).

Moreover, Celador Productions and its agents did more than just fail to object. WMA affirmatively concluded—in a letter reviewed by Lipstone, Petillo, and Silverman—that “the structure of the [participation] statements appears to comply with the terms of [the] contract.” ER3299; see ER2414-2416; ER3295-
3297. The parties’ post-contract conduct thus refutes the interpretation Plaintiff belatedly adopted for trial.\textsuperscript{11}

\textit{Third}, the language in Exhibit B limiting DCC to BVT’s revenues was the subject of specific discussions. The initial drafts mistakenly provided that DCC would be calculated beginning with “all sums actually received by, or credited to, \textit{BVP}”—a reference to BVT’s sister company Buena Vista Productions. ER3216 (emphasis added). In a letter to WMA, Celador Productions’ in-house counsel Gregson referred to this specific language and asked “why only BVP[?]]” ER3307. The next draft substituted “BVT” for “BVP,” ER3254, but neither Gregson nor anyone else ever requested that the contractual language be amended to include ABC as well.

\textit{Fourth}, the undisputed evidence established that Plaintiff’s interpretation of the Rights Agreement would make it an extraordinary deal contrary to all prior industry custom. For example, WMA’s Petillo confirmed that networks “never” share their revenues with participants, ER2386, and a BVT executive testified that he was “not aware of a single transaction in which a network’s advertising revenue was shared with a distributor producer or a participant,” ER1236-1237. Because

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{11} Indeed, the express-contract theory surfaced so late in the case that Judge Cooper barred Plaintiff from pursuing it at trial. ER237-240. But notwithstanding that order and her own initial view that Plaintiff had no viable express-contract theory of its network-license claim, ER138-150, Judge Phillips ultimately allowed Plaintiff’s theory to go to the jury, ER157; see ER22-23.
\end{itemize}
\end{footnotesize}

The extrinsic evidence thus emphatically confirms that the Rights Agreement is not reasonably susceptible to Plaintiff’s interpretation and that the district court should have adopted Defendants’ interpretation as a matter of law. *See F.B.T. Prods.*, 621 F.3d at 964. Moreover, because the only relevant extrinsic evidence is undisputed, the district court should have interpreted the contract as a matter of law—and adopted Defendants’ interpretation—even if the contract were reasonably susceptible to competing interpretations. *Cachil Dehe Band*, 618 F.3d at 1077.

Finally, even if, contrary to these settled principles, the interpretation of the Rights Agreement were properly a question for the jury, Defendants would still be entitled to judgment as a matter of law because the jury’s verdict is not “supported by substantial evidence,” *First Nat’l Mortgage*, 631 F.3d at 1067. In light of the text and extrinsic evidence described above, no reasonable jury could have adopted Plaintiff’s interpretation.

2. **Plaintiff failed to introduce any proof of damages calculated in accordance with its interpretation**

Plaintiff’s express-contract theory also failed as a matter of law for an independent reason. “An essential element of a claim for breach of contract are
damages resulting from the breach.”  St. Paul Fire & Marine Ins. Co. v. American
contract action,” therefore, “[i]t is essential to establish a causal connection
between the breach and the damages sought.”  Thompson Pac. Constr., Inc. v. City
of Sunnyvale, 155 Cal. App. 4th 525, 541 (2007); see ER126 (jury instruction that
“Celador International must prove the amount due under the contract”).  Plaintiff
utterly failed to carry that burden.

Although Plaintiff’s express-contract theory was that ABC’s revenues
should have gone into the DCC calculation, it failed to introduce any evidence of
ABC’s revenues from Millionaire, much less attempt to calculate the amount due
Celador Productions under its interpretation of the Rights Agreement.  Instead,
Plaintiff’s only proof of damages sought to establish the additional amount BVT
would have owed Celador Productions if ABC had increased the license fee it paid
BVT to a purported “fair market” value at some point after the show became a
success.  ER2087-2091; ER3309-3310.  In other words, Plaintiff’s damages case
assumed that, as Defendants argued, DCC was to be calculated based on BVT’s
revenue alone.  As a result, Plaintiff failed to offer any proof of damages caused by
Defendants’ alleged breach, let alone proof sufficient to establish its damages with
the “reasonable certainty” required by law.  Vestar Dev. II, LLC v. General
Dynamics Corp., 249 F.3d 958, 962 (9th Cir. 2001); see Cal. Civ. Code § 3301.
B. Plaintiff’s Implied-Covenant Theory Failed As A Matter Of Law

The implied covenant of good faith and fair dealing is not a license for “the courts effectively to make new agreements for the parties.” *Manneck v. Lawyers Title Ins. Corp.*, 28 Cal. App. 4th 1294, 1304 (1994). Instead, a plaintiff asserting a violation of the implied covenant must prove that the defendant’s actions deprived it of the benefit of the bargain originally struck and that the defendant either “subjectively lack[ed] belief in the validity of its act” or engaged in conduct that was “objectively unreasonable.” *Carma Developers (Cal.), Inc. v. Marathon Dev. Cal., Inc.*, 826 P.2d 710, 727 (Cal. 1992).

Here, Plaintiff sought to use the implied covenant to impose a fundamental transformation of the parties’ bargain, claiming that it required Defendants to more than triple the license fee ABC paid BVT so that BVT would have greater profits to share with Celador Productions. Before sending the case to the jury, the district court correctly held that Plaintiff had failed to offer any evidence that “Defendants subjectively lacked belief in the validity of their conduct.” ER201. It erred, however, in holding that Plaintiff offered sufficient evidence to establish that Defendants’ conduct was “objectively unreasonable” and deprived Celador Productions of the benefit of its bargain.

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12 That holding did not stop Plaintiff from repeatedly and improperly urging the jury to conclude that Defendants acted in subjective bad faith—claiming, for example, that the network license agreement between ABC and BVT was a “secret deal and scheme to deny Celador the benefit of its bargain.” ER2771-2772.
To prove that Defendants’ conduct was “objectively unreasonable” for purposes of the implied covenant, Plaintiff had to show, at a minimum, that they did something outside “the reasonable expectation of the parties” when the contract was signed. *Wolf*, 162 Cal. App. 4th at 1121; *accord Carma*, 826 P.2d at 727, 729; *Caraeu & Co. v. Security Pac. Bus. Credit, Inc.*, 222 Cal. App. 3d 1371, 1395 (1990). Although its theory was vague and elusive, Plaintiff appeared to argue at trial that three aspects of Defendants’ conduct satisfied this standard: (1) ABC and BVT agreed to a perpetual license allowing ABC to broadcast *Millionaire* on the network; (2) that license required ABC to pay a fee equal to BVT’s production costs; and (3) ABC and BVT did not renegotiate the terms of the license after *Millionaire* became a success. Because Plaintiff provided the jury with no basis for finding that any of these actions was outside the parties’ reasonable contemplation when the Rights Agreement was signed, the verdict cannot stand.

1. **The perpetual license**

   Plaintiff first argued that, although the Rights Agreement conveyed the rights to *Millionaire* in perpetuity, it was objectively unreasonable for ABC and BVT to enter into a network license agreement with the same perpetual term. The district court held that a reasonable jury could have accepted this theory based on testimony from entertainment lawyer Richard Marks—the only evidence Plaintiff presented on this issue—that when the Rights Agreement was signed, perpetual
licenses “were not customary in the industry.” ER25. That holding has two fundamental flaws.

First, the district court entirely ignored Defendants’ principal argument on this issue, which was that Celador Productions fully understood that, in this deal, ABC and BVT would enter into a perpetual license. Celador Productions’ agent Lipstone acknowledged that he “absolutely knew by December 1, 1998”—well before the contract was signed—that Defendants would engage in a layoff and “that BVTV would be the layoff company.” ER981; see ER3164. He also unequivocally confirmed his contemporaneous understanding that, as a part of that layoff, BVT would grant ABC a perpetual license:

Q [Y]ou understood, didn’t you, when you were negotiating the agreement, that in laying off the rights from ABC to BVT, ABC would end up with the same perpetual license it had gotten in the first instance from Celador Productions, completing the triangle, correct?

A Sure.

ER1021. This testimony was never contradicted or impeached, and it is dispositive. Lipstone’s knowledge is imputed to Celador Productions as a matter of law, and Celador Productions cannot have had a reasonable expectation that Defendants would refrain from doing what it actually knew they would do. See Carma, 826 P.2d at 728; Wolf, 162 Cal. App. 4th at 1121; see also Restatement (Second) of Contracts § 205 cmt. d, illus. 1 (1981).
Second, even if Lipstone’s testimony were disregarded and Marks’s assertion that perpetual licenses were not customary in 1999 were accepted as fact, there was no support for the conclusion that Defendants’ actions were “objectively unreasonable.” Marks did not testify that there was an established industry custom against perpetual licenses in 1999. Rather, he testified only that the issue was unsettled, and allowed that perpetual licenses for reality programs have since become common. ER1781-1782; see ER598. Plaintiff’s evidence thus established, at best, the mere absence of relevant industry custom. But that cannot possibly satisfy Plaintiff’s burden to prove that Defendants’ actions were objectively unreasonable—especially where Defendants’ conduct complied with what soon became the norm.

2. The amount of the license fee

The district court also held that a reasonable jury could have found that Defendants violated the implied covenant by agreeing to a license fee equal to BVT’s production costs. That was error for three reasons.

First, every witness who testified on the subject—including Celador Productions’ own agent—confirmed that Defendants’ actions were entirely consistent with custom and practice in the industry: “[I]n unscripted reality

13 In reality, numerous witnesses for both parties testified that perpetual licenses for unscripted shows were common by 1999. See, e.g., ER1020; ER1215-1216.
programming the license fee during that time period [was] typically 100 percent of the production costs.” ER2341 (Lipstone); see also ER598 (Silverman); ER1217 (Loughery); ER1376 (Marcus); ER1783 (Marks).\(^{14}\) Indeed, Plaintiff failed to identify a single show whose license fee exceeded its cost of production. And a license fee equal to BVT’s production costs cannot have been outside Celador Productions’ reasonable contemplation where there was no precedent, let alone an industry custom, for a fee in any greater amount.

The district court rejected this argument primarily because it held that conduct can be objectively unreasonable even if it is consistent with an established industry practice. ER11-14. But California law looks to industry custom to define the scope of the reasonable expectations protected by the implied covenant. See Hanson ex rel. Hanson v. Prudential Ins. Co. of Am., 783 F.2d 762, 767 (9th Cir. 1985) (conduct “in accord with [the relevant] industry practice” did not breach the implied covenant); see also, e.g., Wolf, 162 Cal. App. 4th at 1123-1124; Acree v. General Motors Acceptance Corp., 92 Cal. App. 4th 385, 395-396 (2001); R.J.

\(^{14}\) While acknowledging that license fees equal to production costs were typical, Plaintiff’s expert Marks asserted that it was “unusual to have the network license fee equal the cost of production, without a [separate] producer’s fee.” ER1782 (emphasis added); see also ER1780. But that does nothing to advance Plaintiff’s position here because beginning in January 2000, ABC paid BVT a “production fee” of $25,000 per week in addition to the network license fee. ER3291. That fee was later increased to $60,000 per week. ER3293; see ER1147-1148.
Kuhl Corp. v. Sullivan, 13 Cal. App. 4th 1589, 1602 (1993). Indeed, 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. This is entirely sensible: The implied covenant protects the contracting parties’ reasonable expectations, and a party cannot have a reasonable expectation that its counterparty will refrain from doing what parties to such transactions customarily do.

The district court also held, in the alternative, that even if conduct consistent with industry practice ordinarily cannot violate the implied covenant, that rule would not apply here because the custom of paying license fees equal to the costs of production for reality television programs was merely “developing” in 1999. ER26. But if the court were right about that, it would only make Defendants’ conduct more reasonable. Before reality television emerged in the late 1990s, the industry custom was defined by the scripted television market, and every witness to address the subject confirmed that the practice for scripted programs was to pay a license fee “substantially less than the costs of production.” ER1376; see ER982; ER1217; ER1783. If anything, therefore, the license fees paid by ABC were better for Celador Productions than the only established industry norm.15

15 In any event, although the market for unscripted programs was still “developing” in 1999, numerous witnesses testified that it was already typical for
Second, even if the district court were correct that it might be possible in some case for a party to violate the implied covenant while following industry practice, this is not that case. Although the fact that the license fee equaled BVT’s cost of production was obvious from the regular participation statements sent by BVT beginning in December 2000, Celador Productions never objected or otherwise indicated that this was contrary to its expectations. ER622; ER1013-1014; ER1624. And Celador Productions’ agent Lipstone, who had participated in numerous reality television deals before negotiating the Rights Agreement, confirmed that he understood at the time that it was “typical” in such deals for “the license fee that the network would pay the producer [to] be equal to the production costs.” ER985-987. Particularly when combined with Celador Productions’ silence in the face of Defendants’ consistent performance, Lipstone’s contemporaneous knowledge—imputed to Celador Productions as a matter of law—forecloses any claim that a license fee equal to BVT’s production costs was outside the parties’ reasonable expectations when the contract was signed.

Although Lipstone’s testimony on this point was neither impeached nor contradicted, the district court asserted that the jury could have disbelieved him because he had a financial interest in the outcome of this case. ER26-27. But the

their license fees to be equal to production costs. See, e.g., ER2341 (Lipstone); ER1217 (Loughery).
court provided no basis for that statement, and there is none. To the contrary, Lipstone is a former Senior Vice President of WMA and the chief negotiator of this deal, ER912, and Smith has made clear that, if he does not prevail here, he may well sue WMA for inadequately representing him during the negotiations, ER907. If anything, therefore, Lipstone had an interest in helping Plaintiff secure a verdict against ABC and BVT. At worst, he was disinterested. And a court considering a motion for judgment as a matter of law must credit “‘evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses,’” Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 151 (2000)—let alone witnesses aligned with the opposing side.

Third, Plaintiff’s challenge to the amount of the license fee was essentially a claim that ABC and BVT breached the implied covenant by failing to negotiate at arm’s length. But there was no evidence that the terms of the network license would have been different if ABC and BVT had been unaffiliated. To the contrary, BVT executives testified without contradiction that those terms were the same as the terms BVT had negotiated with unaffiliated parties. ER1376; ER1383. In fact, BVT’s President Mort Marcus explained that the Millionaire agreement with ABC was unusually favorable for BVT and a deal he would do “as many times as [he] could.” ER1384-1385. From his perspective, the deal had “no
downside”: it required a relatively “[t]iny investment” (because ABC was funding the production costs), but allowed BVT to “[b]uild an asset” with “a chance to make money” through syndication and merchandising. ER1385. He further explained that having Millionaire air on ABC greatly increased the value of BVT’s rights because it was the network broadcast that created the market for first-run syndication and merchandising. ER1386-1387; ER1392.

In any event, even if Plaintiff had shown that the terms of the deal between ABC and BVT did not match those of an arm’s-length bargain, that showing alone could not establish a breach of the implied covenant because Celador Productions requested an express term that would have required ABC and BVT to deal at arm’s length and Defendants rejected that proposal, instead suggesting alternative language. ER2275-2276; see ER2392; ER3275-3276.16 Because the implied covenant exists to protect the parties’ actual bargain, it cannot impose a duty that the parties specifically considered but declined to include. See Katz v. Oak Indus., Inc., 508 A.2d 873, 880 (Del. Ch. 1986) (conduct cannot breach the implied covenant unless it is clear that the parties “would have agreed to proscribe the act later complained of … had they thought to negotiate with respect to that matter”).

16 Celador Productions never followed up on this counteroffer, and the term was not included in the contract. ER2275-2276.
3. The failure to renegotiate

In addition to challenging the original terms of the network license, Plaintiff argued that the implied covenant required Defendants to renegotiate that agreement to give more money to BVT—and thus to Celador Productions—after it became clear that Millionaire was a success. But California courts have made clear that the implied covenant cannot obligate a party to renegotiate a contract unless there is an express term requiring such a renegotiation. See Los Angeles Equestrian Ctr., Inc. v. City of L.A., 17 Cal. App. 4th 432, 447 (1993); Racine & Laramie Ltd. v. Department of Parks & Recreation, 11 Cal. App. 4th 1026, 1035 (1992).

Accordingly, the district court rightly concluded that, “as a matter of law,” Defendants’ decision not to renegotiate the network license agreement “cannot be ‘objectively unreasonable’” and thus cannot support a finding that they violated the implied covenant. ER27.\(^{17}\)

* * *

For the foregoing reasons, Plaintiff could not identify any action by Defendants that a reasonable jury could have found “objectively unreasonable.”

And while the district court rejected Defendants’ showing that their conduct was

\(^{17}\) In any event, Celador Productions cannot have had a reasonable expectation that such a renegotiation would occur: Lipstone knew that ABC and BVT would agree to a perpetual license and understood that the purpose of a perpetual term was, of course, to avoid the need for renegotiation. ER1020-1021; ER2346; see ER599; ER2591.
objectively reasonable as a matter of law, it too could not identify any objective basis—such as industry practice, a course of dealing, or Defendants’ behavior in similar transactions—on which the jury could have found that Plaintiff carried its burden to prove that Defendants’ actions were unreasonable. ER11-14; ER25-27.

In fact, the real basis for Plaintiff’s complaint—and the essence of its strategy at trial—was its claim that the outcome of the parties’ bargain must have been somehow unfair because Millionaire performed extremely well on ABC yet failed to produce non-merchandising DCC for Celador Productions. ER2765; ER2781-2782. But the fact that a party is disappointed with the result of its contract does not give rise to a violation of the implied covenant. To the contrary, courts “must assess the parties’ reasonable expectations at the time of contracting” and may neither “appease a party who later wishes to rewrite a contract he now believes to have been a bad deal,” Nemec v. Shrader, 991 A.2d 1120, 1126 (Del. 2010), nor “‘rewrite the contracts because they operate harshly or inequitably,’” Thrifty Payless, Inc. v. Mariners Mile Gateway, LLC, 185 Cal. App. 4th 1050, 1063 (2010); accord Third Story Music, Inc. v. Waits, 41 Cal. App. 4th 708, 809 (1995).

Here, the Rights Agreement’s generous fixed fees meant that Celador Productions stood to—and in fact did—make millions of dollars on a successful network run (in addition to untold millions on the foreign rights it had retained).
Its 50% share of non-merchandising DCC, however, was not directly tied to Millionaire’s network performance. Like a typical participant, Celador Productions’ profit sharing was linked to BVT, the producer. And like a typical producer, BVT stood to profit primarily based on the show’s performance in syndication, not on the network. Given Millionaire’s great success on ABC and relatively weaker performance in syndication, Plaintiff may now wish that Celador Productions had made a different bargain. But such second thoughts do not give rise to a violation of the implied covenant—particularly where, as here, the contract expressly warned that “[t]here is no guarantee whatsoever that any sums will be generated and/or become payable to [Celador Productions] … 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.” ER3103 (emphasis added).

C. In The Alternative, The Erroneous Submission Of Plaintiff’s Express-Contract Theory Requires A New Trial Limited To The Implied-Covenant Theory Alone

Even if Plaintiff’s implied-covenant theory did not fail as a matter of law, the erroneous submission of Plaintiff’s express-contract theory to the jury would still require a new trial for two independent reasons.
1. The jury’s erroneous interpretation of the contract tainted its consideration of the implied covenant

The district court’s erroneous submission of the express-contract theory allowed the jury to conclude that the Rights Agreement granted Celador Productions the right to DCC based on the revenues earned by both BVT and ABC—a vastly different bargain than the one to which the parties actually agreed. See ER84 (verdict adopting Plaintiff’s interpretation). That conclusion necessarily tainted the jury’s consideration of Plaintiff’s implied-covenant theory because the requirements of the implied covenant are—and must be—closely tied to the contract’s express terms. Indeed, the only purpose of the implied covenant is to protect the parties’ “right to receive the benefits of the agreement actually made,” Guz v. Bechtel Nat’l, Inc., 8 P.3d 1089, 1110 (Cal. 2000), and the jury was thus instructed to decide the issue by asking whether “Defendant[s] unfairly interfered with Celador International’s right to receive the benefits of the contract,” ER117-118.

Here, the jury’s erroneous interpretation would have led it to answer that question based on the mistaken assumption that those benefits included the right to a share of ABC’s revenues. Indeed, because the court’s instructions gave the jury no meaningful guidance on what constitutes “objectively unreasonable” conduct or “unfair[] interfere[nce]” with the benefits of a contract, the jury may well have concluded that Defendants’ failure to comply with what it believed to be the express terms of the contract was, by itself, an “unfair[] interfere[nce]” with
Celador Productions’ contractual rights. At a minimum, this Court certainly “cannot be confident that the jury verdict was not tainted by the erroneous and prejudicial submission of an unambiguous contract for jury interpretation,” and a new trial on the implied-covenant theory is therefore required. *Green Tree Acceptance, Inc. v. Wheeler*, 832 F.2d 116, 118 (8th Cir. 1987); accord *Lamb Eng’g & Constr. Co. v. Nebraska Pub. Power Dist.*, 103 F.3d 1422, 1433 (8th Cir. 1997).

2. The jury’s network-license verdict may have rested on Plaintiff’s meritless express-contract theory alone

A new trial would also be required even if this Court could conclude that the jury’s erroneous interpretation of the contract did not taint its consideration of the implied covenant. The verdict form indicates that the jury found that Defendants breached the implied covenant, but it does not reveal whether that finding relates to Plaintiff’s network-license claim, its separate merchandising claim, or both. ER92-97. As a result, it is entirely possible that the jury’s network-license verdict rests on the express-contract theory alone. And where, as here, a claim is submitted to the jury on multiple legal theories and the verdict does not reveal which of those theories the jury accepted, that verdict can be upheld “only if there is substantial evidence to support each and every theory of liability submitted to the jury.” *Syufy Enters. v. American Multicinema, Inc.*, 793 F.2d 990, 1001 (9th Cir. 1986).\(^{18}\)

\(^{18}\) The district court stated that it was “preposterous” to invoke *Syufy* here because that rule applies to general verdicts and the jury in this case answered
Accordingly, the fact that Plaintiff’s express-contract theory fails as a matter of law would require a new trial on the network-license claim even if its implied-covenant theory were supported by sufficient evidence. *See Syufy*, 793 F.2d at 1002-1003.  

**D. At A Minimum, The District Court’s Failure To Give Two Critical Jury Instructions Requires A New Trial**

As demonstrated above, Defendants were entitled to judgment as a matter of law on both of Plaintiff’s contract theories. But even if there were sufficient evidence to create a jury question, this Court should at a minimum order a new trial because the district court failed to instruct the jury that two critical aspects of Plaintiff’s case were legally foreclosed.

*First*, with respect to the express-contract theory, Plaintiff repeatedly elicited Paul Smith’s testimony about his understanding of the Rights Agreement. This evidence was central to Plaintiff’s case; indeed, the district court relied on it in numerous special interrogatories. ER32. But “‘[a]n interrogatory containing multiple issues is really no better than a general verdict’” because it leaves open the possibility that the jury relied on an invalid theory. *Friedman & Friedman, Ltd. v. Tim McCandless, Inc.*, 606 F.3d 494, 502 (8th Cir. 2010); *see, e.g.*, *Webb v. Sloan*, 330 F.3d 1158, 1166-1167 (9th Cir. 2003).

19 This Court has held that it “has discretion to construe a general verdict as attributable to [a valid] theory” even if another theory was invalid. *Traver v. Meshriy*, 627 F.2d 934, 938 (9th Cir. 1980). But it should not do so here because Plaintiff’s theories involved different legal and factual elements and the evidence supporting both of them was, at best, weak. *See Syufy*, 793 F.2d at 1001-1002. In the alternative, Defendants contend that this aspect of *Traver* should be overruled because it contradicts Supreme Court precedent. *See Kern v. Levolor Lorentzen, Inc.*, 899 F.2d 772, 789-792 (9th Cir. 1990) (Kozinski, J., dissenting).
denying Defendants judgment as a matter of law. ER22-23. As shown above, Smith’s purported understanding is legally irrelevant because there is no evidence that it was communicated to Defendants. See supra pp. 35-36. But even if a reasonable jury somehow could have found that Smith’s understanding was disclosed, a new trial would be required because this jury was never told it had to make that finding before relying on Smith’s testimony: Although Defendants requested such an instruction, ER304, the district court refused to give it, ER129.

Second, Plaintiff presented extensive testimony and argument seeking to persuade the jury that Defendants’ failure to renegotiate the network license agreement between ABC and BVT breached the implied covenant. ER1785-1787; ER2765-2766. Indeed, Plaintiff’s only damages evidence purported to demonstrate the additional money that would have been due Celador Productions had such a renegotiation occurred. See infra Part III. As the district court correctly concluded, however, this theory was legally foreclosed. See supra Part I.B.3. Once again, Defendants sought an instruction informing the jury that this key aspect of Plaintiff’s case could not be the basis for its verdict, and once again the district court refused. ER129; ER197; ER232; ER305.

A district court must formulate a “set of jury instructions that fairly and accurately states the law, covers the issues presented, and is not misleading.” Jones, 297 F.3d at 934. This Court reviews a district court’s formulation of jury
instructions for abuse of discretion, see id., but a failure to give an instruction on a party’s “theory of the case” is “reversible error if the theory is legally sound and evidence in the case makes it applicable,’” Smith v. Sumner, 994 F.2d 1401, 1404 (9th Cir. 1993). Those requirements are unquestionably met here: The district court’s failure to instruct the jury that key aspects of Plaintiff’s case were legally foreclosed created an unacceptable risk that the jury rested its verdict on an invalid ground. Moreover, “[w]ell-tailored and specific instructions” like the ones Defendant sought are particularly appropriate where, as here, “abstract legal principles are not self-explanatory to a lay jury, and the facts to which they must be applied are complex.” Los Angeles Mem’l Coliseum Comm’n v. NFL, 726 F.2d 1381, 1398 (9th Cir. 1984).

II. DEFENDANTS ARE ENTITLED TO A NEW TRIAL ON THE NETWORK-LICENSE CLAIM BECAUSE EVIDENTIARY ERRORS DEPRIVED THE JURY OF CRITICAL INFORMATION

A. The District Court Erroneously Excluded Evidence Of WMA’s Understanding Of The Parties’ Agreement

As the foregoing makes clear, if there were any issues for trial, WMA’s understanding of the Rights Agreement was chief among them because WMA actually negotiated the agreement with Defendants and its understanding is imputed to Celador Productions as a matter of law. In discovery, WMA produced critical documentary evidence of that understanding: a series of detailed spreadsheets, created shortly after the agreement, containing “forecast[s] of defined
contingent compensation” and making side-by-side comparisons of the amount that would be “Due Paul Smith” (i.e., Celador Productions) under the Rights Agreement and the amount that would be “Due WMA” under a possible commission structure. Because both amounts depended on the meaning and implementation of the Rights Agreement, the spreadsheets were critical evidence of how WMA understood the contract it had negotiated and how it expected Defendants to perform well before any dispute arose—indeed, well before Defendants sent the first participation statement. And to a remarkable degree, those forecasts confirmed that WMA understood the contract exactly as Defendants did.

Indeed, the predictions in the spreadsheets cover every meaningful point of disagreement between the parties at trial and, on each point, they confirm Defendants’ interpretation. The spreadsheets:

- Include only BVT’s licensing revenues, not ABC’s advertising receipts, in the calculation of DCC;
- Correctly anticipate that BVT would receive a network license fee exactly equal to its production costs;
- Correctly anticipate that this would be so for at least five seasons—without renegotiation; and
- Correctly anticipate that Celador Productions would accrue a “network deficit” on Millionaire’s network run resulting from the 10% overhead charge in the Rights Agreement.

See ER3754, ER3735-3745.
In fact, the key portion of each spreadsheet bears a striking similarity to the participation statements BVT would send to Smith and Celador Productions more than a year later, with “license fees” exactly equal to “production costs” and a “network deficit” of approximately 10%:

<table>
<thead>
<tr>
<th>PAUL SMITH DEFINITION</th>
<th>WMA MODIFIED GROSS DEFINITION</th>
</tr>
</thead>
<tbody>
<tr>
<td># of Episodes @ 1/2 hour</td>
<td>50</td>
</tr>
<tr>
<td># of Episodes @ 1 hour</td>
<td>44</td>
</tr>
<tr>
<td>PER EPISODE</td>
<td>Epis.</td>
</tr>
<tr>
<td>License Fee (1/2 hour)</td>
<td>167,900</td>
</tr>
<tr>
<td>License Fee (1 hour)</td>
<td>210,000</td>
</tr>
<tr>
<td>License Fee (1/2 hour)</td>
<td>196,875</td>
</tr>
<tr>
<td>License Fee (1 hour)</td>
<td>200,000</td>
</tr>
<tr>
<td>License Fee (1/2 hour)</td>
<td>206,716</td>
</tr>
<tr>
<td>License Fee (1 hour)</td>
<td>223,538</td>
</tr>
<tr>
<td>TOTAL LICENSE FEES</td>
<td>$19,500.43</td>
</tr>
<tr>
<td>PRODUCTION COSTS</td>
<td>$19,500.43</td>
</tr>
<tr>
<td>PRODUCTION OVERHEAD @ 10%</td>
<td>1,900,040</td>
</tr>
<tr>
<td>NET NETWORK</td>
<td>(1,940,049)</td>
</tr>
<tr>
<td>NETWORK DEFICIT</td>
<td>(1,900,049)</td>
</tr>
<tr>
<td>ADJ SYNDICATION*</td>
<td>22,090,000</td>
</tr>
<tr>
<td>SUBTOTAL SYNDICATION &amp; NETWORK</td>
<td>29,139,957</td>
</tr>
<tr>
<td>LESS DISTRIBUTION FEE**</td>
<td>32%</td>
</tr>
<tr>
<td>LESS DIST. EXPENSES</td>
<td>42%</td>
</tr>
<tr>
<td>DEFINED CONTINGENT COMPENSATION (DCC)</td>
<td>8,084,913</td>
</tr>
<tr>
<td>DUE PAUL SMITH (25% OF 100% OF DCC)</td>
<td>$2,091,228</td>
</tr>
<tr>
<td>ADJUSTED DEFINED RECEIPTS (12.5% DIST. FEE)</td>
<td>$1,652,458</td>
</tr>
</tbody>
</table>

ER3742; compare supra p.19. Other portions of the spreadsheets contain a season-by-season forecast of DCC and confirm WMA’s expectation that the network license fee would not be renegotiated and would remain equal to the cost of production. ER3754. Moreover, the only figure that meaningfully changes from one prediction to the next is the syndication value of the show (compare ER3737,
ER3738, and ER3739), confirming WMA’s understanding that the existence and amount of DCC was dependent on Millionaire’s performance in syndication.

In a pretrial order, the district court excluded these crucial documents as inauthentic under Federal Rule of Evidence 901. In a brief alternative holding, it also concluded that the spreadsheets should be excluded under Rule 403. Finally, after trial, the court decided for the first time that they were inadmissible hearsay. Each of these rulings was a manifest error of law.

1. Rule 901

Rule 901 requires only “evidence sufficient to support a finding that the matter in question is what its proponent claims.” Fed. R. Evid. 901(a) (emphasis added). Accordingly, “[t]he party seeking to have the evidence admitted need only make a prima facie showing of authenticity.” E.W. French & Sons, Inc. v. General Portland Inc., 885 F.2d 1392, 1398 (9th Cir. 1989). And because it is ultimately for the jury as “trier of facts to make its own determination,” Alexander Dawson, Inc., v. NLRB, 586 F.2d 1300, 1302 (9th Cir. 1978), the court must admit evidence so long as that prima facie showing is sufficient for “‘a reasonable juror [to] find in favor of authenticity,’” United States v. Black, 767 F.2d 1334, 1342 (9th Cir. 1985).

Like all evidentiary rulings, authenticity decisions are reviewed for abuse of discretion. Alexander Dawson, 586 F.2d at 1303. But a district court abuses its
discretion when it commits an error of law, United States v. Hinkson, 585 F.3d 1247, 1260-1261 (9th Cir. 2009) (en banc), and the question whether “any reasonable juror” could find a fact like authenticity is ultimately a legal question—it turns on the “same [sufficiency] standard applied by the court in entering judgment as a matter of law,” 2 McCormick on Evidence 7 n.18 (6th ed. 2006).

Accordingly, if this Court concludes that “there was competent evidence from which a reasonable mind could have concluded” that the spreadsheets were authentic, then “the trial court abused its discretion” in excluding them. United States v. Caldwell, 776 F.2d 989, 1001-1002 n.16 (11th Cir. 1985).

In any event, the exclusion of the spreadsheets was improper under any standard because the record contains far more evidence of authenticity than the law requires. Although the WMA employee who created the spreadsheets passed away before trial, Defendants introduced evidence showing that the spreadsheets had been produced by WMA in response to a subpoena, ER3475-3478; that electronic versions existed on WMA’s current server and back-up tapes from the relevant period, ER3453; ER3457; ER3463; ER3468; ER3472-3476; that the “file properties” in these versions showed which employees at WMA had authored (Anna MacInnis) and reviewed and printed (David Leffin) the documents, e.g., ER3459; ER3756-3785; that the files appeared on those employees’ personal sections of the WMA server and back-up tapes, ER3453-3454; ER3466-3468;
ER3471-3476; and that there was no evidence of forgery or alteration, ER3487-
3489, ER3510-3514.

After initially recognizing that Defendants had “sufficiently shown [the
spreadsheets’] authenticity,” ER3707-3708, the district court inexplicably reversed
course in its written decision. Although it acknowledged Defendants’ showing that
WMA employees created the documents at the relevant time and then produced
them from WMA’s archives in response to a subpoena, it excluded them based on
a purported absence of proof regarding “the purpose for which these Exhibits were
created or the accuracy and source of the information contained therein.” ER235-
236. This was reversible error.

a. The district court itself found facts sufficient for authentication

Because weighing the evidence is the province of the jury, not the court, the
threshold authenticity requirement is narrow. Weinstein’s Federal Evidence
§ 900.06[1][c][ii] (2d ed. 1997). It is not concerned with what a document means,
but rather what it is in the sense of being an unaltered writing genuinely connected
to the case, “typically, … [through] some specific connection to a person or
organization.” 2 McCormick 56-57. Once sufficient evidence of that connection is
offered, the document must be admitted without regard to questions about its
meaning or importance. Id. As the Third Circuit explained in a leading decision:
Although the [authenticity] rule requires that the document be free of suspicion, that suspicion does not go to the content of the document but rather to whether the document is what it purports to be .... Questions as to the documents’ content and completeness bear upon the weight to be accorded the evidence and do not affect the threshold question of authenticity.

*Threadgill v. Armstrong World Indus., Inc.*, 928 F.2d 1366, 1376 (3d Cir. 1991) (emphasis added; citation and internal quotation marks omitted). The district court’s concerns about the spreadsheets’ “purpose” and the “accuracy and source” of their contents thus were not authenticity concerns at all.

Indeed, because the spreadsheets were connected to the case through WMA, the most that was required to authenticate them was a prima facie showing that someone at WMA created them at the relevant time. But that is exactly what the district court itself found before trial: “Defendants have offered evidence showing that the Exhibits … were likely prepared by Ms. MacInnis [an accountant at WMA] in late 1999.” ER236. To nonetheless exclude the documents as inauthentic was manifest legal error. Indeed, Defendants have found no case holding an unaltered document inauthentic despite a prima facie showing of authorship, and this Court has described “[t]he issue of authenticity” as simply “the identity of the author of a particular item of evidence,” *Carbo v. United States*, 314 F.2d 718, 743 (9th Cir. 1963).

Inexplicably, the district court contradicted itself after post-trial briefing, stating that it now had “significant concerns about the Exhibits’ creator” because it
agreed with Plaintiff that testimony from WMA’s Lipstone and Leffin that they could not recall the documents “indicated substantial uncertainty about who created the[m].” ER6. But that gets the legal standard backwards: The relevant question is not whether Plaintiff raised “concerns,” but whether Defendants offered evidence sufficient to allow a reasonable juror to find the documents authentic. See, e.g., Jones v. National Am. Univ., 608 F.3d 1039, 1045 (8th Cir. 2010) (evidence that “no employee … was able to identify [the] author” of a document could not defeat prima facie showing of authorship). Moreover, the district court did not even acknowledge any of the compelling evidence of MacInnis’s authorship, including that: (1) MacInnis is identified as the spreadsheets’ creator in the “file properties” accompanying every electronic version of the documents, ER3470; ER3513; ER3756-3785; (2) several versions were discovered on MacInnis’s personal section of WMA’s back-up tapes, ER3472-3477; (3) WMA searched MacInnis’s and Leffin’s email to confirm that the initial version of the spreadsheets did not originate elsewhere, ER3490-3491; and (4) ABC’s principal contact with WMA testified that the spreadsheets did not come from ABC, ER3532. This was more than enough evidence to allow a reasonable juror to agree with the court’s own initial conclusion that MacInnis had created the spreadsheets.

Moreover, because the spreadsheets are connected to the case as evidence of WMA’s understanding, the simple fact that WMA possessed and produced them in
response to a subpoena was itself sufficient to satisfy Rule 901. As the Supreme Court has recognized, the mere act of production “in compliance with a subpoena” amounts to an implicit statement “that the papers existed, were in [the producing party’s] possession or control, and were authentic.” United States v. Hubbell, 530 U.S. 27, 36 (2000). Accordingly, this Court and others have repeatedly held that production by another party in discovery establishes authenticity. See Hangarter v. Provident Life & Accident Ins. Co., 373 F.3d 998, 1020 (9th Cir. 2004); Black, 767 F.2d at 1342; Burgess v. Premier Corp., 727 F.2d 826, 835-836 (9th Cir. 1984); Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 454 F. Supp. 2d 966, 972-973 (C.D. Cal. 2006); Weinstein § 901.04[3][c] & n.22 (collecting cases).

b. The district court’s other concerns were unfounded and unrelated to Rule 901

The district court therefore erred in requiring Defendants to establish the “purpose” of the spreadsheets and the “accuracy and source of the information” they contained, ER5; Rule 901 requires no such showings. That is especially true here because those factors had no bearing on the relevance of the spreadsheets as evidence of what they were offered to show—how WMA understood the Rights Agreement and how it expected Defendants to perform. In any event, Defendants introduced substantial evidence regarding the spreadsheets’ purpose and the circumstances under which they were created.
As an initial matter, the absence of a prima facie showing of the “purpose” for which the spreadsheets were prepared would not have affected their evidentiary value. The spreadsheets were relevant because they reveal how WMA forecasted the DCC calculation—and that is highly probative without regard to the particular reasons why it did so. In any event, Defendants demonstrated that the spreadsheets were likely prepared in connection with WMA’s negotiations with ABC over its package commission. When the spreadsheets were created, ABC had insisted that WMA could not earn more than its client, requiring the sort of side-by-side comparison found in the spreadsheets. ER3528-3529; ER3531-3533; ER3549. This explanation was confirmed by documentary evidence, including a WMA email noting that ABC had offered a commission equal to “10% of net based on Paul Smith’s definition.” ER3755 (emphasis added). The phrase “Paul Smith’s definition” appears only one other place in the record: the top of the excluded spreadsheets. ER3735-3754; supra p.59. The conclusion that WMA created the spreadsheets to compare its own likely compensation with Celador Productions’ is thus not only a reasonable inference, it is the only one supported by the record; neither the court nor the Plaintiff has ever suggested another.

The “source of the information” in the spreadsheets was also beside the point. What is important about the spreadsheets is not their particular numerical inputs, but what they reveal about how WMA understood the deal it had
negotiated. The source of the numbers used in that calculation in no way alters the
spreadsheets’ status as evidence of that understanding.20

Finally, the district court’s questions about the “accuracy” of the
spreadsheets were particularly inapposite. These forecasts were relevant because
of the understanding they disclosed when they were made—a question
unconnected to their ultimate accuracy. But there is also no question that the
spreadsheets’ forecasts were “accurate” in the only relevant sense: They correctly
predicted every aspect of Defendants’ performance about which Plaintiff now
complains, which is exactly why the jury needed to see them.

2. The district court’s alternative holdings

a. Rule 403

In a single paragraph, the district court held that the spreadsheets should also
be excluded under Rule 403 as “likely to cause juror confusion.” ER236; see also
ER8 (same). That holding was an abuse of discretion because it rested on two
mistakes of California law and failed to apply—or even acknowledge—Rule 403’s
requirement that the risk of “confusion of the issues” must “substantially
outweigh[]” the probative value of the evidence. Fed. R. Evid. 403.

20 The evidence nonetheless established that WMA learned the amount of
the license fee from ABC and BVT and knew from its own experience that the
production costs would equal that fee. ER3626-3627.
First, the court incorrectly held that the spreadsheets were of “limited value” because they were created after the Rights Agreement was signed. In fact, “conduct occurring between execution of the contract and a dispute about the meaning of the contract’s terms” is particularly strong evidence of “what the parties understood and intended those terms to mean.” *City of Hope*, 181 P.3d at 155; see ER116 (jury instruction). Accordingly, “[t]he practical interpretation of the contract by one party, evidenced by his words or acts, can be used against him on behalf of the other party.” *Southern Cal. Edison Co. v. Superior Ct.*, 37 Cal. App. 4th 839, 851 (1995). Here, the spreadsheets would have established that Celador Productions’ agent understood that the Rights Agreement was intended to operate exactly as Defendants contend. It is difficult to imagine more powerful evidence that Defendants’ interpretation of the contract was correct and that their conduct was not “objectively unreasonable.”

Second, the court suggested that the spreadsheets were of limited value and likely to cause confusion because of “ambiguities” regarding the “roles and motives of William Morris” when they were created—apparently referencing the fact that WMA was negotiating its own commission at the time. But that fact does not undermine the spreadsheets’ probative weight. As the court itself correctly instructed the jury, “[b]oth a principal and its agent are deemed to have notice of whatever either has notice of within the scope of its agency, and should, in good
faith and the exercise of ordinary care and diligence, communicate to the other.”
ER121; see Cal. Civ. Code § 2332. This standard encompasses all “‘matters in connection with the agency which the principal would desire to know about.’” Powell v. Goldsmith, 152 Cal. App. 3d 746, 750 (1984). There is, of course, no question that Celador Productions would have wanted to know the information reflected in the spreadsheets. Accordingly, even assuming that WMA acquired that information in connection with the negotiation of its commission, that information is still imputed to Celador Productions as a matter of law. See Columbia Pictures Corp. v. De Toth, 87 Cal. App. 2d 620, 631 (1948) (principal is charged with agent’s knowledge, whenever acquired, if it “can reasonably be said to be present in the mind of the agent while acting for the principal”).

Moreover, the spreadsheets would be highly probative even if WMA’s understanding were not imputed to Celador Productions. WMA is among the world’s leading agencies, was heavily involved in the negotiation of the Rights Agreement, and—because its compensation was tied to its client’s, ER3755—had every incentive to interpret the contract as favorably for Celador Productions as possible. The fact that such a party anticipated that Defendants would perform exactly as they did is strong evidence that their performance was in no way objectively unreasonable.
Finally, even if the district court had not made these legal errors, its exclusion of the spreadsheets on grounds of “juror confusion” would remain an abuse of discretion. Rule 403 requires a risk of “confusion of the issues” that “substantially outweigh[s]” the probative value of the documents. Here, however, the spreadsheets concededly went to the heart of the issues for trial: In Plaintiff’s words, they were “key, crucial document[s],” that Defendants might use “to essentially prove [their] interpretation of the contract.” ER3719-3720. Such critically probative evidence is unlikely to confuse the issues—indeed, it likely clarifies them—making this element of Rule 403 a doubly inapposite ground for exclusion. This is confirmed by the district court’s failure to offer any reasons why the spreadsheets might cause “confusion” other than the mistaken points of law discussed above.

In short, by invoking “juror confusion” here—when not even Plaintiff had done so—the court transformed itself from a gatekeeper into the ultimate arbiter of the value of evidence. It also violated this Court’s admonition that invocations of Rule 403 “must be cautious and sparing” because “[i]ts major function is limited to excluding matter of scant or cumulative probative force, dragged in by the heels for the sake of its prejudicial effect.” United States v. Hankey, 203 F.3d 1160, 1172 (9th Cir. 2000).
b. Hearsay

After post-trial briefing, the district court concluded for the first time that the spreadsheets were inadmissible hearsay. ER9-10. That belated holding cannot withstand even minimal scrutiny. As the court acknowledged, the spreadsheets were offered only to show WMA’s knowledge and understanding, not for the truth of their contents. ER9-10; ER3718. The court nonetheless stated that its uncertainties about the spreadsheets’ purpose and the source of their contents made them “insufficiently reliable to demonstrate what Plaintiff purportedly knew.” ER9. In other words, the court simply repeated its reasons for excluding the spreadsheets under Rules 901 and 403. Those reasons are wrong, as demonstrated above. But they would not establish a hearsay problem even if they were right: Where, as here, a statement is not “offered in evidence to prove the truth of the matter asserted,” Fed. R. Evid. 801(c), it is not hearsay, period.

B. The District Court Erroneously Excluded Evidence of Millionaire’s Financial Performance

At trial, Plaintiff sought to focus the jury on the contrast between two narrow aspects of Millionaire’s financial performance: its great success on ABC and its failure to produce non-merchandising DCC for Celador Productions. ER2765; ER2775; ER2781-2782. In response, Defendants attempted both to show that the parties’ bargain was far more favorable to Celador Productions than Plaintiff let on and to explain to the jury why Celador Productions did not earn
non-merchandising DCC. But the jury never learned the relevant facts because
Defendants were hamstrung by two evidentiary errors.

1. **The district court improperly excluded evidence of Celador Productions’ foreign revenues**

   Foreign licensing rights typically generate additional profits for producers,
increasing the size of the “pot” from which participants draw contingent
compensation. ER992-993. Here, however, Celador Productions itself retained
the valuable foreign format licensing rights for *Millionaire*. ER1256. The
financial significance of that decision was critical to understanding the parties’
bargain: Celador Productions not only kept a highly lucrative asset for itself, but
also eliminated a substantial source of potential profits for BVT and thereby
reduced its own chances of earning non-merchandising DCC.

   The district court barred Defendants from introducing any evidence of the
value of Celador Productions’ foreign rights, deeming the issue irrelevant because
“[t]here [wa]s no evidence that [Defendants] wanted any foreign rights.” ER29;
see ER207-208; ER247. But that premise is demonstrably wrong: Two witnesses
tested that BVT sought to “acquire worldwide rights” to *Millionaire* and was
unable to do so because “Celador wanted to retain those rights and was only
willing to grant the U.S. domestic rights.” ER1255-1256; see ER2539; ER2545-
2547. This testimony was confirmed by a BVT executive’s notes on a
conversation between ABC, BVT, and WMA, which stated: “We want WW [i.e.,
world-wide] rights, except UK.” ER3345. Although Defendants specifically cited this evidence in their post-trial briefs, ER278-279, the court simply ignored it—and gave no other basis for excluding evidence of Celador Productions’ foreign revenues as irrelevant.

In fact, the value of the foreign rights was highly relevant because it would have refuted Plaintiff’s repeated—and inaccurate—insinuations that ABC and BVT received a disproportionate share of the profits from Millionaire. In addition, it would have helped explain why, despite the show’s success on ABC, Celador Productions did not receive non-merchandising DCC.

2. The district court improperly excluded evidence of Millionaire’s performance in syndication

The district court compounded its error by depriving the jury of critical information about Millionaire’s performance in syndication. Plaintiff repeatedly urged the jury to infer that Defendants must have done something objectively unreasonable because Millionaire was “one of the most successful shows in the history of television” yet the non-merchandising DCC calculation showed an increasing deficit. ER2775. But this focus on Millionaire’s network success was misleading: As demonstrated above, Celador Productions’ right to non-merchandising DCC depended primarily on the show’s performance in syndication, not on the network. And, unfortunately, that performance did not match the show’s network success.
Because Millionaire’s relatively weak performance in syndication was critical to understanding why Celador Productions did not receive non-merchandising DCC, Defendants sought to introduce the deposition testimony of John Bryan, the BVT employee responsible for selling the syndicated version of the show. Bryan would have explained that, after Millionaire’s first year in syndication, a group of stations replaced it with other shows because of its low ratings, ER3075-3076; ER3083; that BVT had difficulty finding buyers in several major markets, ER3079-3084; and that the show’s ratings in New York were just “okay,” meaning that “[i]t wasn’t a miserable failure but it wasn’t a hit” like “Wheel of Fortune [or] Jeopardy,” ER3077.

Although this evidence would have provided a critical counterpoint to Plaintiff’s emphasis on Millionaire’s network success, the district court excluded it under Rule 403. ER210-211. The only “prejudice” the court identified, however, was the fact that it had precluded Plaintiff from claiming that ABC and BVT breached the implied covenant by failing to put the show into syndication earlier. ER210. But Plaintiff had waived that claim by failing to plead it, ER1465-1473, and the fact that Bryan’s testimony would have been relevant to a forfeited claim scarcely made it “unfair[ly] prejudicial” for Defendants to use it in responding to the claims Plaintiff was actually pressing. To the contrary, evidence is unfairly prejudicial only if it has a “tendency to suggest decision on an improper basis.”
Fed. R. Evid. 403 (advisory committee note). Bryan’s testimony raised no such concern, and the district court abused its discretion by excluding it.

*   *   *

These errors cannot be dismissed as harmless. An evidentiary error requires a new trial unless it “‘more probably than not’” had no effect on the verdict. *Boyd v. City & County of S.F.*, 576 F.3d 938, 943 (9th Cir. 2009). As explained above, the exclusion of the WMA spreadsheets could not have been more prejudicial; indeed, neither the district court nor Plaintiff has ever suggested that it might be deemed harmless. Similarly, the erroneous exclusion of evidence on *Millionaire*’s valuable foreign rights and disappointing performance in syndication allowed Plaintiff to paint a distorted picture of the parties’ bargain and to suggest to the jury that the absence of non-merchandising DCC was due to some misconduct by Defendants rather than the balance of risks and rewards that Celador Productions assumed when it negotiated the Rights Agreement.\(^1\) Whether viewed individually or collectively—as it must be, *see In re First Alliance Mortgage Co.*, 471 F.3d 977, 1000 (9th Cir. 2006)—the prejudicial effect of these errors demands a new trial.

\(^{1}\) In denying Defendants’ motion for a new trial, the district court held that any error in the exclusion of Celador Productions’ foreign revenues was harmless. The court did not deny the probative force of that evidence, relying solely on what it called “the substantial evidence supporting Plaintiff’s claims.” ER30. But, as demonstrated above, the evidence supporting Plaintiff’s claims was anything but “substantial.” *See supra* Part I.
III. **DEFENDANTS ARE ENTITLED TO A NEW TRIAL ON THE NETWORK-LICENSE CLAIM BECAUSE THE DISTRICT COURT ERRONEOUSLY ADMITTED PREJUDICIAL EXPERT TESTIMONY ON DAMAGES**

The district court also committed reversible error by allowing Plaintiff to present, through expert testimony, inflated damages estimates that were completely unsupported by the record. That testimony should have been excluded because an expert may not testify based on assumptions lacking record support.

**A. Plaintiff’s Back-To-Inception Calculations Were Inadmissible**

Although even the district court recognized that California law does not impose a duty of renegotiation, Plaintiff’s sole theory of damages was that, if ABC and BVT had renegotiated *Millionaire*’s license fee after the show became a hit, BVT would have received a higher fee—producing greater DCC for Celador Productions. Plaintiff called two expert witnesses to estimate the result of this hypothetical renegotiation. James Dertouzos, an economist, used an econometric model based on many other shows and estimated the fee at $2.4 million. ER1971. Marks, an entertainment lawyer, relied on a simple comparison with a single show—the scripted drama *Law & Order*—to hypothesize a fee of $3 million. ER1800. Plaintiff then called an accountant, Steven Sills, to translate these per-episode fees into estimates of Celador Productions’ damages.

Sills performed that calculation in two ways. First, as one would expect, he assessed the impact of applying these fees *after* the point at which Plaintiff
contended the renegotiation should have occurred: Episode 108. ER2091-2092. But in addition—and over Defendants’ objection, ER213-215—the district court allowed Sills to calculate for the jury the amount Celador Productions would have received if those same fees were applied retroactively to Millionaire’s very first episode. This “back-to-inception” approach produced vastly higher numbers than starting from the renegotiation point: The damages yielded by Dertouzos’s $2.4 million estimate went from $203 million to $289 million, and the result of Marks’s $3 million estimate went from $279 million to a staggering $396 million. See ER2087-2092. Predictably, Plaintiff featured the inflated back-to-inception numbers first—and prominently—in both Sills’s testimony, ER2085-2092, and its closing argument, ER2776-2777. Indeed, Plaintiff’s counsel urged the jury to apply whatever license fee it deemed appropriate “back to Episode 1,” asserting that “[i]t’s completely up to you.” ER2777.

Sills’s back-to-inception estimates should have been excluded because there was no record basis for a retroactive application of the hypothetical “renegotiated” fees. To the contrary, those figures purported to estimate the appropriate license fee after the show was an established hit. Marks specifically testified that his $3 million estimate “would not apply retroactively,” ER1801, and Dertouzos likewise explained that his model estimated the value of a show that “had reached maturity … by virtue of the number of episodes,” ER1971. No witness testified
that the full-cost-of-production fee ABC actually paid was too low at the show’s inception; every witness on this point—even Plaintiff’s expert—said exactly the opposite. ER597-598 (Silverman); ER984-988; ER1006 (Lipstone); ER1216-1217 (Loughery); ER1351-1352; ER1354; ER1376; ER1383-1385 (Marcus); ER1783; ER1846 (Marks). Thus, before the hypothetical renegotiation at Episode 108, Celador Productions was not even arguably damaged, making any award a windfall. See New W. Charter Middle Sch. v. Los Angeles Unified Sch. Dist., 187 Cal. App. 4th 831, 844 (2010) (contract damages may not exceed “‘the benefit which [the plaintiff] would have received had the promisor performed’”).

Neither Plaintiff nor the district court could identify any proper foundation for Sills’s back-to-inception numbers. The only basis they did identify was the claim that “ABC renegotiated the fees [paid to] WMA retroactively to Millionaire’s first episode.” ER34; see ER215; ER285. Even if true, however, that fact would be irrelevant. The discussions between WMA and ABC involved different entities negotiating a different agreement and using different numbers. Neither the district court nor Plaintiff has ever offered any legal support for the claim that freely choosing to renegotiate in one fashion with one entity creates a

\[22\] Even Episode 108 was an unsupportable renegotiation point. Plaintiff’s own expert (Dertouzos) testified that his econometric model established the absence of any significant relationship between episode number and renegotiation until some unspecified point between Episode 122 and Episode 500, and that he “could not draw any conclusions” regarding renegotiation before that point. ER2050.
legal obligation to renegotiate with another in the same manner. Moreover, the terms of that wholly separate renegotiation certainly could not justify the use of Marks’s and Dertouzos’s estimates in a manner they themselves disclaimed.

Remarkably, Plaintiff all but conceded this point. After eliciting Sills’s back-to-inception calculations and urging the jury to grant a retroactive award, Plaintiff walked away from those calculations in its post-trial briefing. There, Plaintiff dismissed “Sills’ damage model which applies a renegotiated license fee from Episode 1,” acknowledging instead that “[t]he great weight of the evidence pegged renegotiated license fees starting” only after the hypothetical renegotiation point. ER285-286 n.14 (emphasis added).

Despite the total lack of evidentiary support, the district court overruled Defendants’ objection, admitted Sills’s back-to-inception calculations, and allowed Plaintiff to display a chart characterizing those calculations as “Based upon … Expert Reports” ER216; ER2087. That was reversible error. In addition to ensuring that expert testimony is based on reliable methods, a district court also has a duty to confirm that it is “sufficiently tied to the facts of the case that it will aid the jury in resolving a factual dispute.” Daubert v. Merrill Dow Pharm., Inc., 509 U.S. 579, 591 (1993). Accordingly, “[i]t is an abuse of discretion to admit expert testimony which is based on assumptions lacking any factual foundation in the record.” Stecyk v. Bell Helicopter Textron, Inc., 295 F.3d 408, 414 (3d Cir.)
2002); see also, e.g., Boucher v. U.S. Suzuki Motor Corp., 73 F.3d 18, 22 (2d Cir. 1996). Where, as here, there is no record support for a “necessary predicate” for an expert’s damages calculation, that testimony is “too speculative to [be] submitted to the jury.” Baker v. Kroger Co., 784 F.2d 1172, 1176 (4th Cir. 1986); see United States v. Redlightning, 624 F.3d 1090, 1111 (9th Cir. 2010) (expert testimony inadmissible where plaintiff “did not sufficiently show how [the expert’s] testimony would have applied to the facts of his case”); LuMetta v. U.S. Robotics, Inc., 824 F.2d 768, 771 (9th Cir. 1987) (“[W]here foundational facts demonstrating relevancy … are not sufficiently established, exclusion of proffered expert testimony is justified.”).

B. The Error Was Not Harmless

Evidentiary error requires a new trial unless it is “‘more probable than not that the error did not materially affect the verdict.’” Boyd, 576 F.3d at 943. This Court is particularly hesitant to treat inappropriate damages evidence as harmless because it is usually impossible to discern the precise basis for the jury’s specific award; if it requires speculation to choose between competing conceptions of the award, a reviewing court is “unable to say ‘that the jury’s verdict is more probably than not untainted by the error.’” Dorn v. Burlington N. Santa Fe R.R. Co., 397 F.3d 1183, 1197 (9th Cir. 2005); see Uniloc USA, Inc. v. Microsoft Corp., 632 F.3d 1292, 1321 (Fed. Cir. 2011) (erroneous admission of inflated damages calculations
is prejudicial because it “lend[s] legitimacy” to a plaintiff’s request for a lower award); *Crane v. Crest Tankers, Inc.*, 47 F.3d 292, 297 (8th Cir. 1995) (collecting cases).

Here, the erroneous admission of estimates based on a back-to-inception methodology cannot be deemed harmless. Those estimates received the greatest attention in both Sills’s testimony, ER2085-2092, and Plaintiff’s closing argument, in which counsel used Sills’s chart detailing the retroactive calculation to tell the jury that it was “entitled to decide whether Celador should receive” a “renegotiation here back to Episode 1,” ER2777. There is no reason to believe that the jury declined this invitation or disregarded evidence featured so prominently by the Plaintiff. Indeed, it is “readily apparent that [an] error was not harmless” where the “improper testimony constituted a significant share of the damages evidence presented,” *Donlin v. Philips Lighting N. Am. Corp.*, 581 F.3d 73, 83 (3d Cir. 2009), or where “the wrongly admitted evidence was emphasized in arguments to the jury,” *Cameron v. City of N.Y.*, 598 F.3d 50, 61 (2d Cir. 2010).

This alone demonstrates that the admission of Sills’s back-to-inception scenarios cannot be dismissed as harmless. It is noteworthy, however, that the only other evidence that could possibly support an award even approaching $260 million—Marks’s $3 million estimate—was exceptionally weak. *See Elsayed Mukhtar v. California State Univ., Hayward*, 299 F.3d 1053, 1068 (9th Cir. 2002)
(erroneous admission of expert testimony was not harmless where the verdict otherwise rested on “less-than-convincing” evidence). Marks’s “methodology” was, at best, rudimentary: He reviewed a list of other highly rated shows from the relevant period, selected a single point of comparison—*Law & Order*—and then derived his $3 million estimate simply by assuming that the ratio between *Millionaire*’s license fee and the “spot price” for an advertisement on the show should have been identical to the ratio between *Law & Order*’s license fee and spot price. ER1799-1800. But *Law & Order* was a scripted program, and the uncontroverted evidence at trial established that, because of their different cost structures, the economics of such programs are entirely different from reality programs like *Millionaire*. See supra pp. 7-8. Plaintiff’s own economist so testified. ER1972-1974. There is no reason to think that the jury accepted Marks’s comparison of apples to oranges (or, more accurately, a single apple to a single orange) while rejecting the testimony of Plaintiff’s *own* economist, who engaged in a more rigorous version of the same exercise and came to a far lower estimate.23

Indeed, Plaintiff’s overall damages presentation was entirely conjectural. Despite advocating a $3 million per-episode license fee, neither Marks nor Plaintiff ever identified a single reality or game show with a license fee even approaching

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that range. Despite arguing for a license fee equal to three or four times Millionaire’s production costs, Plaintiff never identified a single show with a license fee greater than its cost of production. Nor did either of Plaintiff’s experts control at all for that critical variable, see ER2049, despite the fact that scripted dramas like Law & Order are clearly more expensive to make, see, e.g., ER1972. Under such conditions, Plaintiff’s inappropriate calculation of damages ranging up to nearly $400 million surely “len[t] legitimacy” to its plea for a nine-digit award. Uniloc, 632 F.3d at 1321.

IV. DEFENDANTS WERE ENTITLED TO JUDGMENT AS A MATTER OF LAW ON THE MERCHANDISING CLAIM

The jury also awarded $9 million on Plaintiff’s separate claim that Defendants breached the Rights Agreement (and the implied covenant) by deducting out-of-pocket expenses when calculating DCC from the sale of Millionaire merchandise. The merchandise—consisting primarily of computer games—was produced and sold by Disney-owned companies other than BVT. In calculating DCC, BVT included those affiliates’ revenues and costs in the DCC calculation, treating them as if they had been earned and incurred by BVT itself. ER2725. Plaintiff claimed that the Rights Agreement did not permit the deduction of any of the costs associated with merchandising.24

24 Ironically, this dispute arose only because BVT chose an accounting method that was particularly generous to Celador Productions. Consistent with
The relevant portion of the Rights Agreement, Exhibit B, provides that DCC is to be calculated by making five specific deductions from BVT’s revenues. ER3102. There is no dispute that, in calculating non-merchandising DCC, BVT was entitled to deduct both a distribution fee and actual expenses. Plaintiff claimed, however, that in calculating merchandising DCC, the express contract and implied covenant limited BVT to its percentage-based distribution fee alone. The district court had a duty to reject Plaintiff’s express-contract theory matter of law because the Rights Agreement is not reasonably susceptible to this interpretation. And because Plaintiff’s implied-covenant theory contradicts the express terms of the contract, it too fails as a matter of law.

A. The Verdict Cannot Be Sustained On An Express-Contract Theory

The Rights Agreement provides that DCC is calculated by making five specific deductions from BVT’s revenues. One of those deductions is for “[o]ut-of-pocket advertising, promotion and distribution expenses [directly] related to the industry practice, BVT could have calculated merchandising DCC by including as its revenue an imputed fair market royalty payment. ER2571-2573. Under this imputed-royalty method, BVT would have had no merchandising expenses to be deducted in calculating DCC, but its merchandising revenues would have been limited to the imputed royalty payments alone. By instead treating all of the affiliates’ revenues and costs as if they were its own, BVT chose an accounting method that turned out to be “three or four times better for Celador [Productions].” ER2726-2727; see ER2574; ER2652-2654.
Pilot and/or Series.” ER3102. Plaintiff’s merchandising claim turns on the proper interpretation of this provision: The expenses associated with Millionaire merchandise were properly deducted so long as they qualify as expenses “[directly] related to the Pilot and/or Series.” The district court erred in submitting this question to the jury over Defendants’ objection. ER179-182. Instead, the court should have interpreted the contract as a matter of law because both the text and the extrinsic evidence demonstrate that the Rights Agreement is not “‘reasonably susceptible’” to Plaintiff’s interpretation, F.B.T. Prods., 621 F.3d at 963, or, at a minimum, because there is no “material conflict in [the] extrinsic evidence,” Cachil Dehe Band, 618 F.3d at 1077.

1. **The text**

   *First*, the Rights Agreement makes clear that merchandising expenses are “[directly] related to the Pilot and/or Series,” and, therefore, deductible. The only provision of the contract giving Celador Productions *any* right to DCC provides that it is entitled to share in DCC “derived” from “the exploitation of any Pilot and Series.” ER3088. Plaintiff thus cannot dispute that merchandising revenues are “derived” from the “Pilot and Series”; otherwise, Celador Productions would not be entitled to DCC from merchandising at all. That should resolve the issue: If merchandising *revenues* are “derived” from the “Pilot and Series,” then it

---

25 A provision in the body of the Rights Agreement inserts the bracketed “directly” into this sentence of Exhibit B. ER3091.
necessarily follows that merchandising expenses are “[directly] related to the Pilot and/or Series.” If anything, the inclusion of “related to”—a “broad” term, *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992)—makes the expenses provision the more expansive of the two.

*Second,* the Rights Agreement provides that in calculating DCC, “costs and revenues in connection with merchandising shall not be cross-collateralized with costs and revenues related to the production of the Pilot and/or Series.” ER3089 (emphasis added). This clause cannot be reconciled with Plaintiff’s interpretation because, if Plaintiff were correct, there would be no “costs … in connection with merchandising.” The district court rejected this argument, reasoning that “‘costs’ may include expenses other than the distribution expenses” at issue here. ER47. But the Rights Agreement permits only five deductions in calculating DCC: (1) “BVT’s normal distribution fees”; (2) “[o]ut-of-pocket advertising, promotion, and distribution expenses [directly] related to the Pilot and/or Series”; (3) interest on development and production costs; (4) development and production costs plus overhead; and (5) WMA’s “[a]gency package fee.” ER3102. It is undisputed that the deductions for interest and development/production costs do not apply to merchandising, and both BVT’s distribution fees and WMA’s agency fee are percentage-based fees, not “costs” that could create a negative balance. Accordingly, if the deduction for “advertising, promotion, and distribution
expenses [directly] related to the Pilot and/or Series” did not apply to merchandising, the merchandising “costs” that the Rights Agreement expressly contemplates could never exist.

2. **The extrinsic evidence**

   Plaintiff’s interpretation is also contrary to the undisputed extrinsic evidence. There is no question that parties intended Celador Productions to be a “profit” participant, meaning that it was “to share in revenues less expenses.” ER999; see ER620-621. Accordingly, the agents who negotiated the contract understood that expenses associated with merchandising were deductible. Lipstone confirmed that Celador Productions was entitled to share in DCC only “after the deduction of merchandising expenses.” ER1000-1001. ABC’s Rierson stated that he had the same understanding and had discussed the issue with Celador Productions’ representatives during the negotiations. ER2214-2217. That testimony was corroborated by Rierson’s contemporaneous notes from a conversation with Petillo and Gregson, which state that “merchandising revenues can be subject to costs associated with merchandising and fees.” ER2214; see ER3312. Most importantly, Petillo confirmed that during the negotiations she requested a change in the contract language in an “attempt to have expenses included within the distribution fees, instead of on top of them”—that is, to adopt
precisely the position Plaintiff now advocates—but that her effort “did not prevail.” ER2376 (emphasis added); see ER2199-2200; ER3199.

Despite this powerful evidence confirming Defendants’ reading, the court held that Plaintiff’s interpretation could be submitted to the jury because four witnesses—Smith, Gregson, Plaintiff’s auditor Diana Crudeli, and Plaintiff’s expert Marks—testified to their “understanding that merchandising distribution expenses were not deductible.” ER48. But all of that testimony was legally irrelevant.

First, Smith and Gregson testified that they believed that the insertion of the word “directly” into the relevant paragraph of Exhibit B rendered merchandising expenses nondeductible. But they also conceded that they could not recall disclosing that understanding to Defendants during the negotiations. See ER891-892 (Smith had no “personal knowledge” as to whether his understanding “was communicated to [Defendants]”); ER3009 (Gregson “d[id]n’t recall having discussed” her understanding with “any … representative of ABC or BVT”). Their testimony thus constitutes the sort of “evidence of the undisclosed subjective intent of the parties” that is “irrelevant to determining the meaning of contractual language.” Winet, 4 Cal. App. 4th at 1166 n.3. 26

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26 Because Plaintiff relied on this testimony regarding the undisclosed subjective understanding of Celador Productions’ employees, the district court’s refusal to instruct the jury that such undisclosed-understanding evidence is irrelevant would require a new trial on the merchandising claim even if Defendants were not entitled to judgment as a matter of law. See supra Part I.D.
Second, the district court was correct thatCrudeli testified about her interpretation of the contract. But the court’s reliance on that testimony ignored its own limiting instruction, which provided that Crudeli’s interpretation of the contract could be considered only “for the purpose of understanding what [Crudeli] was doing” in the audit—not as evidence of the contract’s actual meaning. ER1443-1444. Moreover, Crudeli was instructed to adopt that interpretation by Celador Productions when it hired her, and she did no independent work to confirm it. ER1440-1442; ER1608-1609; ER3301.

Finally, Plaintiff’s expert Marks testified that he interpreted the contract not to permit the deduction of merchandising expenses. But it is hornbook law that expert testimony on the legal meaning of a contract is irrelevant. For example, in Cooper Cos. v. Transcontinental Insurance Co., the court held that “while the testimony of the parties’ experts regarding the scope of the disputed policy language differed,” the “relevant extrinsic evidence [wa]s not in dispute” because “the meaning of the policy is a question of law about which expert testimony is inappropriate.” 31 Cal. App. 4th 1094, 1100 (1995); accord Schaffter v. Creative Capital Leasing Group, LLC, 166 Cal. App. 4th 745, 752 n.2 (2008).27

27 Marks’s testimony also violated the Federal Rules of Evidence, which prohibit expert testimony on legal questions like the meaning of a contract’s text. See Elsayed Mukhtar, 299 F.3d at 1065 & n.10. Such inadmissible testimony “contributes nothing to [the] ‘legally sufficient evidentiary basis’” required to avoid judgment as a matter of law. Weisgram v. Marley Co., 528 U.S. 440, 454 (2000).
B. The Verdict Cannot Be Sustained On An Implied-Covenant Theory

The express terms of the contract thus call for the deduction of merchandising expenses in calculating DCC. That conclusion forecloses not only Plaintiff’s express-contract theory, but also any suggestion that Defendants breached the implied covenant: It is well settled that “if the defendant did what it was expressly given the right to do, there can be no breach” of the implied covenant. Wolf, 162 Cal. App. 4th at 1120; accord Carma, 826 P.2d at 728; ER117 (jury instruction).

Moreover, Plaintiff’s implied-covenant theory also failed as a matter of law because it was duplicative of its express-contract theory. Plaintiff’s theory was that Defendants breached the implied covenant by departing from a purported “industry custom” that merchandising expenses are deductible only if they are “specifically” identified as such in a contract. ER49. Under this theory, however, Defendants breached the implied covenant only if the express terms of the Rights Agreement did not permit the deduction. And where an “implied covenant claim seeks simply to invoke terms to which the parties did agree, it is superfluous” and should be dismissed. Guz, 8 P.3d at 1112; accord Bionghi v. Metropolitan Water Dist. of S. Cal., 70 Cal. App. 4th 1358, 1370 (1999); Careau & Co., 222 Cal. App. 3d at 1395.
V. THE ERRONEOUS EXCLUSION OF EVIDENCE THAT PLAINTIFF WAS NOT A PARTY TO THE RIGHTS AGREEMENT REQUIRES A NEW TRIAL ON ALL CLAIMS

The Rights Agreement was signed not by Plaintiff Celador International, but by Celador Productions—a distinct and now unaffiliated company, ER815-817. When it filed its complaint in 2004, Plaintiff alleged that its suit was proper because it was the “successor-in-interest to Celador Productions.” ER3803; see also ER3797-3798 (second amended complaint). As late as April 2006, Smith signed a sworn declaration stating that Celador Productions was Plaintiff’s “predecessor-in-interest.” ER3340. As Smith later acknowledged, however, that declaration and the allegations in Plaintiff’s complaint were false: “[T]he Rights Agreement was not transferred from Celador Productions to Celador International,” and Plaintiff is not the “successor” to Celador Productions in any other sense. ER784-785; see ER781; ER2731-2732.

In an attempt to solve this problem, Plaintiff sought to amend its complaint to add Celador Productions as a party in April 2009, just weeks before the trial was originally scheduled and long after the district court’s deadline for filing amended pleadings had expired. ER3845. The district court denied leave to amend, explaining that Plaintiff had failed to establish good cause for this delay. ER3786-3793. At trial, therefore, Plaintiff advanced a new theory contrary to its original complaint and Smith’s sworn declaration: It claimed that Plaintiff Celador
International had held the rights to *Millionaire* all along, despite the fact that Celador Productions had warranted in the Rights Agreement that it was the “exclusive” owner of the rights and had the “exclusive” right to convey them, ER3095; ER3098. Celador International further claimed that Celador Productions actually entered into the Rights Agreement on its behalf, “as the agent of an undisclosed principal.” ER2733-3734; see ER2741. The jury accepted this newly minted claim, ER83, and the court held that there was sufficient evidence to support the verdict based on testimony from Smith and Gregson. ER199-200; see ER14.

Defendants are entitled to a new trial because the court erroneously excluded a formal agreement between Celador International and Celador Productions that would have refuted this self-serving testimony. That document, referred to as the “Step One Agreement,” was a November 2006 contract prepared in anticipation of the sale of Celador International and signed by Smith on behalf of both companies. ER3313; ER3335-3337; see ER219. In a list of Celador Productions’ contracts, it identifies the parties to the Rights Agreement as ABC, BVT, Smith, and Celador Productions—not Celador International. ER3331. Consistent with the non-assignment provision in the Rights Agreement, moreover, the Step One Agreement identifies the Rights Agreement as a contract that could not be transferred from
Celador Productions to Celador International unless it was “novated”—an event that never occurred. ER3316; ER3331.

The Step One Agreement thus established that Celador Productions held the rights to Millionaire when the Rights Agreement was signed; that it entered into the contract only on its own behalf; that it continued to hold the rights as of November 2006; and that Plaintiff’s belated “undisclosed agent” theory was invented for this litigation. Yet the district court excluded this evidence on the ground that it was “not relevant to any issues before the jury.” ER248; see ER15; ER217-230. That holding is clearly wrong. Indeed, the court itself acknowledged that the Step One Agreement “weighs against the testimony” of Smith and Gregson. ER15. Evidence that impeaches the self-serving testimony of an opposing party’s key witnesses is relevant by definition—particularly where, as here, that testimony was the principal evidence supporting that party’s position on a dispositive issue.

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28 Prior to trial, and before the Step One Agreement had even been produced in discovery, Plaintiff moved to exclude all evidence of the sale of Celador International. Judge Cooper granted that motion in a terse order holding that “[e]vidence concerning the sale … is not relevant to any issues before the jury.” ER248. During trial and in denying Defendants’ post-trial motions, Judge Phillips refused to reconsider this order or interpret it not to apply to the Step One Agreement—which, as Judge Phillips herself appeared to acknowledge, indisputably is relevant. ER14-15; ER132-135; ER230.
The district court also appeared to hold, in the alternative, that even if the Step One Agreement was improperly excluded, the error was harmless because the Agreement “would not render the jury’s verdict ‘contrary to the clear weight of the evidence.’” ER15. As an initial matter, that holding reflects a basic confusion about the harmless-error standard. As the case quoted by the court makes clear, the fact that a verdict is “‘contrary to the clear weight of the evidence’” is an independent basis for a new trial, even absent evidentiary error. Molski v. M.J. Cable, Inc., 481 F.3d 724, 729 (9th Cir. 2007). Where, as here, the court has erroneously excluded evidence, a new trial is required unless it can be said that the error “‘more probably than not’” had no effect on the verdict, Boyd, 576 F.3d at 943—a standard far more likely to require retrial.

In any event, the erroneous exclusion of the Step One Agreement cannot be dismissed as harmless under any standard. The principal evidence supporting Plaintiff’s belated “undisclosed agent” theory was testimony from Smith and Gregson. Both witnesses had a direct financial stake in this case: Smith stands to receive 20% of the judgment (about $64 million), and Gregson approximately 5% (roughly $16 million). ER810-812. Smith’s testimony also contradicted his own sworn declaration and allegations made in complaints filed on his behalf, and Plaintiff offered no disinterested testimony to support its claim. Indeed, numerous witnesses involved in the negotiation of the Rights Agreement—including Celador
Productions’ own agents—testified that they had never even heard of Celador International or its predecessor, Entertainment Developments. ER629 (Silverman); ER970 (Lipstone); ER2209 (Rierson); ER2370 (Petillo). Under the circumstances, the erroneous exclusion of a formal agreement between Celador International and Celador Productions contradicting Smith’s and Gregson’s testimony demands a new trial. *Cf. Dean v. Trans World Airlines, Inc.*, 924 F.2d 805, 812 (9th Cir. 1991) (exclusion of impeachment evidence “was not harmless error” because of “the importance of [the] testimony” being impeached).

**CONCLUSION**

The judgment should be reversed and the case remanded with instructions to enter judgment as a matter of law for Defendants. Alternatively, the judgment should be vacated and the case remanded for a new trial.
Respectfully submitted.

/s/ Seth P. Waxman

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STATEMENT OF RELATED CASES

Plaintiff has filed a cross-appeal from the district court’s judgment, *Celador International, Inc. v. American Broadcasting Companies, Inc.*, No. 11-55172.

Other than the cross-appeal, Defendants are not aware of any cases pending in this Court that are related to this case as defined in Ninth Circuit Rule 28-2.6.
CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 28.1(e)(2)(A) and 32(a)(7)(C) and Ninth Circuit Rules 32-1 and 32-2, the undersigned hereby certifies that:

1. This brief is accompanied by a motion for leave to file an oversize brief pursuant to Ninth Circuit Rule 32-2 and contains 21,501 words, excluding portions exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the type size and type face requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6). The brief has been prepared in proportionally spaced typeface using Microsoft Word 2003 in 14 point Times New Roman font. As permitted by Federal Rule of Appellate Procedure 32(a)(7)(C)(i), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

/s/ Seth P. Waxman
SETH P. WAXMAN

July 26, 2011
CERTIFICATE OF SERVICE

I hereby certify that 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 on July 26, 2011. All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ Seth P. Waxman
SETH P. WAXMAN
ADDENDUM A

Statutory Addendum
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FEDERAL RULES OF EVIDENCE

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

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.

(d) Statements which are not hearsay. A statement is not hearsay if—

(1) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant’s testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with the declarant’s testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving the person; or

(2) Admission by party-opponent. The statement is offered against a party and is (A) the party’s own statement, in either an individual or a representative capacity or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party’s agent or servant concerning
a matter within the scope of the agency or employment, made during
the existence of the relationship, or (E) a statement by a coconspirator
of a party during the course and in furtherance of the conspiracy. The
contents of the statement shall be considered but are not alone
sufficient to establish the declarant’s authority under subdivision (C),
the agency or employment relationship and scope thereof under
subdivision (D), or the existence of the conspiracy and the
participation therein of the declarant and the party against whom the
statement is offered under subdivision (E).

Rule 901—Requirement of Authentication or Identification

(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.

(b) Illustrations. By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

(1) Testimony of witness with knowledge. Testimony that a matter
is what it is claimed to be.

(2) Nonexpert opinion on handwriting. Nonexpert opinion as to the
genuineness of handwriting, based upon familiarity not acquired for
purposes of the litigation.

(3) Comparison by trier or expert witness. Comparison by the trier
of fact or by expert witnesses with specimens which have been
authenticated.

(4) Distinctive characteristics and the like. Appearance, contents,
substance, internal patterns, or other distinctive characteristics, taken
in conjunction with circumstances.

(5) Voice identification. Identification of a voice, whether heard
firsthand or through mechanical or electronic transmission or
recording, by opinion based upon hearing the voice at any time under
circumstances connecting it with the alleged speaker.
(6) **Telephone conversations.** Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if (A) in the case of a person, circumstances, including self-identification, show the person answering to be the one called, or (B) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.

(7) **Public records or reports.** Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.

(8) **Ancient documents or data compilation.** Evidence that a document or data compilation, in any form, (A) is in such condition as to create no suspicion concerning its authenticity, (B) was in a place where it, if authentic, would likely be, and (C) has been in existence 20 years or more at the time it is offered.

(9) **Process or system.** Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.

(10) **Methods provided by statute or rule.** Any method of authentication or identification provided by Act of Congress or by other rules prescribed by the Supreme Court pursuant to statutory authority.
CALIFORNIA STATUTES

California Civil Code § 1636—Mutual intention to be given effect

A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful.

California Civil Code § 1639—Ascertainment of intention; written contracts

When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible; subject, however, to the other provisions of this Title.

California Civil Code § 2332—Notice to principal or agent as notice to the other

As against a principal, both principal and agent are deemed to have notice of whatever either has notice of, and ought, in good faith and the exercise of ordinary care and diligence, to communicate to the other.

California Civil Code § 3301—Certainty

No damages can be recovered for a breach of contract which are not clearly ascertainable in both their nature and origin.
ADDENDUM B

The Rights Agreement
(ER3085-3103)
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 is
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
"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 set 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, 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 one-time-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-
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 sublease 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 all 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 digitized 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 multimedia 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 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 hereeto, 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:**

**CELADOR PRODUCTIONS**

By: [Signature]

Its: VP, Business Affairs

**AMERICAN BROADCASTING COMPANIES, INC.**

By: [Signature]

Its: SR. PROGRAM ATTORNEY

**BUENA VISTA TELEVISION**

By: [Signature]

Its: VP, Business 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.

Paul Smith
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 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
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.

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.

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.

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.

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. 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.
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"
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 therefor 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.
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 practice 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.
ADDENDUM C

Cast of Characters
CAST OF CHARACTERS

Celador Productions

Paul Smith  Chairman and CEO of Celador Productions and Plaintiff Celador International at the time the Rights Agreement was negotiated

Sarah Gregson  Celador Productions’ in-house counsel

William Morris Agency

Greg Lipstone  WMA Vice-President and Celador Productions’ lead negotiator

Angela Petillo  WMA attorney who helped negotiate and draft the Rights Agreement

Ben Silverman  WMA agent who originally contacted Smith about representing Celador Productions

David Leffin  WMA’s Vice-President of Participations

Anna MacInnis  WMA employee in Leffin’s department and author of the WMA spreadsheets

Celador Productions’ Auditors

Steven Sills  Partner at Celador Productions’ auditing firm who also testified as a damages expert at trial

Diana Crudeli  Partner who led the day-to-day audit
ABC

Michael Davies  ABC’s Director of Alternative Programming who initiated discussions with Smith and WMA about Millionaire

Lee Bartlett  ABC’s Vice-President of Business Affairs and lead negotiator of the principal deal points

Lee Rierson  ABC attorney who drafted the Rights Agreement and negotiated the revisions

BVT

Mort Marcus  BVT’s President

Don Loughery  BVT’s head of Business Affairs

Lori Bernstein  BVT’s Senior Vice-President of Business Affairs

Stephanie Drachkovitch  Senior Vice-President of Programming at BVT’s sister company Buena Vista Productions
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.

On Appeal from the United States District Court
for the Central District of California, No. 2:04-cv-03541-VAP
Before the Honorable Virginia A. Phillips

REPLY AND RESPONSE BRIEF OF
DEFENDANTS-APPELLANTS / CROSS-APPELLEES
ABC, BVT, AND VALLEYCREST

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November 30, 2011
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INTRODUCTION

In 96 pages of briefing, Plaintiff does not quote—even once—the contract language on which this case actually turns. Instead, it takes the entire carefully negotiated and defined concept of “Defined Contingent Compensation” and replaces it with the word “profits.” Plaintiff’s need to rewrite the contract demonstrates that, as written, it is not reasonably susceptible to Plaintiff’s interpretation. The district court thus erred in sending that interpretation to the jury rather than rejecting it as a matter of law—an error subject to de novo review and correction here. That error requires at least retrial of Plaintiff’s implied-covenant claim because, having been allowed to misinterpret the contract, the jury was instructed to use the implied covenant to protect a bargain different from the one the parties struck. But more fundamentally, Defendants are entitled to judgment on the implied-covenant claim as well because the uncontradicted testimony demonstrates that Celador Productions’ own agents actually expected Defendants to perform precisely as they did.

Throughout its brief, Plaintiff recharacterizes the Agreement, isolating one revenue stream (the network run) from all others so as to claim that Defendants put Millionaire into a “guaranteed loss.” It thus relegates $21 million in network-broadcast and syndication payments to a footnote, and glosses over the undisputed testimony from every relevant witness that—according to the industry’s traditional
allocation of risks and rewards—producers like BVT and participants like Celador Productions expect to profit not from network-license fees, but from downstream sources like syndication, foreign licensing, and merchandising.

More generally, Plaintiff’s claims cannot survive the uncontradicted and unimpeached testimony of Celador Productions’ own agents at WMA. Plaintiff’s express-contract claim seeks to include ABC’s profits in DCC; Celador Productions’ agent testified that she knew they would not be included. ER2386. Plaintiff’s implied-covenant claim contends that the absence of network-run profits was objectively unreasonable; Celador Productions’ agent testified that it was exactly what he expected. ER987; ER1011; ER1017-1020. Plaintiff’s merchandising claim would prevent BVT from deducting its costs; Celador Productions’ agent testified that she sought exactly that result in negotiations but “did not prevail.” ER2376.

Confronted with this uncontradicted, unimpeached, and dispositive testimony, Plaintiff’s sole response is to invite this Court to disregard it based on a theory of bias unmentioned below and unsupported by any evidence. Plaintiff may be disappointed with WMA’s representation, but it cannot challenge the district court’s holding that WMA was Celador Productions’ exclusive agent. WMA’s understanding is imputed to its principal, and because WMA alone negotiated the
contract language, ignoring the agents’ undisputed testimony cannot be squared with any legitimate effort to determine the parties’ mutual intent.

Plaintiff’s aversion to any evidence reflecting WMA’s understanding is exemplified by its successful efforts to keep the WMA spreadsheets from the jury. Those spreadsheets would have further proved that—before any dispute—WMA fully anticipated every aspect of Defendants’ conduct that Plaintiff now attacks. They would have both provided critical evidence confirming that Plaintiff’s contract interpretation was untenable and shattered the argument that Defendants’ actions were “objectively unreasonable.” In this and other respects, however, erroneous trial rulings prevented Defendants from telling the jury the whole story.

One final point bears emphasis. A plaintiff’s right to sue is never a “distraction,” RB90, especially where, as here, the proper plaintiff’s claim was time-barred. The evidence excluded on this point not only went to a dispositive issue, it also showed that Plaintiff’s most important witness contradicted his sworn statements when they proved inconvenient. Such evidence cannot be “irrelevant,” and its exclusion alone would demand a new trial were judgment for Defendants not otherwise required.
ARGUMENT

I. THE NETWORK-LICENSE CLAIM MUST BE REJECTED OR RETRIED

A. Submitting Plaintiff’s Contract Interpretation To The Jury Was Reversible Error

Contract interpretation is for the court—not the jury—unless two conditions are met. First, “in light of the extrinsic evidence,” the contract must be “reasonably susceptible to the interpretation urged by the party.” *Halicki Films v. Sanderson Sales*, 547 F.3d 1213, 1223 (9th Cir. 2008). Lack of clarity is insufficient; Plaintiff must show that “the contract is reasonably susceptible of a particular meaning,” *id.; Winet v. Price*, 4 Cal.App.4th 1159, 1165 (1992) (for these purposes, “ambiguity” means “whether the language is ‘reasonably susceptible’ to the interpretation urged by a party”). Second, even if the contract is susceptible to Plaintiff’s reading, interpretation remains for the court unless there is a material conflict in the relevant extrinsic evidence. *Id. at 1166 & n.3.* “[E]ven [if] conflicting inferences may be drawn from the undisputed extrinsic evidence,” it is the court, not the jury, that must resolve those inferences. *Wolf v. Walt Disney Pictures*, 162 Cal.App.4th 1107, 1126 (2008).

Plaintiff’s response makes neither showing. Defendants are thus entitled to judgment in their favor for two separate reasons: first, because the text and extrinsic evidence demonstrate that the Agreement is not susceptible to Plaintiff’s interpretation; and second, because the evidence is not in conflict and Defendants’
interpretation better resolves any conflicting inferences. Either way, it was error to submit Plaintiff’s interpretation to the jury. The decision to do so is reviewed de novo on both grounds. *Brinderson-Newberg Joint Venture v. Pacific Erectors*, 971 F.2d 272, 277 (9th Cir. 1992) (reasonable susceptibility “is a matter of law that is reviewed de novo”); *Wagner v. Columbia Pictures*, 146 Cal.App.4th 586, 589 (2007) (“If the evidence is not in conflict but is subject to different interpretations then we do not defer to the trial court’s findings. Instead, we review the lower court’s interpretation de novo.”).

1. **The contract is not susceptible to Plaintiff’s interpretation**
   a. **The Rights Agreement does not pledge 50% of ABC’s profits**

   The premise of Plaintiff’s entire express-contract claim is that the Rights Agreement “explicitly says” that ABC was required “to share its Millionaire profits 50/50 with Celador.” RB23. But Plaintiff can only say that by rewriting the contract. As if nothing turns on the issue, Plaintiff asserts that “‘Defined Contingent Compensation’ is simply a profits definition,” and replaces it with “the common term ‘profits.’” RB11. Only this allows Plaintiff to claim that “the contract explicitly says [that] Celador shares in the profits ‘derived by ABC/BVT’” from Millionaire. RB23 (emphasis altered). But that is not what the contract says, “explicitly” or otherwise.
What the contract says is that Celador Productions “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.” ER3088. Exhibit B in turn defines DCC to include “all sums actually received by, or credited to, BVT” less certain deductions for BVT’s fees and costs. ER3102 (emphasis added). The contract thus entitles Celador Productions to 50% of BVT’s receipts after various deductions, not 50% of ABC’s receipts. In this $300 million contract dispute, Plaintiff never quotes this contract language.

Plaintiff makes much of the provision entitling Celador Productions to 50% of the DCC “derived by ABC/BVT,” arguing that this reference to ABC somehow overrides Exhibit B’s definition of DCC. RB25-26. But the quoted language does not address how DCC is to be calculated.1 That is the question in this case, and on that issue, the Agreement is absolutely clear: “Defined Contingent Compensation”

1 DCC is the product of a calculation that starts with BVT’s receipts and deducts certain amounts. Identifying the parties to whom DCC may be distributed (i.e., who “derives” it) says nothing about whether ABC’s receipts are properly an input into that calculation. Providing that Celador Productions would receive 50% of DCC “derived by ABC/BVT,” however, did ensure that Celador Productions would receive its full share of DCC (if any) regardless of how ABC and BVT might allocate the output of that calculation between themselves. For example, although ABC and BVT have agreed to share syndication profits, ER3291, the quoted contract language guarantees Celador Productions its portion of DCC irrespective of any such arrangement. Id.
is “defin[ed] … in Exhibit ‘B,’” ER3088, and is tied to “all sums actually received
by, or credited to, BVT.” ER3102. That was true when Celador Productions
signed the Agreement; it was true when it failed to object to the participation
statements reflecting only BVT’s receipts; and it remains true today.

Plaintiff cannot even articulate a coherent contrary interpretation. Its
express-contract theory is that “[t]he Rights Agreement requires ABC to share its
Millionaire profits 50/50” with Celador Productions. RB23. But Plaintiff
concedes that it was barred from claiming a contractual entitlement “to share
directly in ABC’s revenues,” ER239—not on some procedural technicality, as
Plaintiff suggests, RB4, but because Plaintiff never suggested that the Agreement
promised 50% of ABC’s revenue until five years into litigation, ER3795. As late
as March 2009, the district court regarded as “undisputed” that “Celador’s 50%
participation in DCC” was “tied to BVT’s revenues and profits.” ER263; RER37
(same). Plaintiff thus acknowledges that it could only claim “an indirect share of
ABC’s revenues … that should have flowed to [Celador Productions] through
BVT,” in the form of a “fair market” license. RB4. But that is not an express-
contract claim—the contract says nothing about what ABC should pay BVT.2 And

2 The contract cannot possibly entitle Celador Productions to 50% of ABC’s
profits “through BVT.” Because Celador Productions receives 50% of BVT’s net,
it could only end up with 50% of ABC’s profits “through BVT” if ABC paid BVT
at least 100% of its Millionaire receipts. Not even Plaintiff embraces that
conclusion.
in any event, once Plaintiff acknowledges that it could only claim profit-sharing “through BVT,” it disavows the very express-contract theory accepted by the jury, ER108-111, and urged upon this Court. RB23.

Nor is Plaintiff’s reading made reasonable by the contract’s reference to Exhibit B as containing “ABC/BVT’s standard definition.” RB24-25. ABC and BVT were both contracting parties and they—“collectively,” ER3085—defined DCC in Exhibit B by reference to BVT’s receipts. That ABC “adopted” Exhibit B, RB25, is reason to apply its definition according to its terms, not to change it.

b. Plaintiff’s interpretation conflicts with other contract terms

Other provisions of the Agreement provide textual confirmation that Celador Productions agreed to share BVT’s profits, not ABC’s.

First, the Agreement only allows Celador Productions to audit “BVT’s books and records,” not ABC’s. ER3091; ER3102. Unable to quarrel with this text, Plaintiff responds that “[t]he parties here understood the audit provision to apply to all Disney entities, including ABC.” RB30. But it cites no evidence of any such understanding. Plaintiff’s citations merely show that a Disney entity handles audits for affiliates, SER291; ER3037-3039, and that Celador Productions’ auditor looked at BVT’s receipts from ABC (not ABC’s own receipts or expenses) along with other documents relating to BVT’s rights and obligations, SER293; see also ER3300. That proves Defendants’ point: the only audit authorized or
undertaken was of revenues “received by, or credited to, BVT,” ER3102; see ER3280-3281; ER3301 (audit engagement letters referring only to BVT).

Second, Exhibit B’s DCC definition cannot even be applied coherently to ABC. The deductions it allows—BVT’s fees, distribution costs, production costs, and interest and overhead on production costs, ER3102—all apply to a production company like BVT, not a network like ABC. Exhibit B’s definition of DCC makes no allowance whatsoever for the cost of running a nationwide broadcast system, selling advertisements, or anything else a network does.3 Accordingly, Plaintiff’s theory that DCC included ABC’s profits must fail because the Agreement contains no measure of ABC’s profits at all.

c. **Plaintiff offers no basis to disregard Exhibit B**

Plaintiff’s other efforts to disregard Exhibit B’s express definition of what Celador Productions was to receive are equally unavailing.

First, Plaintiff contends that “[t]he typewritten Rights Agreement prevails over Exhibit B’s boilerplate form language.” RB28. In fact, as Plaintiff acknowledges, both Exhibit B and the Rights Agreement were derived from previous contracts. RB11; ER1056-1059. But more important, Exhibit B was not an unaltered form: not only was it thoroughly reviewed and changed “throughout

---

3 The only contractual deduction Plaintiff even ventures as a network cost is WMA’s package commission. RB30. But even that was paid by BVT, not ABC. ER3108; ER3115.
the negotiations,” ER990, the parties even exchanged redlines, ER3216; *compare* ER3199 (draft) *with* ER3102 (final).

Notably, Sarah Gregson—Celador Productions’ in-house counsel—carefully reviewed the very provision at issue and questioned why an initial draft referred to “all sums actually received/credited to, *BVP*” (BVT’s sister company), ER3307, resulting in a change from BVP to BVT in a subsequent draft. ER3216; ER3254. No one ever suggested adding ABC. Plaintiff responds that adding ABC was “unnecessary” because “ABC was already a contracting party.” RB29. But so was BVT. Had Celador Productions really believed it had struck an unprecedented agreement to share network receipts, it would never have bothered to substitute BVT for BVP while finding it “unnecessary” to mention ABC in that provision.

*Second*, although Plaintiff argues that ABC negotiator Lee Rierson “admitted” that Exhibit B and the Rights Agreement “conflicted,” RB25, Rierson in fact denied any pertinent conflict. When Plaintiff’s counsel pointed out that ¶3B(1) of the Agreement refers to Exhibit B as containing “ABC/BVT’s standard definition” while Exhibit B is *captioned* “BVT Defined Contingent Compensation,” Rierson said, “I guess you could call it a conflict,” ER1093. But Plaintiff omits that Rierson expressly rejected any *substantive* disagreement: “the definition [in Exhibit B] is referred to in that paragraph [¶3B(1)], so I wouldn’t call it in conflict.” ER1091.
Third, Plaintiff argues that Exhibit B must be incomplete because it “contains important blanks.” RB27. But the Rights Agreement elsewhere defines who would receive DCC (Celador Productions) and how much (50%), making it unnecessary to address those issues in Exhibit B itself. Instead, the Agreement incorporates Exhibit B for its complete and unambiguous definition of DCC, ER3088, which is unaffected by any “blanks.”

Fourth, Plaintiff argues the Agreement must be construed as a whole, RB26, and in favor of Celador Productions “as the benefitted party,” RB28. Both arguments beg the question. That contracts must be interpreted as a whole only confirms that Exhibit B’s controlling definition cannot be cast aside. And a profit-sharing provision does not “benefit” either party—it defines the allocation of benefits between them. The question is what formula the parties agreed on, and as the Agreement says, the answer is “set forth in Exhibit ‘B.’” ER3088.

Similarly, Exhibit B and the main body of the contract are not separate “agreements” as Plaintiff contends. RB26-27. The parties executed a single, complete agreement, ER3096-3097, and the main body itself makes Exhibit B indispensable by incorporating its definition of DCC, ER3088.

Fifth, Plaintiff misstates the legal standard and misrepresents the Agreement in arguing that “defendants’ reading makes network-run broadcast profits an impossibility,” and “[t]he jury could properly [have found] that the parties did not
intend a guaranteed no-profits outcome.” RB27. The legal question is whether the contract is “reasonably susceptible” to Plaintiff’s interpretation—an issue for the court, not the jury. But more important, the concept of “network-run broadcast profits” is a litigation construct reflected nowhere in the contract.

The Agreement directs two separate DCC calculations: one for merchandising, and one for everything else. ER3089. BVT’s fees and costs for the network run go into the “non-merchandising pot.” As WMA understood, ER987; ER1011; ER1017-1020, and BVT agreed, ER1384-1387, the network run was—as always—expected to yield an initial loss for this pot. From the producer’s perspective, the network run is not an independent source of profit, but rather an investment that establishes a show’s brand and enhances downstream revenue sources like syndication, foreign licensing, and merchandising. APB7-9; APB46. Plaintiff’s references to the “guaranteed loss” on “network-run broadcast profits” obscure the fact that BVT (and thus Celador Productions) could well have profited from the “non-merchandising pot”—the only relevant contractual category—had the show performed better in syndication or had BVT received its customary share of foreign rights. APB16-17; APB68-71; infra pp.47-49.

Finally, omitting key language, Plaintiff argues that television-industry history is irrelevant to Exhibit B’s interpretation because Exhibit B “rejects ‘any conventional understanding’ as ‘used in the entertainment industry.’” RB29.
What Exhibit B actually says is that “words and terms used in connection with Participant’s contingent participation … are intended to be understood and applied only as defined … and are not intended to correspond to any conventional understanding … whether used in the entertainment industry or any other.” ER3103 (emphasis added). This language makes Defendants’ point. Exhibit B’s definition of DCC is, by its terms, controlling. Neither industry practice nor “the common term ‘profits,’” RB11, can substitute for the Agreement’s actual definition. The extrinsic evidence, including industry history, is relevant here not to give DCC some special meaning, but to confirm that the Agreement means what it says and did not pledge the first-ever share of network profits without mentioning ABC or its profits in the controlling definition.

2. The extrinsic evidence does not conflict and confirms the error in submitting Plaintiff’s interpretation to the jury

Plaintiff’s contention (RB31) that “[s]ubstantial evidence supports the jury’s conclusion that the deal included ABC’s network profits” once again misstates the law and mischaracterizes the record.

As explained below, the extrinsic evidence overwhelmingly confirms that the contract cannot bear Plaintiff’s reading. But even if the text and extrinsic evidence left some doubt, that would not create a jury issue. Rather, “the trial court interprets the contract … even when conflicting inferences may be drawn from the undisputed evidence or that extrinsic evidence renders the contract terms
susceptible to more than one reasonable interpretation.” *Wolf*, 162 Cal.App.4th at 1126-1127. Absent a dispute about what the facts *are*, rather than what they *mean*, the court must interpret the agreement. *Winet*, 4 Cal.App.4th at 1166 & n.3. The dispute, moreover, must be material to the interpretive outcome to create a jury question. *Cachil Dehe Band v. California*, 618 F.3d 1066, 1077-1079 (9th Cir. 2010).

Plaintiff consistently ignores this inquiry, arguing that the “jury’s decision” was supported by “substantial evidence.” But because Plaintiff raises only conflicting *inferences*, not disputed *evidentiary facts*, the district court should have resolved these questions itself. Similarly, on appeal, where “the evidence is not in conflict, [the court] construe[s] the instrument, and … resolve[s] any conflicting inferences, [it]sel[f].” *ASP Props. v. Fard*, 133 Cal.App.4th 1257, 1267 (2005). Here, the inferences from the record—in particular, the unambiguous testimony of the agents who negotiated on Celador Productions’ behalf—overwhelmingly support Defendants’ interpretation.

1. *WMA Testimony*. There is no conflict in the most probative extrinsic evidence—the testimony from Celador Productions’ agents that they fully understood that ABC’s network revenues would not contribute to DCC. APB32-33. Petillo testified, without contradiction, that she “did not believe that the network’s ad revenue would go into the back-end pot” because it “never goes in.”
ER2386. Lipstone testified that the network-run input to DCC would be “the license fee that a network like ABC would pay” to BVT, ER2337-2338; ER987-988, not ABC’s receipts. He also agreed that while “the show was still on the network,” he “would expect for the everything-else pot to be in a negative position.” ER1011. Plaintiff points to no conflicting evidence regarding WMA’s understanding.4 Indeed, the silence is deafening: Plaintiff has no testimony from anyone who negotiated the contract language saying that they expected ABC’s revenues to be part of DCC.

Plaintiff is thus left to argue that “the jury did not have to believe the WMA witnesses.” RB34. But the possibility of disbelief cannot itself create a jury question where the testimony merely confirms what the contract says. Even more important, this testimony cannot be disregarded; juries and reviewing courts must credit “uncontradicted and unimpeached” testimony from “disinterested” witnesses. Reeves v. Sanderson Plumbing Prods., 530 U.S. 133, 151 (2000). And while Plaintiff now argues that the WMA witnesses were “interested” because of a purported incentive to curry favor with Disney, RB34-35, it never made that argument below, never cross-examined Lipstone or Petillo on this question, and never introduced any supporting evidence. Indeed, the only record evidence cuts

4 Plaintiff’s contention (RB35) that these “witnesses’ understanding was only how a ‘typical deal’ would work” simply mischaracterizes the testimony. ER2386; ER1011; ER1018-1020; ER2337-2338.
just the other way: Smith testified that he may sue WMA if he does not prevail, APB45; ER907, Petillo still worked there, ER2354, and although Lipstone had left, ER912, his career would hardly benefit from a malpractice suit.

Finally, even if Plaintiff’s argument had any record support, it would still fail. That a witness’s company “had been doing a substantial amount of business with [defendant],” is the type of “indirect interest … in the outcome of the case [that is] insufficient to create a credibility question requiring jury resolution.”


2. _Pre-Litigation Conduct._ It is undisputed that BVT began sending Celador Productions semiannual participation statements showing DCC calculated based on only BVT’s receipts in December 2000, ER3108; ER3118; ER3130, and yet Celador Productions never asserted that ABC’s revenues should have contributed to DCC until almost a decade later—five years into litigation. ER3795. Plaintiff’s sole response is to obscure the issue by arguing that “Celador questioned defendants’ accountings immediately and persistently.” RB37. But its “question[s]” had nothing to do with the manifest absence of ABC’s receipts from the participation statements. Celador Productions raised _other_ concerns, mostly concerning the size of merchandising deductions, APB19; ER1012-1014, but
despite this flyspecking, neither Celador Productions, nor WMA, nor the auditor ever claimed that ABC’s revenues belonged in DCC. APB19-20; Supra p.7.5

The letter from WMA’s David Leffin makes this unmistakable. It says he reviewed the first participation statement and the “Contingent Compensation section(s)” of the Rights Agreement and concluded that “the structure of the statement[] appears to comply with the terms of your contract.” ER3299. It even notes that “the contract defines gross receipts as ‘all sums actually received by, or credited to BVT from all sources worldwide,’” ER3300—the very language Plaintiff omits from its brief. Plaintiff argues that Leffin reserved judgment on “the reasonableness of some of the figures” and “some of the calculations.” RB38. But it is inconceivable that a sophisticated agency, which under Plaintiff’s argument had just negotiated an unprecedented network-profit sharing agreement, simply overlooked the absence of the network’s profits. That goes to the “general structure” of the deal, not “the reasonableness of some of the figures.” And again, this evidence is entirely consistent with what the contract says.

3. Pre-Contract Notes. Plaintiff places great weight on the pre-contract notes of ABC’s Lee Bartlett. RB23; RB31-32. But because their content is

5 Plaintiff suggests that its failure to object resulted from the pace of Disney’s audit responses. RB37. But no audit was needed to recognize the absence of ABC’s receipts from the statements, nor did the audit even seek information on ABC’s receipts. Supra pp.8-9.
undisputed, these notes cannot establish an evidentiary conflict for the jury.

Moreover, the inference Plaintiff would draw from them is baseless.

Plaintiff infers from the notation “Disney 50/50” under the “Network side” heading that Bartlett contemplated a 50/50 split of ABC’s profits. RB31-32. But that inference is unsupported. Rather, this is shorthand for what appears four lines above under the syndication heading: a “backend 50/50” split “per [the] Disney definition”—what would later be codified as 50% of DCC as defined in Exhibit B. “Network side,” moreover, is not a reference to network profits, but to the network run. Indeed, Plaintiff omits that it asked Bartlett what these notations meant—in 2006, before it ever claimed entitlement to ABC’s profits—and he gave exactly this explanation: “Network side[] mean[s] if it’s on the broadcast network” and
“Disney 50/50 means the *Disney definition* with a 50/50 split.” ER2973-2974 (emphases added).

Plaintiff’s inference—that “‘Disney’ could *only* mean ABC” (RB32)—is also wrong. Plaintiff again omits that it asked Bartlett why the notes refer to Disney, not ABC, and he explained that, as a network, ABC would not have its own DCC definition. ER2972. Moreover, Lipstone’s subsequent notes confirm that the “Disney definition” refers to the producer’s profits definition, not the network’s. They state that “BVTV [and not ABC] has the right to reduce” Celador Productions’ share by adding additional profit participants. ER3148-3149.

Thus, Plaintiff’s marquee documents only confirm the understanding stated in the Agreement: Celador Productions would be a participant with “BVTV” per the “Disney definition” in Exhibit B. Plaintiff’s contrary inferences do not withstand scrutiny, and would not create a jury question even if they did.

4. *Smith and Gregson.* Plaintiff also argues that “both Smith and … Gregson had plenty of direct contact with ABC,” implying that they conveyed to Defendants an understanding that Celador Productions would receive 50% of ABC’s profits. RB33-35. Plaintiff never actually says this, however, because any such contention isunsupported by the record. There is no evidence Gregson even held the belief that ABC’s profits would go into DCC, let alone communicated it. Her only recorded communication—to her agent, Petillo—reflects that her “understanding
of the basic deal terms,” ER3304, was that contingent compensation was limited by the definition of Defined Receipts in Exhibit B, ER3307. Indeed, Gregson deferred to Petillo, ER3031, who unequivocally testified that she believed ABC’s receipts would not go into the DCC pot because they “never” do, ER2386. And Smith’s purported beliefs are irrelevant uncommunicated subjective intent, APB33-34—when asked about DCC and Exhibit B, Smith admitted that he left the negotiations with Defendants to Lipstone and Petillo, ER466; ER663-664, and had no way to know what Defendants were told, ER753-756. That Smith was on a “late-stage” conference call, RB35, regarding other issues, SER225; ER2264-2268, that he could not even recall, ER750-756, provides no evidence that he communicated anything to anyone.

Plaintiff’s evidence that Smith wanted a “network deal” is also irrelevant. RB33. Smith made clear why he wanted a “network deal”: to ensure that Millionaire aired on network television. ER654-655; ER428; ER455; ER771. Throughout its brief, Plaintiff relies on the unsupported inference that “network deal” meant much more—a right to share in network profits. E.g., RB31; RB39. But once again, Plaintiff’s inference is baseless and would not create a jury question even if it had support.

5. Industry Custom. Finally, Plaintiff does not dispute that no network in television history had ever agreed to share its profits with a participant. Plaintiff’s
response that this deal was “unique” in having a network as a party, RB38-39, ignores the record, and misses the point.

The witnesses testified that networks do purchase program rights from participants and convey them to producers in a “layoff.” ER977; ER1080. Yet no network had ever agreed to share its revenue with a participant, “whether there was a layoff company or whether there wasn’t a layoff company.” ER1237.6 Having a network sign the deal was hardly unique, but even if it was, that would not support the inference that ABC entered the first-ever network-profits participation agreement without any discussion of the issue, without the knowledge of Celador Productions’ agents, without bothering to include ABC in the controlling definition, and without anyone suggesting—for years—that ABC’s revenues belonged on BVT’s participation statements.

3. **Plaintiff’s express-contract theory also fails because Plaintiff made no showing of damages**

As previously shown, APB38, Plaintiff’s express-contract claim also failed for the separate reason that Plaintiff offered no corresponding damages case. Plaintiff makes no response on this dispositive point: it does not dispute the legal requirement, and it concedes that it “did not present direct evidence of ABC’s advertising revenue.” RB72. It is unclear how Plaintiff’s statement that it “did not

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6 Plaintiff exaggerates Millionaire’s pre-contract success, implying that this required an unprecedented offer from ABC. RB38-39. As the district court found, no other U.S. network was even interested in Millionaire. SER3.
pursue” a direct claim on ABC’s receipts, RB74, could constitute anything other than a concession of the very express-contract theory presented to the jury. ER108-111.

Plaintiff would excuse its failure to present a corresponding damages case because “defendants insisted below, and the district court required, that Celador not directly claim a share of [ABC’s] revenues.” RB74. That cannot help Plaintiff. Defendants moved to exclude that evidence because “[i]t was not until January 12, 2009, two years after the close of discovery … that Plaintiff[] disclosed for the first time—in a footnote—a potential claim that Celador Productions was entitled to directly share in ABC’s revenues.” ER3795. The court agreed, and “precluded [Plaintiff] at trial from claiming they are entitled to share directly in ABC’s revenues.” ER239. The barrier to an adequate damages case on the express-contract theory was of Plaintiff’s own making, and it forecloses Plaintiff’s express-contract claim.

**B. Plaintiff’s Implied-Covenant Theory Failed As A Matter Of Law**

Plaintiff’s implied-covenant theory is that the network-license fees for *Millionaire* undercompensated BVT, and thus Celador Productions. Yet much of Plaintiff’s response is devoted to unsupported insinuations of bad faith that have no connection to that claim. Once these distractions are swept aside, it is clear that Defendants are entitled to judgment on the implied-covenant claim for two
Independent reasons. First, as a matter of law, conduct within “the reasonable expectation of the parties” cannot violate the covenant, *Wolf*, 162 Cal.App.4th at 1121, and the unimpeached, uncontradicted testimony shows that Celador Productions’ agent expected Defendants to perform exactly as they did. Second, it was Plaintiff’s burden to establish that Defendants’ conduct was “objectively unreasonable” by identifying some norm that Defendants violated, *Carma Developers v. Marathon*, 826 P.2d 710, 727 (Cal. 1992), and yet it still offers none.

1. Plaintiff’s insinuations of bad faith are unsupported and irrelevant

Plaintiff’s brief, like its jury arguments, focuses on unsupported attacks on Defendants’ integrity—“secret[]” “backdated” deals and “extracontractual machinations” undertaken in “bad faith” for the purpose of “cheat[ing]” Celador Productions, RB9; RB15; RB43-46 & n.11. All of this is a distraction not appropriately raised, lacking record support, and bearing no relation to the claim that BVT was undercompensated.

As an initial matter, Plaintiff makes no effort to explain how any of this is appropriately raised on appeal. The district court found no evidence of subjective bad faith, ER201, and thus instructed the jury only on objective unreasonableness, ER118. Plaintiff does not challenge the court’s conclusions. Even if it did, a jury verdict cannot be affirmed on an uninstructed theory. *E.g.*, *Reynolds Metals v. Yturbi, 258 F.2d 321, 327 n.8 (9th Cir. 1958).*
As the court’s holding suggests, Plaintiff’s insinuations are also baseless. ABC did not “unnecessarily transfer[] all of its rights … to BVT for nothing,” RB46, in some effort to “cheat” Celador Productions. Rather, consistent with WMA’s expectations, ABC and BVT effected a “layoff” allocating their respective rights so that ABC retained those needed by a broadcast network (i.e., the right to air the program) and BVT retained those needed by a producer (i.e., the right to make and sell it). Consistent with the industry’s typical allocation of risks and rewards, BVT received a network-license fee covering all its costs, leaving it with a no-risk opportunity to profit if the show’s popularity on network television led to downstream sales in syndication and merchandising. APB7-9; APB46. Celador Productions’ agent understood that such a layoff would occur. ER981; ER3164.

To make matters worse, Plaintiff never explains how its insinuations even relate to its contention that BVT was underpaid. The premise of Plaintiff’s implied-covenant theory is that ABC had to pay BVT a fair-market license fee—a fee ABC owed BVT only because of the layoff’s allocation of rights. Plaintiff cannot simultaneously claim that ABC should have paid BVT more money and attack the transaction that entitled BVT to a license fee in the first place.7

7 Similarly, Plaintiff’s contention that the “license-fee-equals-production-costs contract” was not properly documented (RB19; RB51 n.13) has nothing to do with the reasonableness of the fee actually paid. Nor is it defensible. The network license set a fee exactly equal to anticipated production costs and then allowed for overages. ER3287 (short-form); SER349-350 (long-form); ER3338 (budget);
Plaintiff also relies on its claim that, contrary to the text, the contract expressly promised 50% of ABC’s profits—repeating its earlier errors (and demonstrating that its implied-covenant claim cannot stand apart from its misreading of the text, infra pp.31-32). It contends, for example, that Defendants frustrated Celador Productions’ “contractual right to share Millionaire’s network-run broadcast profits.” RB39-40. But the contract contains no such right. The only relevant contractual concept is a single “pot” containing both network-run and syndication costs and receipts, and as Plaintiff does not dispute, Celador Productions could have earned DCC from this pot as a whole had Millionaire performed better in syndication. APB16-17; APB49.

Indeed, Lipstone testified without contradiction that he understood when he negotiated the deal that—viewed in isolation—the network run would result in a deficit for Celador Productions. ER987; ER1011.8 And all agree: the longer the run, the larger the deficit to be overcome in syndication. RB46; ER1018. But a longer network run builds a stronger brand for the show and generates greater per-episode fees for Celador Productions—$35,000 for every ABC broadcast. That

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8 Plaintiff mischaracterizes Lipstone’s testimony that he would not have agreed to a guaranteed loss on DCC. Lipstone was talking about DCC as a whole, not the network run alone. Compare RB27 with ER1029 (cited testimony); ER1011; ER1017-1020.
was the balance Lipstone negotiated for his client. ER1017-1020. Plaintiff obscures all this, casually asserting that Celador Productions received “nothing for ABC’s network broadcast and BVT’s syndication of Millionaire.” RB18. In fact, it received $250,000 upfront and per-episode fees totaling $21 million before trial. APB12; APB16.9

Finally, Plaintiff cannot avoid the contract’s express warning that “profits” for BVT or any exhibitor (i.e., ABC) do not guarantee that a participant will earn DCC. ER3103. Plaintiff’s response—“[n]o quarrel there,” because “there’s never any guarantee of success,” RB48—ignores the text, which required Celador Productions to “acknowledge[] and agree[] that there is no guarantee whatsoever [of] any … contingent participation as … defined herein, regardless of the level of income, revenues, profits and/or receipts, if any, that BVT or any … exhibitor realizes” from Millionaire. ER3103 (emphases added). The implied covenant is not a license to rewrite this or any other term.

2. **Plaintiff cannot identify any conduct that was “objectively unreasonable” or beyond the parties’ expectations**

Plaintiff argues that Defendants’ conduct was “not indisputably reasonable.” RB49. This inverts the standard. It was Plaintiff’s burden to present substantial evidence showing that Defendants engaged in identifiable, objectively

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9 Plaintiff’s footnote conceding this compensation wrongly asserts that it was merely for “Smith’s services.” RB18 n.4. Smith testified that these payments were “license fee[s]” covering “the right to acquire the format.” ER456.
unreasonable conduct that deprived Celador Productions of the benefit of its bargain. *Wolf*, 162 Cal.App.4th at 1121. Plaintiff resists this burden, arguing that “Defendants’ *overall* treatment of Plaintiff was objectively unreasonable.” RB49. But Plaintiff cannot insulate the judgment from review by declining to say what Defendants did wrong.

When Plaintiff finally turns to the specific conduct it proffers as implied-covenant violations, it cites no evidence that any was outside “the reasonable expectation of the parties” or “objectively unreasonable” by any identifiable measure. If basic principles of contract have any meaning, Plaintiff’s contentions cannot provide a basis for revising the deal the parties actually struck.

**a. Perpetual license**

Plaintiff’s contention that the perpetual network-license agreement between ABC and BVT was objectively unreasonable, RB49, fails as a matter of law. Lipstone testified he was aware the network-license agreement would be perpetual. APB41. Plaintiff argues that the jury could disbelieve that testimony and that Lipstone did not testify that perpetual licenses are “always reasonable.” RB50. But the jury was not entitled to simply disbelieve Lipstone’s uncontradicted and unimpeached testimony. *Supra* p.15. And it is irrelevant whether perpetual licenses are “always” reasonable because Lipstone testified that he (and thus
Celador Productions) actually knew that this license would be perpetual. ER1021. Conduct actually anticipated cannot frustrate expectations.

Moreover, Plaintiff failed to carry its burden to show that a perpetual license was inconsistent with any objective norm. Plaintiff’s only evidence on this point was Richard Marks’s testimony that industry custom on perpetual licenses was unsettled at the time. RB49. But Plaintiff, not Defendants, needed to show a settled industry custom because it pointed to no other objective norm by which the jury could have determined that Defendants’ conduct was “objectively unreasonable.”

**b. License fee**

Plaintiff’s contention that paying a license fee equal to production costs was “objectively unreasonable” likewise fails. Plaintiff did not cite any show in history whose network-license fee exceeded its production costs. All the relevant witnesses, including Celador Productions’ agents, agreed that network-license fees for unscripted programming were typically equal to (and sometimes below) production costs. APB42-43. That is consistent with the industry’s allocation of risks and rewards among networks and producers, APB7-9; APB46, and thus with the “reasonable expectations” that govern implied-covenant claims. Lipstone’s uncontradicted testimony was that he expected a network-run deficit, ER1011, and understood that network-license fees for non-scripted programs typically equaled production costs. ER985-987. Plaintiff’s citations to evidence about when
Lipstone learned that BVT would in fact get all its costs covered, ER937-942, and whether success affects the outcome of renegotiations for scripted television, ER2345-2346, do nothing to undercut his dispositive testimony that he expected a network-rum deficit. ER987; ER1011; ER1017-1020.

Apart from again attempting to disavow WMA’s testimony, Plaintiff argues that Marks “controverted” it. RB50. He did not. Although Marks said that “a license-fee-equals-production-cost arrangement, ‘just doesn’t make sense,’”’” RB50, his complete answer explained that a producer should not work “for basically just the costs and not even a fee,” ER1780; But BVT received a separate producer’s fee, making Marks’s answer irrelevant. APB43 n.12. Moreover, testimony about what generally “make[s] sense” or is “not a good place to finish” cannot overcome a showing that the negotiators actually expected this result.

In the face of undisputed evidence that a network-license fee equal to production costs is the best a producer hopes for in television, Plaintiff demurs that “[i]ndustry custom can be objectively unreasonable.” RB45 (citing Ladd v. Warner Bros. Entm’t, 184 Cal.App.4th 1298 (2010)). But this again evades Plaintiff’s burden. While Ladd suggests that compliance with industry custom is not an absolute defense, it does not relieve Plaintiff’s obligation to set forth some objective norm that Defendants violated. Plaintiff still offers none.
c. Failure to renegotiate

Plaintiff also contends that ABC and BVT acted unreasonably by failing to renegotiate their “perpetual” license. RB51-53. That argument fails as a matter of law—and common sense—on three grounds.

First, as the court correctly stated, “there is no obligation [under California law] to renegotiate a contract, and the case law is clear on that.” ER2490; APB47-48. Plaintiff would distinguish these cases on the ground that they dealt with a renegotiation between the opposing parties in the dispute, not third parties. RB51. The cases recognize no such distinction. The relevant principle is that contracts are meaningful precisely because they are binding during their terms.

Second, an implied-covenant violation is impossible because Lipstone testified that he actually knew ABC and BVT would enter into a perpetual network license, and that the purpose of such perpetual agreements was to avoid renegotiations. ER1020-1021. His testimony that he did not know “why you couldn’t renegotiate” a perpetual license, ER1027 (emphasis added), does not remotely suggest that anyone would expect such renegotiations to occur. Indeed, he said the opposite—that, typically, “resetting of license fees is characteristic of licenses that are for a set number of years.” ER2345-2346.

Third, Plaintiff once again fails to identify any evidence that Defendants’ conduct was “objectively unreasonable.” It cites an industry practice “to
renegotiate license fees on success,” RB51, but not perpetual contracts. Nor did ABC and BVT “renegotiate” the network-license fee. RB52. From day one, the license provided for a fee equal to the anticipated production costs plus any overages; payment of overages thus represented performance, not renegotiation. APB15 n.3; ER3287; SER350; ER1235.10 Unsurprisingly, no evidence suggests that renegotiating perpetual agreements is the objective norm.

**d. Syndication delays**

Finally, Plaintiff contends that Defendants violated the implied covenant by delaying Millionaire’s move to syndication. RB52. It omits that the district court barred it from pursuing this unpled theory. RER23-24; ER1455-1473.

**C. Alternatively, The Failure Of Plaintiff’s Express-Contract Theory Alone Requires A New Trial**

Even if this Court does not reject Plaintiff’s implied-covenant claim outright, the failure of Plaintiff’s express-contract theory would still require a new trial.

1. **The erroneous contract interpretation taints the implied-covenant verdict**

   In deciding the implied-covenant claim, the jury was instructed to answer whether “Defendants unfairly interfered with Celador International’s right to receive the benefits of the contract.” ER118 (emphasis added). Because the erroneous submission of Plaintiff’s express-contract theory allowed the jury to

10 Plaintiff’s reference to “per-episode production fees” adds nothing. Those fees covered additional producing services required from BVT. APB12; ER1299.
conclude that 50% of ABC’s revenues was among “the benefits of the contract,” the jury’s consideration of the implied-covenant claim was necessarily tainted. APB50-51.

Plaintiff’s response actually confirms that its implied-covenant claim depends upon its express-contract interpretation because it emphasizes that interpretation throughout its implied-covenant argument. RB40 (“The implied covenant barred [Defendants] from frustrating Celador’s contractual right to … broadcast profits.” (emphasis added)); RB43; RB44; RB52 (same). It nonetheless argues that there is no taint because the implied covenant protects beyond the contract’s “express terms” and, to the extent the jury might have confused the issue, Defendants should have sought a clarifying instruction. RB55. That misses the point: the jury’s erroneous contract interpretation led it to answer the question whether Celador Productions was denied the “benefits of the contract” based on a misunderstanding of the contract’s benefits. No instruction—short of rejecting Plaintiff’s erroneous interpretation of the contract—could have avoided that flaw. APB50-51.

2. The award separately fails as a general verdict

The failure of the express-contract claim also requires a new trial under Syufy Enterprises v. American Multicinema, 793 F.2d 990 (9th Cir. 1986). The verdict form does not include any specific finding of an implied-covenant violation
with respect to the network-license claim, ER86-99, and the network-license award might therefore rest on the erroneous express-contract theory alone. Such a verdict is “general” and cannot be upheld if any theory fails on appeal. *Syufy*, 793 F.2d at 1001; APB51-52.

Plaintiff’s procedural objections are wrong (Defendants did request a verdict form without these flaws, RER9-17), but also miss the point. Defendants are not challenging any “defect” in the verdict form. RB53-54. Rather, the error was submitting Plaintiff’s express-contract interpretation to the jury. *Syufy* concerns only its consequences.

Finally, Plaintiff argues that *Syufy* is inapplicable because one might discern that the jury rejected the implied-covenant theory on merchandising. RB54. This not only requires the speculation Plaintiff itself condemns, RB55, it is also the opposite of Plaintiff’s position below. RER7-8 (jury could “conclude, as it did, that Defendants breached the implied covenant” on merchandising).

**D. Failure To Give Essential Jury Instructions Requires Retrial**

Plaintiff does not dispute that failure to instruct on a party’s “theory of the case is reversible error if the theory is legally sound and evidence in the case makes it applicable.” *Smith v. Sumner*, 994 F.2d 1401, 1404 (9th Cir. 1993). This principle requires reversal.
1. **Uncommunicated Understanding.** Over objection, Plaintiff repeatedly elicited testimony about Smith’s and Gregson’s subjective understandings of the Rights Agreement—including Smith’s supposed belief that Celador Productions would share in ABC’s receipts. *E.g.*, ER484-486. Because a party’s undisclosed subjective beliefs are irrelevant, Defendants requested a jury instruction not to rely on such evidence without first determining that the understanding had been disclosed. Plaintiff does not dispute that such an instruction is legally correct; it argues instead that Defendants’ proposed instruction was different and “argumentative.” RB56-57. The text of the proposed instruction demonstrates that these contentions are meritless. ER304. It also demonstrates that, contrary to Plaintiff’s assertion, RB56, Defendants did not limit their request to any single witness or issue. Defendants noted Gregson’s testimony only as an example of the instruction’s importance. ER304.\(^{11}\)

Contrary to Plaintiff’s suggestion, it was not enough to instruct the jury to “decide what the *parties*—[plural]—intended,” RB57. Such pluralization does not remotely convey that what “the parties intended” is legally irrelevant unless they expressed those intentions to each other. The mistake is easy to make: the court itself

\(^{11}\) Nor did Defendants withdraw their objection. RB56. The court rejected the instruction, then sided with Defendants on a related issue, to which counsel responded, “Fine.” ER129. Neither Plaintiff nor the court suggested any waiver when this objection was reasserted post-trial. ER50.
twice relied on uncommunicated intent in its post-trial merchandising judgment—an error not even Plaintiff defends. *Infra* pp.57-58; APB83-84. Refusing this instruction invited the same prejudicial error on a $300 million claim. There is no justification for leaving this jury uninformed about such a critical rule of law.

2. **Renegotiation.** The district court rejected Plaintiff’s theory that ABC and BVT breached the implied covenant by failing to renegotiate the network-license fee between themselves. ER2489-2490. Yet the court refused to instruct the jury that this theory could not support a verdict. ER197. Plaintiff’s response that it contended only that the network license—not the Rights Agreement—should have been renegotiated is a non-sequitur: an obligation to renegotiate the network license is exactly what the court rejected. ER27; ER2490.

**II. EVIDENTIARY ERRORS REQUIRE RETRIAL**

A. **The WMA Spreadsheets**

Shortly after the Agreement was signed, and long before BVT’s first participation statement issued, WMA created a series of spreadsheets correctly anticipating every aspect of Defendants’ future performance that Plaintiff would attack at trial. These spreadsheets reflect the understanding that: (1) only BVT revenues would contribute to DCC; (2) license fees would equal production costs; (3) there would be no renegotiation for at least five seasons; (4) a “network deficit” would result; and (5) Celador Productions’ DCC would depend on syndication
revenues overcoming that deficit. APB55-57; RB46-48; ER3754. Excluding this critical evidence was reversible error. APB55-68.

Plaintiff’s principal response is a slanted account of the facts surrounding creation of the spreadsheets that attempts to undermine the probative weight of what even Plaintiff previously recognized were “key, crucial document[s].” ER3719-3720. But questions of meaning and weight are for the jury; they do not determine the admissibility of critical evidence. Fairly read, the record shows that Defendants made a far-more-than-sufficient evidentiary showing of the origin and significance of these documents. Defendants were thus entitled to present that theory to the jury.

That record shows that the spreadsheets were created by WMA accountant Anna MacInnis and reviewed by her supervisor Leffin. APB58-59; APB61. Their two-person group (ER3632) was responsible for “ensur[ing] … that [Celador Productions’] contingent compensation was properly calculated.” ER3571. When the first participation statement arrived—reflecting all the features correctly predicted in the spreadsheets—it was Leffin who reviewed it and, after consulting with Lipstone and Petillo, confirmed to Celador Productions that “the structure of the statement appears to comply with the terms of your contract.” ER3295-3296; ER3299. And MacInnis forwarded later statements with instructions to “call [her] … if you should have any questions.” ER3112. WMA represented Celador
Productions throughout this period, including in connection with review of the participation statements and the audit. ER3583-3584. The spreadsheets therefore confirm that Leffin wrote what he did because the first participation statement was exactly as Celador Productions’ agent expected in every relevant respect.

These documents were thus among the most important in Defendants’ case. That WMA anticipated all of Defendants’ disputed conduct would have fatally undermined the argument that these actions were “objectively unreasonable” and confirmed that Plaintiff’s interpretation of the contract is untenable. But the jury never saw these documents. Relying on MacInnis’s death and Leffin’s claim not to remember these devastating documents, Plaintiff pressed a misguided authenticity objection to keep them from the jury, and the court sustained it based on a misapplication of the standard. Plaintiff tries to save that holding with alternative grounds for exclusion, but none fares any better.

1. The spreadsheets were relevant

Plaintiff devotes much of its argument to litigating the spreadsheets’ meaning. RB59-62. These are all jury arguments—a reason to admit the evidence to the factfinder, not exclude it.

Plaintiff first disputes whether the spreadsheets even reflect WMA’s understanding, arguing that “no evidence” shows that “MacInnis did, in fact, create [them].” RB61. But Plaintiff concedes there is “forensic” evidence of MacInnis’s
authorship, including that: (1) the documents were located on WMA’s backup tapes; (2) MacInnis’s section of the server contained seven different versions; (3) the file properties identify MacInnis as the author of every iteration; and (4) “[a]nother employee” (MacInnis’s supervisor Leffin) viewed and printed the spreadsheet. APB58-59; RB59-60 & n.16. 12 Lipstone testified to his “[belief] that this document relates to a comparison between the Celador Productions definition and how it would operate and the [WMA] commission.” ER3583. Indeed, Plaintiff’s theory below was that the spreadsheets did reflect WMA’s understanding, but not Smith’s. ER3687-3688. Because the meaning of the document is a question for the jury if any evidence supports Defendants’ theory, Plaintiff’s concessions foreclose this argument.

Plaintiff next disputes whether WMA’s understanding should be imputed to Celador Productions, attacking MacInnis’s status as an agent and arguing that an adverse relationship existed between WMA and Celador Productions when the spreadsheets were created because WMA was negotiating its own commission. RB62-63. These arguments also fail.

First, they are procedurally improper. “The existence [and extent] of an agency relationship … are questions of fact for the jury[.]” E.g., California Viking

12 Plaintiff’s artful reference to “[a]nother WMA employee [who] reviewed and printed the file,” RB60, omits that—according to the same “forensic” evidence—that employee was Leffin, ER3459; ER3758.
Sprinkler v. Pacific Indem., 213 Cal.App.2d 844, 850 (1963). Thus, at most, this was a jury question. But here the court actually found and instructed that, “[i]n this case, the William Morris Agency acted as the agent for Celador Productions,” ER121, without limiting that instruction to negotiation of the Agreement or any particular individuals. Contrary factual assertions cannot justify affirmance. Supra p.23.

Second, Plaintiff omits essential facts. Lipstone testified, with documentary confirmation, that WMA’s pursuit of a package commission was disclosed to and authorized by Celador Productions, ER3559-3560; ER3615-3616, and that package-commission negotiations related to matters within the agency relationship, ER3617. Indeed, the package commission actually benefited Celador Productions by relieving it of the obligation to pay the usual 10% commission on its receipts. ER3592-3593.

Third, Plaintiff is wrong on the law. MacInnis’s individual status as agent is clear: “When an agent is itself a corporation or other legal person, … employees … designated to work on the principal’s account are subagents.” Restatement (Third) of Agency §3.15 cmt.b, at 273 (2006); Moss v. Ole South Real Estate, 933 F.2d 1300, 1312-1313 (5th Cir. 1991) (this is “black letter law”). The jury instruction was that WMA acted as agent, not particular individuals. Moreover, Leffin’s agency status is undisputed, and he possessed and reviewed the documents.

Nor is there any merit to Plaintiff’s adverseness argument. Under settled law, knowledge of “matters in connection with the agency which the principal
would desire to know about” is imputed, *Powell v. Goldsmith*, 152 Cal.App.3d 746, 750 (1984) (emphasis added), and Plaintiff does not dispute that Celador Productions would have wanted to know about the matters in the spreadsheets. It is irrelevant what was happening at the exact moment the spreadsheets were created; imputation turns not on when the understanding was acquired, but on whether it was “present in the mind of the agent while acting for the principal.” *O’Riordan v. Fed. Kemper Life Assurance*, 114 P.3d 753, 757 (Cal. 2005). Even if—contrary to the testimony—the spreadsheets’ *creation* was not part of the agency relationship, it is undisputed that WMA continued acting for Celador Productions long after their creation, ER3583-3584—specifically, in reviewing the participation statements, ER3570-3572. WMA’s knowledge relating to that representation is indisputably relevant to the agency relationship, reflected in the spreadsheets, and imputed to the principal.14

Finally, the spreadsheets were plainly relevant whether the understanding they reflect is imputed or not. The spreadsheets demonstrate that a sophisticated

13 Plaintiff misunderstands the adverseness rule. The California Supreme Court has explained that “cases holding that an agent’s knowledge is not imputed … when the agent is acting adversely” are applicable only where “the [third party] is acquainted with circumstances indicating that the agent will not advise his principal.” *Elfstrom v. New York Life*, 432 P.2d 731, 734-735 & n.3 (Cal. 1967). Plaintiff does not allege such circumstances here.

14 After settling with WMA, Plaintiff ratified the package-commission arrangement and retained its benefits, ER3610-3612, which also forecloses a claim of adverseness, see *Restatement (Third) of Agency* §5.04.
agency that would have benefited from *Plaintiff’s* interpretation, APB63, instead shared *Defendants’* understanding of how the Agreement would work. APB66. Plaintiff’s argument that “[s]uch third-party opinions are irrelevant,” RB61 n.19, misses the critical distinction between testimony about the meaning of express terms, *infra* p.58, and testimony about whether a party’s actions are reasonable for implied-covenant purposes. *Neal v. Farmers Ins. Exchange*, 582 P.2d 980, 987-988 (Cal. 1978). In deciding whether Defendants actions were “objectively unreasonable,” the jury was entitled to know that, despite a pecuniary interest in maximizing the contract’s value, Celador Productions’ own agent correctly anticipated every single element of which Plaintiff complained.

Moreover, by establishing that WMA’s understanding was long held, the spreadsheets would have refuted Plaintiff’s present suggestion that WMA witnesses testified falsely to favor Defendants, RB34-35; RB86. Indeed, explaining the spreadsheets at the Rule 104 hearing, Lipstone agreed that “William Morris understood that the license fee would equal the production costs,” ER3577-3578, and that this explained why they were equal in the spreadsheets, ER3626-3627. Having questioned the veracity of WMA’s uncontradicted testimony, Plaintiff cannot deny the “relevance” of documents that confirm it.
2. **The spreadsheets easily satisfied Rule 901**

Overwhelming authority holds that a document introduced to show an entity’s knowledge or understanding is typically authenticated by that entity’s act of production. APB61-62. Plaintiff’s sole response is that these cases *affirm* authentication by discovery production, but do not *require* it. RB67. That distinction is meaningless where the standard is “evidence sufficient to support a finding” of authenticity, Fed.R.Evid. 901(a), and this Court has found private possession of documents sufficient to affirm authentication. *United States v. Black*, 767 F.2d 1334, 1342 (9th Cir. 1985) (approving authentication on “[t]hat fact alone”).

In any event, Plaintiff does not dispute that a prima facie showing of authorship is sufficient and concedes there is “forensic evidence” of authorship. RB59-60. That should end the matter.

Rule 901(a) requires only a prima facie showing “that the matter in question is what its proponent claims”—here, in Plaintiff’s words, “document[s] prepared by Anna MacInnis [at WMA].” RER34. The evidence Plaintiff concedes, *supra* pp.37-38, alone established what the district court initially found—that “Defendants have offered evidence showing that the Exhibits were likely prepared

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15 Plaintiff’s only contrary authority is a 1980 Eastern District of Pennsylvania opinion *admitting* challenged documents and acknowledging that production in discovery “tends to authenticate the documents.” *Zenith Radio v. Matsushita*, 505 F. Supp. 1190, 1223. Its only case upholding exclusion involved a document to be authenticated not as the producing party’s, but as an ancient document. *Chemetall GMBH v. ZR Energy*, 320 F.3d 714, 722 (7th Cir. 2003).
by Ms. MacInnis in late 1999.” ER236. That compels reversal: under what
Plaintiff cites as the governing standard, RB66, if there “was competent evidence
from which a reasonable mind could have concluded [the] exhibit [was authentic]
… the trial court abused its discretion in excluding [it].” United States v. Caldwell,
776 F.2d 989, 1001 n.16 (11th Cir. 1985).

Plaintiff’s argument that the spreadsheets were properly excluded because its
own “expert testified that the computer records were untrustworthy,” RB66,
misconceives the inquiry. “Once the proponent has made the requisite showing,
the trial court should admit the exhibit … in spite of any issues the opponent has
raised,” because “[s]uch flaws go to the weight of the evidence instead of its
admissibility” and are for the jury to resolve. 5 Weinstein’s Federal Evidence
§901.02[3], at 901–17; United States v. Isiwele, 635 F.3d 196, 200 (5th Cir. 2011);
APB61.

If anything is “speculative,” RB66-67, it is Plaintiff’s assertion that someone
other than MacInnis created the spreadsheets. The disinterested IT specialist from
WMA testified that “Anna MacInnis is the author,” ER3483, the files so indicating
were reliable and unmodified, ER3510-3514, and Plaintiff counsel’s contrary
speculations were inconsistent with his years of experience at WMA. ER3516.
The record likewise refutes Plaintiff’s unsupported speculation that ABC created
the documents. Compare APB61 with RB60. But, for admissibility, the relevant
question is not who was ultimately right about this. Having made the required, prima facie showing, Defendants were entitled to present the documents to the jury and let it decide.

3. **Exclusion under Rule 403 was improper**

Rule 403 permits exclusion only if evidence’s probative value is “substantially outweighed” by, *inter alia*, “confusion of the issues, or misleading the jury.” *Compare* ER236 (omitting “substantially outweighed”). As previously demonstrated, the court’s one-paragraph ruling on this point rested on two errors of California law and struck an untenable balance between any supposed risk of “juror confusion” and the enormous probative value of the evidence. APB64-67. Plaintiff does not address these flaws or even mention the court’s juror-confusion rationale—indeed, it never argued juror confusion below. Instead, Plaintiff ventures that exclusion was appropriate because MacInnis had died, making the evidence “prejudicial.” Review is *de novo* because the district court performed no balancing on this factor. *United States v. Moran*, 493 F.3d 1002, 1013 (9th Cir. 2007).

Plaintiff offers no authority for its theory of prejudice, and Defendants are aware of none. Plaintiff complains that Defendants would have had “free rein to argue to the jury a meaning without any basis in fact,” RB68, but deciding between competing “argu[ments]” about “meaning” is precisely the jury’s role.
Plaintiff suggests the spreadsheets could have had an “improper … allure,” RB68, but fails to say what that allure would be; the spreadsheets are neither emotional nor inflammatory. That Defendants’ interpretation of the evidence is more convincing on the merits makes the spreadsheets probative, not “unfairly prejudicial.” *United States v. Hankey*, 203 F.3d 1160, 1172 (9th Cir. 2000).

4. **The spreadsheets were not hearsay**

After trial, the district court held for the first time that the spreadsheets were hearsay, but not even Plaintiff defends the court’s theory that its (erroneous) authenticity concerns also render the spreadsheets hearsay. ER9. Instead, Plaintiff raises a multiple-hearsay argument never argued below, RB64-66. But this new argument also fails because the spreadsheets simply are not hearsay under Rule 801(c). Hearsay status is a legal question reviewed *de novo*. *United States v. Collicott*, 92 F.3d 973, 978 (9th Cir. 1996).

A document introduced to demonstrate knowledge or belief, rather than the truth of that knowledge or belief, is not hearsay. 5 *Weinstein §801.11[5][a]* (“Statements are not hearsay when they are offered … to prove the extent of a declarant’s knowledge[.]”); *id. §801.11[5][c]* (“Words or conduct offered as circumstantial evidence of an actor’s beliefs” are not hearsay.); *United States v. Parry*, 649 F.2d 292, 294-295 (5th Cir. 1981). Defendants did not offer these spreadsheets to prove that the license fee in fact equaled production costs or that a
“network deficit” in fact resulted—those facts are undisputed. Instead, the spreadsheets were offered to show WMA’s understanding, shortly after the Agreement and before any dispute, regarding the relevant aspects of Defendants’ future performance. That understanding is evident from the spreadsheets themselves—which predicted Defendants’ actions a year before the first participation statement—not from believing the “truth” of anything they “assert.” The district court recognized as much at the Rule 104 hearing, observing that the spreadsheets were “not really being offered for the truth of the matter.” ER3706.

Moreover, because the documents themselves constitute the relevant evidence, they are admissible regardless of any alleged “layers” of out-of-court statements. That is precisely what this Court said in Gray v. First Winthrop, 82 F.3d 877, 885 & n.10 (9th Cir. 1996) (memorandum from Fisher to Brown, stating what Fisher “underst[oo]d from” Wolk, admissible for state of mind). A second, “unnamed speaker need not be identified to conclude that [a] statement is nonhearsay” where the overall document “[i]s not offered for its truth.” United States v. Ferguson, 653 F.3d 61, 87 (2d Cir. 2011).

Plaintiff’s mistake is demonstrated by its argument that the spreadsheets must be hearsay because “cross examination as to the how’s, what’s and wherefore’s of the spreadsheet’s assertions” would be useful. RB65. The relevant principle is not that documents are hearsay whenever testimony would clarify them...
(that is true of all documents), but that they are often hearsay when cross-examination is essential to test the credibility of their statements. 5 Weinstein §801.11[1]. Here, Plaintiff cannot identify any credibility issue because it is the mere fact that WMA created and reviewed these documents at the relevant time that shows WMA’s state of mind.

Finally, even if there were some hearsay use for the spreadsheets, that would not justify exclusion. Rather, a limiting instruction is “the appropriate way to limit the jury’s use of [nonhearsay statements].” Tennessee v. Street, 471 U.S. 409, 417 (1985).

B. Off-Network Performance

Plaintiff also cannot defend the exclusion of important evidence regarding Millionaire’s off-network performance in foreign licensing and syndication. As explained, supra p.12, the contract makes network-license fees one part of a larger “non-merchandising” pot that also included syndication revenues. Frequently, this pot would also include merchandising and foreign rights, but Celador Productions wanted merchandising treated separately and kept all foreign rights for itself. Defendants’ theory of the case was that, while these were enormous benefits to Celador Productions, removing these revenue streams increased the likelihood that the non-merchandising pot would show an overall deficit. The erroneous
exclusion of foreign licensing and syndication evidence hamstrung Defendants in presenting that explanation to the jury.

Plaintiff’s only response is to recite its unsupported contention that it had an independent right to receive network-run profits and to attack the evidence’s relevance to that theory. But a defendant is entitled to present its theory, United States v. Pineda-Doval, 614 F.3d 1019, 1032-1033 (9th Cir. 2010), and evidence is relevant if it tends to prove any fact relating thereto. Id.; United States v. Boulware, 384 F.3d 794, 805 & n.3 (9th Cir. 2004). Both categories of excluded evidence easily satisfy this standard.

1. Foreign licensing

Plaintiff concedes that the court’s only reason for excluding foreign-licensing evidence—that Defendants did not seek foreign rights—was wrong. Compare APB68-70 (court’s conclusion “demonstrably wrong”) with RB69 (“So what?”). Instead, Plaintiff argues that foreign rights “had no bearing” on its claim. RB70. That new argument is also wrong.

To respond to Plaintiff’s suggestion that “Hollywood accounting” kept Celador Productions from earning non-merchandising DCC, Defendants sought to show the jury how much non-merchandising DCC Celador Productions would have received if it had not retained all of Millionaire’s lucrative foreign rights for itself. This evidence would have shown that the absence of non-merchandising
DCC was attributable not to any allegedly unreasonable behavior by Defendants, but to Celador Productions’ decision to retain certain benefits entirely for itself. That evidence was central to the defense, and no court could hold it irrelevant absent the mistake Plaintiff now concedes.

2. Syndication

The exclusion of evidence about Millionaire’s syndication performance exacerbated this problem. The reality, which Plaintiff does not contest, is that Millionaire was not particularly successful in syndication. But the jury never heard why: syndicators quickly dropped Millionaire because of low ratings, BVT struggled finding major-market buyers, Millionaire “wasn’t a hit” like “Wheel of Fortune [or] Jeopardy,” and was outperformed by The People’s Court. ER3075-3084. This would have been highly probative in showing the jury that Millionaire unexpectedly bucked the trend for game shows and failed to match its network success in syndication, providing an essential counterpoint to Plaintiff’s singular focus on Millionaire’s network success.16

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16 Plaintiff also argues that this evidence was “prejudicial” because Plaintiff was barred from claiming that Millionaire was held out of syndication too long. But Plaintiff forfeited that claim by never pleading it, supra p.31, and such forfeiture cannot diminish the evidence’s importance to the defense of claims that were presented, APB71.
C. Harmlessness

Plaintiff does not dispute prejudice, waiving the issue. *Clem v. Lomeli*, 566 F.3d 1177, 1182 (9th Cir. 2009) (issue waived where appellee “failed to address prejudice in his answering brief”).

III. Plaintiff’s Introduction of Inadmissible Damages Evidence Requires Retrial

A. Sills’ Episode 1 Model And Testimony Were Inadmissible

It is an abuse of discretion to admit expert testimony based on assumptions lacking any foundation in the record. APB76. Nevertheless, over Defendants’ objection, Plaintiff introduced exhibits and expert testimony from Steven Sills that took the “fair market” license-fee approximations that Plaintiff’s other experts had calculated based on a hypothetical renegotiation between ABC and BVT at some point after Episode 108—figures those experts testified would not apply retroactively, ER1801; ER1971—and applied them retroactively to Millionaire’s first episode. The chart Sills created, with the caption “Based Upon … Expert Reports” and the number $395,635,556 in the bottom right corner, featured prominently in closing argument. ER2087; ER2776-2777. After trial, Plaintiff admitted that this presentation was inconsistent with “[t]he great weight of the evidence.” ER285-286 n.14. It now argues that the “Episode 1 assumption” was supported. RB75-77. But Plaintiff still offers not one authority tying the Episode 1 assumption to any legally permissible theory of contract damages, nor
any plausible justification for showing the jury a grossly inflated calculation inconsistent with even its own experts’ testimony.

Plaintiff’s argument is that it was acceptable for Sills to calculate a back-to-inception damages claim because Defendants renegotiated “retroactively” with other parties. RB75. Even if true, this is irrelevant as a matter of law. Contract damages are a measure of the harm to the Plaintiff resulting from the breach. Cal. Civ. Code §3300; *Coughlin v. Blair*, 262 P.2d 305, 314 (Cal. 1953). Here, Plaintiff’s alleged harm from the breach was ABC’s failure to pay BVT a “fair-market” network-license fee. RB72. But Plaintiff does not dispute that every witness, including Plaintiff’s experts, testified that the initial license fee was perfectly fair. APB74; RB75-77. Plaintiff identifies no contract-law theory on which different negotiations with a different party using far-smaller numbers under a different contract could justify taking a license-fee hypothesis specifically crafted “not [to] apply retroactively,” ER1801, and applying it retroactively.

All Plaintiff says—citing nothing—is that its “Episode 1 calculation is a damages estimate, not a theory of liability.” RB76. But that is precisely the problem: the “damages estimate” must estimate damages from the alleged breach, not seek windfalls. Cal. Civ. Code §3300. Celador Productions had no harm to remedy at Episode 1 because the initial license fee was concededly fair.
Plaintiff cites *GHK Associates v. Mayer Group*, 224 Cal.App.3d 856, 873 (1990), for the uncontroversial proposition that “the amount of damages need not be calculated with absolute certainty.” That does not authorize a party to submit damages calculations unsupported by the very expert testimony on which they rely, inflating the “estimate” by roughly $100 million. Indeed, *GHK Associates* confirms Plaintiff’s error by acknowledging another uncontroversial proposition—that a plaintiff cannot recover more than the value of the performance it claims was required. *Id.* at 874-875.

**B. The Error Was Prejudicial**

Plaintiff argues that the error was harmless because the jury’s award was below Sills’s Episode 1 estimates. That is insufficient to demonstrate harmlessness and ignores Plaintiff’s own argument against “inva[d]ing] the jury’s thought process.” *RB78*.

If conjecture is required to conclude that an award was based solely on proper evidence, then a reviewing court is “unable to say ‘that the jury’s verdict is more probably than not untainted by the error,’” and the judgment must be reversed. *Dorn v. BNSF*, 397 F.3d 1183, 1197 (9th Cir. 2005). In *Dorn*, evidence of “hedonic” damages was inappropriately admitted. The Court noted that “[m]athematically, the [award] could be construed” as denying “any award of hedonic damages,” but found that “such an interpretation would be founded on
conjecture,” and so rejected a harmlessness argument. *Id.* at 1196-1197. The same is true here. The jury did not accept any of Plaintiff’s proffered numbers, and as Plaintiff points out, *Id.*, this Court should not speculate about how the jury reached the amount it chose.

Even were such speculation permissible, there is substantial reason to believe that the inadmissible evidence affected the verdict.\(^{17}\)

*First*, presenting grossly inflated damages calculations ranging up to $400 million “len[t] legitimacy” to an enormous award. *Uniloc USA v. Microsoft*, 632 F.3d 1292, 1321 (Fed. Cir. 2011). Anchoring deliberations with such large, unsupportable numbers is inherently prejudicial.

*Second*, contrary to Plaintiff’s characterization, *Id.*, Plaintiff prominently featured the back-to-inception evidence. Plaintiff spent more trial time on the Episode 1 calculations, ER2085-2091, than the Episode 108 calculations, ER2091-2092, and likewise featured them first and more prominently in closing argument. ER2776-2778. *Cameron v. City of N.Y.*, 598 F.3d 50, 61 (2d Cir. 2010) (error not harmless where “the wrongly admitted evidence was emphasized in arguments to the jury”).

\(^{17}\) Plaintiff argues that substantial evidence supported the award, *Id.*, but this misses the point. Defendants have shown an evidentiary error, the question is whether that error was harmless, and Plaintiff’s cases and discussion do not concern harmlessness at all.
Third, Plaintiff’s experts reached different conclusions about the “fair-market” fee, and the evidence supporting the higher fee—which the jury would have needed to accept to reach its award without crediting the Episode 1 calculations—was unusually weak. See Mukhtar v. California State Univ., 299 F.3d 1053, 1068 (9th Cir. 2002) (expert testimony not harmless where other evidence was “less-than-convincing”). Marks’s $3 million hypothesis was predicated on comparing Millionaire to a single, manifestly different show, and was 25% higher than Plaintiff’s own statistical analysis. APB72-73. Even starting the calculation as early as Episode 108 was contrary to Plaintiff’s own statistical analysis. APB74 n.20. For harmless-error purposes, there is little reason to believe the jury credited Marks’s methodology over Plaintiff’s own economist’s.

Fourth, Plaintiff’s damage theory was weak overall. Seeking four times the cost of production at the end of the network run—and fifteen times the cost of production at the outset—Plaintiff could not identify a single show whose network-license fee ever exceeded its production costs by even a dollar. The uncontroverted testimony was that 100% of production costs was as good as it gets on network runs. APB42-43.

Ultimately, Plaintiff invited reversal when, over objection, it featured a grossly inflated damages calculation inconsistent with its own experts’ testimony. Its contention that this error should be disregarded on appeal is equally baseless.
IV. **Plaintiff’s Merchandising Claim Should Not Have Gone To The Jury**

The merchandising dispute turns on whether the Agreement permits deducting out-of-pocket merchandising costs. RB80-81. Plaintiff’s position is that merchandising costs were not deductible because they were implicitly included in BVT’s merchandising fee. RB80-81. But it cannot reconcile that theory with Petillo’s uncontradicted and unimpeached testimony that she sought exactly this result for Celador Productions in negotiations—that “expenses [be] included within the distribution fees, instead of on top of them”—and “did not prevail.” ER2376.

The Agreement—especially in light of this undisputed evidence—is not reasonably susceptible to Plaintiff’s reading. But even if it were, Plaintiff cannot identify any conflict in the material extrinsic evidence, making it error to submit this claim to the jury. Review is *de novo*. *Supra* pp.4-5.

A. **Text**

The text refutes Plaintiff’s reading in three respects:

*First*, it would transform a profit-sharing agreement into a revenue-sharing agreement—contrary to Plaintiff’s own position, RB11. Under Plaintiff’s view,

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18 Plaintiff no longer argues that it has a viable implied-covenant claim on merchandising. APB85-86; RB80-86; RB54.
BVT could lose money on a merchandising campaign and still owe Celador Productions a large percentage of its gross receipts. Nothing supports this view.

Second, Plaintiff’s interpretation reads language entirely out of the contract. The “separate pot” provision says that “costs and revenues in connection with merchandising shall not be cross-collateralized.” ER3089 (emphasis added). This language expressly contemplates deducting merchandising costs. Plaintiff suggests that, here, “costs” means BVT’s “fees.” But as Plaintiff itself points out, when different words are used “the rule of construction is that the words have different meanings.” RB84.

Third, Plaintiff’s interpretation is linguistically untenable. Plaintiff does not dispute that Celador Productions only receives DCC “derived” from “the exploitation of any Pilot and Series,” ER3088, and therefore must agree that the “Pilot and Series” language includes merchandising. But virtually identical language is used in the contested deduction, ER3102 ¶2 (“the Pilot and/or Series”), so that provision must also include merchandising. Plaintiff is thus left to argue that the phrase “derived from” is necessarily broader than “directly related to.” RB84. That contention, however, is at odds with common usage, the other terms of the agreement, and the testimony of Celador Productions’ own agent.

Moreover, Plaintiff’s argument that Exhibit B “distinguishes” between “the episodes of the Series” and “ancillary and subsidiary rights” is backwards. RB82;
RB84. While Exhibit B identifies them separately, it treats both as “Defined Receipts,” and subjects all “Defined Receipts” to the same deductions. ER3102. The fact that Defined Receipts refers separately to “episode” and “ancillary” revenues, but the relevant deduction does not use those words, only confirms that the deduction does not make the same distinction, and instead applies to “episode” costs and “ancillary” costs alike.

B. Extrinsic Evidence

The extrinsic evidence also forecloses Plaintiff’s interpretation. The witnesses who negotiated the contract testified that merchandising costs were deductible, Petillo confirmed that this issue was raised and resolved in negotiations, and Rierson’s notes memorialize this communicated intent. APB82-83. Plaintiff offers no relevant contrary testimony from anyone affiliated with either party. RB85-86. Indeed, while Plaintiff claims there is a dispute about why the word “directly” was added to Exhibit B, the only testimony it cites on this point is from Defendant’s expert. RB86 (citing ER2597). If that addition was intended to create the odd effects identified above, there would be some evidence that this intent was discussed in negotiations.

The court nonetheless found a conflict in the extrinsic evidence based on four witnesses’ testimony. ER48. As previously shown, all this testimony was irrelevant: Smith’s and Gregson’s because it was admittedly undisclosed subjective
understanding; Crudeli’s because she was instructed to take that position for her audit; and Marks’s because, as an expert, he could not testify to the parties’ intent. APB83-85. Plaintiff abandons the first three, relying solely on Marks. RB85-86. But his testimony could not create a material conflict in the relevant extrinsic evidence; indeed, Plaintiff does not even discuss the authorities Defendants cited for the proposition that expert testimony does not create a conflict in extrinsic evidence for purposes of contract interpretation. APB84-85 & n.25.

Plaintiff does cite one case for the undisputed proposition that Marks could testify regarding the facts of industry custom and practice. RB85-86. But that does not allow Marks to offer his opinion on the legal question of contract meaning. E.g., Summers v. A.L. Gilbert, 69 Cal.App.4th 1155, 1178-1182 (1999). And contrary to Plaintiff’s suggestion, RB85, that is exactly what Marks did. ER1805-1806 (stating “opinion” about whether provisions “apply to merchandising”). Plaintiff does not even state what fact about industry custom Marks was asserting, nor how that conflicted with any other testimony. RB85-86.

Most important, this kind of expert testimony cannot conflict with evidence of the parties’ actual understanding, like Petillo’s admission that she “did not prevail” in seeking Plaintiff’s now-asserted outcome in negotiations. ER2376. As with the network-license claim, Plaintiff identifies only contested (and implausible) inferences based on non-conflicting evidence. This claim should not have gone to the jury.
V. EXCLUSION OF EVIDENCE ON PLAINTIFF’S RIGHT TO SUE REQUIRES RETRIAL

Because Celador Productions signed the Rights Agreement and is identified as the contracting party and owner of the rights, ER3085; ER3095-3096, Plaintiff Celador International’s right to sue was suspect from the start. Plaintiff’s Complaints averred that it could sue as the “successor-in-interest to Celador Productions,” ER3803; ER3797-3798, and Smith signed a sworn declaration to that effect, ER3340. But Smith later acknowledged this was false, ER784-785; ER781; ER2731-2732, and when an effort was made to “moot” this issue by adding Celador Productions and relating back its by-then-untimely suit, leave to amend was denied for lack of good cause, ER3786-3793. Plaintiff could thus sue only if it proved an entirely new contention first proffered four years into litigation: that, contrary to its own earlier assertions, Celador International held the Millionaire rights all along, and Celador Productions only signed on its behalf “as the agent of an undisclosed principal.” ER2733-2734; ER83.

The only testimony supporting this newly-minted theory came from interested witnesses with millions at stake: Smith ($64 million) and Gregson ($16 million). APB89. Meanwhile, discovery yielded a document—signed by Smith himself—that proved this testimony untruthful. ER3313-3337; see ER219. As Plaintiff concedes, the 2006 “Step One Agreement,” prepared in anticipation of Celador International’s sale, “appears to describe numerous rights as among [the]
commonly-owned entities.” RB88. In fact, it identifies the parties to the Rights Agreement as ABC, BVT, Smith, and Celador Productions—not Celador International, ER3331—and shows that Celador Productions owned the Rights Agreement and could not transfer it without a novation. ER3316; ER3331. This evidence could hardly be more relevant. It showed not only that Plaintiff’s key witness was untrustworthy, but also that, in truth, Celador Productions held the Millionaire rights and owned the Agreement at all relevant times, and was the only party who could assert its now time-barred claim.

The court excluded this evidence as “not relevant to any issues before the jury.” ER15; ER248. As Defendants explained, APB87-88, that holding is indefensible, especially because the court acknowledged that it “weighs against the testimony” of Smith and Gregson. ER15.

Plaintiff’s response demonstrates the importance of this evidence by assuming the truth of the very fact it was offered to dispute. Plaintiff argues that Celador Productions must have signed as Celador International’s agent because Celador International owned Millionaire’s rights and the contract would otherwise have failed to transfer them. RB87-88 (citing Smith and Gregson). But Defendants’ position is that this is untrue—that Celador Productions had held the Millionaire rights since receiving them in 1998 from Celador International’s predecessor in connection with the U.K. show, ER413; ER2796, and so signed the
Rights Agreement for itself. The Step One Agreement, an official legal document between Celador Productions and Celador International, would have proved it. This is precisely why Defendants needed to show it to the jury when Smith took the stand to offer his revisionist account. ER477-479.

Because this evidence clearly was relevant—and critically so—Plaintiff offers meritless alternative grounds for affirmance.

Plaintiff first argues that Defendants “cannot claim error” because they never proffered evidence on the existence and meaning of a Welsh “novation.” RB88. But Plaintiff admitted by interrogatory that Celador Productions never transferred the Agreement to Celador International, ER2732, making such a proffer unnecessary. The only relevant point is that Smith stated in an important legal document that Celador Productions owned the Agreement throughout the suit.

Plaintiff next invokes Rule 403. RB89. “To the extent the ruling was based on Rule 403, [this Court] review[s] it de novo because the court did not engage in explicit balancing of the Rule 403 factors.” Moran, 493 F.3d at 1013; see ER15; ER248; ER230. Plaintiff’s only argument here is a kind of preemptive waiver, suggesting that Defendants had an obligation to address every Rule 403 consideration in their opening brief. RB89. This argument is specious: the post-trial ruling makes clear that the evidence was excluded on relevance grounds, ER15 (referring to ER248)—whether under Rule 401 or Rule 403—and
Defendants’ opening brief argues relevance at length, APB88; see also ER230 (referring to ER248).

To the extent Plaintiff actually argues the merits under Rule 403, its argument is trivial. It cites every Rule 403 consideration, specifically argues for none, cites no authority on the merits, and avers only that the evidence was “complex.” RB89. Documents that simultaneously undermine the credibility of Plaintiff’s star witness and prove a legally dispositive fact cannot be excluded on such insubstantial concerns. *Weinstein’s Evidence Manual* §6.02[2], at 6–22.

Finally, Plaintiff argues harmlessness, asserting that “overwhelming evidence” supported the undisclosed-agent theory. If the evidence favoring this theory were “overwhelming,” Plaintiff would not have awaited the failure of its original averments—four years into litigation—to assert it. Nor would Smith have found himself entangled in contradictory testimony, ER778 (admitting to testifying that *Millionaire*’s rights were both transferred to Celador Productions and retained by Celador International). Nor, of course, would the contract be precisely to the contrary. *E.g.*, ER3092 (upon expiration, “the Property and the rights therein shall revert to Owner”—defined as “Celador Productions,” ER3085).

In fact, beyond Smith’s testimony, Plaintiff’s “overwhelming evidence” consists entirely of an indirect inference from the letterhead on two or three documents. SER203; SER226; SER239. Such inferences pale in comparison to
direct evidence, under Smith’s own signature on an important legal document, about which company held the Agreement. This evidence is also dubious: for example, the “invoice” Plaintiff cites, SER203, arrived under a Celador Productions cover letter, SER202, and BVT responded to and paid Celador Productions, SER204-205. But more importantly, Celador Productions received every participation statement, ER3112-3134, hired WMA and the auditors, ER3301; ER3280, and signed the contract, ER3096. It would be surprising if the evidence that it did so as part of an “undisclosed” and undocumented agency relationship “overwhelmed” Smith’s signed statements to the contrary.

CROSS APPEAL

I.   Plaintiff’s Appeal Is Meritless And Waived

Plaintiff based its fraudulent inducement claim on five general, vague, and opinionated pre-contract statements, among them that ABC would be the “best,” “perfect,” “cleanest,” and “only” home for Millionaire. RER18-19. Finding the evidence undisputed that (1) Smith was a sophisticated industry participant; (2) Smith was represented by a sophisticated agent; and (3) no other network was even interested in Millionaire, the district court rejected the claim at the close of Plaintiff’s case, concluding that the relevant statements could not establish fraud. SER2-4. Plaintiff does not contest the factual conclusions, but argues they are irrelevant. RB94-95. Its appeal should be rejected for three independent reasons.
First, the court’s holding is correct. Plaintiff’s identified statements are classic puffery, Schonfeld v. Vallejo, 50 Cal.App.3d 401, 412 (1975), and no reasonable juror could conclude that some of the industry’s most sophisticated parties would justifiably rely on a vague impression arising from such statements over the terms of the contract itself.

Second, Plaintiff makes no effort to show that any of these statements meets the fraud standard—or even was false—and instead cobbles them together into a different promise: that Celador Productions was getting a “network deal” with ABC alone, which was allegedly untrue because ABC intended to inject BVT and create a “production company deal.” RB92. This theory is incomprehensible: Celador Productions knowingly signed a contract with ABC and BVT.

Finally, Plaintiff’s sole articulation of its fraud theory is new on appeal and should be disregarded. Plaintiff’s cross-appeal repeatedly refers to a “network deal” promise it has never articulated before—the term appears nowhere in the Complaints, RER39-47, the Pretrial Order, ER3358-3360, Plaintiff’s opposition to judgment on this issue, RER19-22, and its oral argument, ER2492-2497. Among all claims, the “circumstances constituting fraud” must be specifically articulated, Fed.R.Civ.P. 9(b), and when Plaintiff re-pleaded to meet this standard below, RER48-54 (dismissing on particularity); RER43-47 (repleading), it adopted a very different theory from its new “network-deal” promise. Indeed, Plaintiff’s fraud
theory for trial was that Defendants “falsely assured Plaintiffs that an agreement with ABC and BVT would maximize the Series potential.” ER3359 (emphasis added). It is far too late for yet another change in Plaintiff’s allegations.

CONCLUSION

The judgment should be reversed and remanded for entry in Defendants’ favor. Alternatively, the judgment should be vacated and remanded for retrial. The cross-appealed judgment should be affirmed.

Respectfully submitted.

/s/ Seth P. Waxman

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November 30, 2011
CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 28.1(e)(2)(A)(i), the undersigned hereby certifies that:

1. This brief contains 13,995 words, excluding portions exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the type size and type face requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6). The brief has been prepared in proportionally spaced typeface using Microsoft Word 2003 in 14 point Times New Roman font. As permitted by Federal Rule of Appellate Procedure 32(a)(7)(C)(i), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

/s/ Seth P. Waxman
SETH P. WAXMAN

November 30, 2011
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I hereby certify that 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 on November 30, 2011. All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/\s/ Seth P. Waxman
SETH P. WAXMAN
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.

On Appeal from the United States District Court
for the Central District of California, No. 2:04-cv-03541-VAP
Before the Honorable Virginia A. Phillips

REPLY AND RESPONSE BRIEF OF
DEFENDANTS-APPELLANTS / CROSS-APPELLEES
ABC, BVT, AND VALLEYCREST

November 30, 2011
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INTRODUCTION

In 96 pages of briefing, Plaintiff does not quote—even once—the contract language on which this case actually turns. Instead, it takes the entire carefully negotiated and defined concept of “Defined Contingent Compensation” and replaces it with the word “profits.” Plaintiff’s need to rewrite the contract demonstrates that, as written, it is not reasonably susceptible to Plaintiff’s interpretation. The district court thus erred in sending that interpretation to the jury rather than rejecting it as a matter of law—an error subject to de novo review and correction here. That error requires at least retrial of Plaintiff’s implied-covenant claim because, having been allowed to misinterpret the contract, the jury was instructed to use the implied covenant to protect a bargain different from the one the parties struck. But more fundamentally, Defendants are entitled to judgment on the implied-covenant claim as well because the uncontradicted testimony demonstrates that Celador Productions’ own agents actually expected Defendants to perform precisely as they did.

Throughout its brief, Plaintiff recharacterizes the Agreement, isolating one revenue stream (the network run) from all others so as to claim that Defendants put Millionaire into a “guaranteed loss.” It thus relegates $21 million in network-broadcast and syndication payments to a footnote, and glosses over the undisputed testimony from every relevant witness that—according to the industry’s traditional
allocation of risks and rewards—producers like BVT and participants like Celador Productions expect to profit not from network-license fees, but from downstream sources like syndication, foreign licensing, and merchandising.

More generally, Plaintiff’s claims cannot survive the uncontradicted and unimpeached testimony of Celador Productions’ own agents at WMA. Plaintiff’s express-contract claim seeks to include ABC’s profits in DCC; Celador Productions’ agent testified that she knew they would not be included. ER2386. Plaintiff’s implied-covenant claim contends that the absence of network-run profits was objectively unreasonable; Celador Productions’ agent testified that it was exactly what he expected. ER987; ER1011; ER1017-1020. Plaintiff’s merchandising claim would prevent BVT from deducting its costs; Celador Productions’ agent testified that she sought exactly that result in negotiations but “did not prevail.” ER2376.

Confronted with this uncontradicted, unimpeached, and dispositive testimony, Plaintiff’s sole response is to invite this Court to disregard it based on a theory of bias unmentioned below and unsupported by any evidence. Plaintiff may be disappointed with WMA’s representation, but it cannot challenge the district court’s holding that WMA was Celador Productions’ exclusive agent. WMA’s understanding is imputed to its principal, and because WMA alone negotiated the
contract language, ignoring the agents’ undisputed testimony cannot be squared with any legitimate effort to determine the parties’ mutual intent.

Plaintiff’s aversion to any evidence reflecting WMA’s understanding is exemplified by its successful efforts to keep the WMA spreadsheets from the jury. Those spreadsheets would have further proved that—before any dispute—WMA fully anticipated every aspect of Defendants’ conduct that Plaintiff now attacks. They would have both provided critical evidence confirming that Plaintiff’s contract interpretation was untenable and shattered the argument that Defendants’ actions were “objectively unreasonable.” In this and other respects, however, erroneous trial rulings prevented Defendants from telling the jury the whole story.

One final point bears emphasis. A plaintiff’s right to sue is never a “distraction,” RB90, especially where, as here, the proper plaintiff’s claim was time-barred. The evidence excluded on this point not only went to a dispositive issue, it also showed that Plaintiff’s most important witness contradicted his sworn statements when they proved inconvenient. Such evidence cannot be “irrelevant,” and its exclusion alone would demand a new trial were judgment for Defendants not otherwise required.
ARGUMENT

I. THE NETWORK-LICENSE CLAIM MUST BE REJECTED OR RETRIED

A. Submitting Plaintiff’s Contract Interpretation To The Jury Was Reversible Error

Contract interpretation is for the court—not the jury—unless two conditions are met. First, “in light of the extrinsic evidence,” the contract must be “reasonably susceptible to the interpretation urged by the party.” Halicki Films v. Sanderson Sales, 547 F.3d 1213, 1223 (9th Cir. 2008). Lack of clarity is insufficient; Plaintiff must show that “the contract is reasonably susceptible of a particular meaning,” id.; Winet v. Price, 4 Cal.App.4th 1159, 1165 (1992) (for these purposes, “ambiguity” means “whether the language is ‘reasonably susceptible’ to the interpretation urged by a party”). Second, even if the contract is susceptible to Plaintiff’s reading, interpretation remains for the court unless there is a material conflict in the relevant extrinsic evidence. Id. at 1166 & n.3. “[E]ven [if] conflicting inferences may be drawn from the undisputed extrinsic evidence,” it is the court, not the jury, that must resolve those inferences. Wolf v. Walt Disney Pictures, 162 Cal.App.4th 1107, 1126 (2008).

Plaintiff’s response makes neither showing. Defendants are thus entitled to judgment in their favor for two separate reasons: first, because the text and extrinsic evidence demonstrate that the Agreement is not susceptible to Plaintiff’s interpretation; and second, because the evidence is not in conflict and Defendants’
interpretation better resolves any conflicting inferences. Either way, it was error to submit Plaintiff’s interpretation to the jury. The decision to do so is reviewed de novo on both grounds. *Brinderson-Newberg Joint Venture v. Pacific Erectors*, 971 F.2d 272, 277 (9th Cir. 1992) (reasonable susceptibility “is a matter of law that is reviewed de novo”); *Wagner v. Columbia Pictures*, 146 Cal.App.4th 586, 589 (2007) (“If the evidence is not in conflict but is subject to different interpretations then we do not defer to the trial court’s findings. Instead, we review the lower court’s interpretation de novo.”).

1. The contract is not susceptible to Plaintiff’s interpretation

   a. The Rights Agreement does not pledge 50% of ABC’s profits

   The premise of Plaintiff’s entire express-contract claim is that the Rights Agreement “explicitly says” that ABC was required “to share its Millionaire profits 50/50 with Celador.” RB23. But Plaintiff can only say that by rewriting the contract. As if nothing turns on the issue, Plaintiff asserts that “‘Defined Contingent Compensation’ is simply a profits definition,” and replaces it with “the common term ‘profits.’” RB11. Only this allows Plaintiff to claim that “the contract explicitly says [that] Celador shares in the *profits* ‘derived by ABC/BVT’” from Millionaire. RB23 (emphasis altered). But that is not what the contract says, “explicitly” or otherwise.
What the contract says is that Celador Productions “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.” ER3088. Exhibit B in turn defines DCC to include “all sums actually received by, or credited to, BVT” less certain deductions for BVT’s fees and costs. ER3102 (emphasis added). The contract thus entitles Celador Productions to 50% of BVT’s receipts after various deductions, not 50% of ABC’s receipts. In this $300 million contract dispute, Plaintiff never quotes this contract language.

Plaintiff makes much of the provision entitling Celador Productions to 50% of the DCC “derived by ABC/BVT,” arguing that this reference to ABC somehow overrides Exhibit B’s definition of DCC. RB25-26. But the quoted language does not address how DCC is to be calculated. That is the question in this case, and on that issue, the Agreement is absolutely clear: “Defined Contingent Compensation”

1 DCC is the product of a calculation that starts with BVT’s receipts and deducts certain amounts. Identifying the parties to whom DCC may be distributed (i.e., who “derives” it) says nothing about whether ABC’s receipts are properly an input into that calculation. Providing that Celador Productions would receive 50% of DCC “derived by ABC/BVT,” however, did ensure that Celador Productions would receive its full share of DCC (if any) regardless of how ABC and BVT might allocate the output of that calculation between themselves. For example, although ABC and BVT have agreed to share syndication profits, ER3291, the quoted contract language guarantees Celador Productions its portion of DCC irrespective of any such arrangement. Id.
is “defin[ed] … in Exhibit ‘B,’” ER3088, and is tied to “all sums actually received by, or credited to, BVT.” ER3102. That was true when Celador Productions signed the Agreement; it was true when it failed to object to the participation statements reflecting only BVT’s receipts; and it remains true today.

Plaintiff cannot even articulate a coherent contrary interpretation. Its express-contract theory is that “[t]he Rights Agreement requires ABC to share its Millionaire profits 50/50” with Celador Productions. RB23. But Plaintiff concedes that it was barred from claiming a contractual entitlement “to share directly in ABC’s revenues,” ER239—not on some procedural technicality, as Plaintiff suggests, RB4, but because Plaintiff never suggested that the Agreement promised 50% of ABC’s revenue until five years into litigation, ER3795. As late as March 2009, the district court regarded as “undisputed” that “Celador’s 50% participation in DCC” was “tied to BVT’s revenues and profits.” ER263; RER37 (same). Plaintiff thus acknowledges that it could only claim “an indirect share of ABC’s revenues … that should have flowed to [Celador Productions] through BVT,” in the form of a “fair market” license. RB4. But that is not an express-contract claim—the contract says nothing about what ABC should pay BVT.2 And

2 The contract cannot possibly entitle Celador Productions to 50% of ABC’s profits “through BVT.” Because Celador Productions receives 50% of BVT’s net, it could only end up with 50% of ABC’s profits “through BVT” if ABC paid BVT at least 100% of its Millionaire receipts. Not even Plaintiff embraces that conclusion.
in any event, once Plaintiff acknowledges that it could only claim profit-sharing “through BVT,” it disavows the very express-contract theory accepted by the jury, ER108-111, and urged upon this Court. RB23.

Nor is Plaintiff’s reading made reasonable by the contract’s reference to Exhibit B as containing “ABC/BVT’s standard definition.” RB24-25. ABC and BVT were both contracting parties and they—“collectively,” ER3085—defined DCC in Exhibit B by reference to BVT’s receipts. That ABC “adopted” Exhibit B, RB25, is reason to apply its definition according to its terms, not to change it.

b. Plaintiff’s interpretation conflicts with other contract terms

Other provisions of the Agreement provide textual confirmation that Celador Productions agreed to share BVT’s profits, not ABC’s.

First, the Agreement only allows Celador Productions to audit “BVT’s books and records,” not ABC’s. ER3091; ER3102. Unable to quarrel with this text, Plaintiff responds that “[t]he parties here understood the audit provision to apply to all Disney entities, including ABC.” RB30. But it cites no evidence of any such understanding. Plaintiff’s citations merely show that a Disney entity handles audits for affiliates, SER291; ER3037-3039, and that Celador Productions’ auditor looked at BVT’s receipts from ABC (not ABC’s own receipts or expenses) along with other documents relating to BVT’s rights and obligations, SER293; see also ER3300. That proves Defendants’ point: the only audit authorized or
undertaken was of revenues “received by, or credited to, BVT,” ER3102; see ER3280-3281; ER3301 (audit engagement letters referring only to BVT).

Second, Exhibit B’s DCC definition cannot even be applied coherently to ABC. The deductions it allows—BVT’s fees, distribution costs, production costs, and interest and overhead on production costs, ER3102—all apply to a production company like BVT, not a network like ABC. Exhibit B’s definition of DCC makes no allowance whatsoever for the cost of running a nationwide broadcast system, selling advertisements, or anything else a network does.3 Accordingly, Plaintiff’s theory that DCC included ABC’s profits must fail because the Agreement contains no measure of ABC’s profits at all.

c. Plaintiff offers no basis to disregard Exhibit B

Plaintiff’s other efforts to disregard Exhibit B’s express definition of what Celador Productions was to receive are equally unavailing.

First, Plaintiff contends that “[t]he typewritten Rights Agreement prevails over Exhibit B’s boilerplate form language.” RB28. In fact, as Plaintiff acknowledges, both Exhibit B and the Rights Agreement were derived from previous contracts. RB11; ER1056-1059. But more important, Exhibit B was not an unaltered form: not only was it thoroughly reviewed and changed “throughout

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3 The only contractual deduction Plaintiff even ventures as a network cost is WMA’s package commission. RB30. But even that was paid by BVT, not ABC. ER3108; ER3115.
the negotiations,” ER990, the parties even exchanged redlines, ER3216; *compare* ER3199 (draft) *with* ER3102 (final).

Notably, Sarah Gregson—Celador Productions’ in-house counsel—carefully reviewed the very provision at issue and questioned why an initial draft referred to “all sums actually received/credited to, BVP” (BVT’s sister company), ER3307, resulting in a change from BVP to BVT in a subsequent draft. ER3216; ER3254. No one ever suggested adding ABC. Plaintiff responds that adding ABC was “unnecessary” because “ABC was already a contracting party.” RB29. But so was BVT. Had Celador Productions really believed it had struck an unprecedented agreement to share network receipts, it would never have bothered to substitute BVT for BVP while finding it “unnecessary” to mention ABC in that provision.

Second, although Plaintiff argues that ABC negotiator Lee Rierson “admitted” that Exhibit B and the Rights Agreement “conflict[ed],” RB25, Rierson in fact denied any pertinent conflict. When Plaintiff’s counsel pointed out that ¶3B(1) of the Agreement refers to Exhibit B as containing “ABC/BVT’s standard definition” while Exhibit B is *captioned* “BVT Defined Contingent Compensation,” Rierson said, “I guess you could call it a conflict,” ER1093. But Plaintiff omits that Rierson expressly rejected any *substantive* disagreement: “the definition [in Exhibit B] is referred to in that paragraph [¶3B(1)], so I wouldn’t call it in conflict.” ER1091.
Third, Plaintiff argues that Exhibit B must be incomplete because it “contains important blanks.” RB27. But the Rights Agreement elsewhere defines who would receive DCC (Celador Productions) and how much (50%), making it unnecessary to address those issues in Exhibit B itself. Instead, the Agreement incorporates Exhibit B for its complete and unambiguous definition of DCC, ER3088, which is unaffected by any “blanks.”

Fourth, Plaintiff argues the Agreement must be construed as a whole, RB26, and in favor of Celador Productions “as the benefitted party,” RB28. Both arguments beg the question. That contracts must be interpreted as a whole only confirms that Exhibit B’s controlling definition cannot be cast aside. And a profit-sharing provision does not “benefit” either party—it defines the allocation of benefits between them. The question is what formula the parties agreed on, and as the Agreement says, the answer is “set forth in Exhibit ‘B.’” ER3088.

Similarly, Exhibit B and the main body of the contract are not separate “agreements” as Plaintiff contends. RB26-27. The parties executed a single, complete agreement, ER3096-3097, and the main body itself makes Exhibit B indispensable by incorporating its definition of DCC, ER3088.

Fifth, Plaintiff misstates the legal standard and misrepresents the Agreement in arguing that “defendants’ reading makes network-run broadcast profits an impossibility,” and “[t]he jury could properly [have found] that the parties did not
intend a guaranteed no-profits outcome.” RB27. The legal question is whether the contract is “reasonably susceptible” to Plaintiff’s interpretation—an issue for the court, not the jury. But more important, the concept of “network-run broadcast profits” is a litigation construct reflected nowhere in the contract.

The Agreement directs two separate DCC calculations: one for merchandising, and one for everything else. ER3089. BVT’s fees and costs for the network run go into the “non-merchandising pot.” As WMA understood, ER987; ER1011; ER1017-1020, and BVT agreed, ER1384-1387, the network run was—as always—expected to yield an initial loss for this pot. From the producer’s perspective, the network run is not an independent source of profit, but rather an investment that establishes a show’s brand and enhances downstream revenue sources like syndication, foreign licensing, and merchandising. APB7-9; APB46. Plaintiff’s references to the “guaranteed loss” on “network-run broadcast profits” obscure the fact that BVT (and thus Celador Productions) could well have profited from the “non-merchandising pot”—the only relevant contractual category—had the show performed better in syndication or had BVT received its customary share of foreign rights. APB16-17; APB68-71; infra pp.47-49.

Finally, omitting key language, Plaintiff argues that television-industry history is irrelevant to Exhibit B’s interpretation because Exhibit B “rejects ‘any conventional understanding’ as ‘used in the entertainment industry.’” RB29.
What Exhibit B actually says is that “words and terms used in connection with Participant’s contingent participation … are intended to be understood and applied only as defined … and are not intended to correspond to any conventional understanding … whether used in the entertainment industry or any other.” ER3103 (emphasis added). This language makes Defendants’ point. Exhibit B’s definition of DCC is, by its terms, controlling. Neither industry practice nor “the common term ‘profits,’” RB11, can substitute for the Agreement’s actual definition. The extrinsic evidence, including industry history, is relevant here not to give DCC some special meaning, but to confirm that the Agreement means what it says and did not pledge the first-ever share of network profits without mentioning ABC or its profits in the controlling definition.

2. The extrinsic evidence does not conflict and confirms the error in submitting Plaintiff’s interpretation to the jury

Plaintiff’s contention (RB31) that “[s]ubstantial evidence supports the jury’s conclusion that the deal included ABC’s network profits” once again misstates the law and mischaracterizes the record.

As explained below, the extrinsic evidence overwhelmingly confirms that the contract cannot bear Plaintiff’s reading. But even if the text and extrinsic evidence left some doubt, that would not create a jury issue. Rather, “the trial court interprets the contract … even when conflicting inferences may be drawn from the undisputed evidence or that extrinsic evidence renders the contract terms
susceptible to more than one reasonable interpretation.” *Wolf*, 162 Cal.App.4th at 1126-1127. Absent a dispute about what the facts *are*, rather than what they *mean*, the court must interpret the agreement. *Winet*, 4 Cal.App.4th at 1166 & n.3. The dispute, moreover, must be material to the interpretive outcome to create a jury question. *Cachil Dehe Band v. California*, 618 F.3d 1066, 1077-1079 (9th Cir. 2010).

Plaintiff consistently ignores this inquiry, arguing that the “jury’s decision” was supported by “substantial evidence.” But because Plaintiff raises only conflicting *inferences*, not disputed *evidentiary facts*, the district court should have resolved these questions itself. Similarly, on appeal, where “the evidence is not in conflict, [the court] construe[s] the instrument, and … resolve[s] any conflicting inferences, [it]sel[f].” *ASP Props. v. Fard*, 133 Cal.App.4th 1257, 1267 (2005). Here, the inferences from the record—in particular, the unambiguous testimony of the agents who negotiated on Celador Productions’ behalf—overwhelmingly support Defendants’ interpretation.

1. *WMA Testimony*. There is no conflict in the most probative extrinsic evidence—the testimony from Celador Productions’ agents that they fully understood that ABC’s network revenues would not contribute to DCC. APB32-33. Petillo testified, without contradiction, that she “did not believe that the network’s ad revenue would go into the back-end pot” because it “never goes in.”
ER2386. Lipstone testified that the network-run input to DCC would be “the license fee that a network like ABC would pay” to BVT, ER2337-2338; ER987-988, not ABC’s receipts. He also agreed that while “the show was still on the network,” he “would expect for the everything-else pot to be in a negative position.” ER1011. Plaintiff points to no conflicting evidence regarding WMA’s understanding.\(^4\) Indeed, the silence is deafening: Plaintiff has no testimony from anyone who negotiated the contract language saying that they expected ABC’s revenues to be part of DCC.

Plaintiff is thus left to argue that “the jury did not have to believe the WMA witnesses.” RB34. But the possibility of disbelief cannot itself create a jury question where the testimony merely confirms what the contract says. Even more important, this testimony cannot be disregarded; juries and reviewing courts must credit “uncontradicted and unimpeached” testimony from “disinterested” witnesses. *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 151 (2000). And while Plaintiff now argues that the WMA witnesses were “interested” because of a purported incentive to curry favor with Disney, RB34-35, it never made that argument below, never cross-examined Lipstone or Petillo on this question, and never introduced any supporting evidence. Indeed, the only record evidence cuts

\(^4\) Plaintiff’s contention (RB35) that these “witnesses’ understanding was only how a ‘typical deal’ would work” simply mischaracterizes the testimony. ER2386; ER1011; ER1018-1020; ER2337-2338.
just the other way: Smith testified that he may sue WMA if he does not prevail, APB45; ER907, Petillo still worked there, ER2354, and although Lipstone had left, ER912, his career would hardly benefit from a malpractice suit.

Finally, even if Plaintiff’s argument had any record support, it would still fail. That a witness’s company “had been doing a substantial amount of business with [defendant],” is the type of “indirect interest … in the outcome of the case [that is] insufficient to create a credibility question requiring jury resolution.”


2. _Pre-Litigation Conduct._ It is undisputed that BVT began sending Celador Productions semiannual participation statements showing DCC calculated based on only BVT’s receipts in December 2000, ER3108; ER3118; ER3130, and yet Celador Productions never asserted that ABC’s revenues should have contributed to DCC until almost a decade later—five years into litigation. ER3795. Plaintiff’s sole response is to obscure the issue by arguing that “Celador questioned defendants’ accountings immediately and persistently.” RB37. But its “question[s]” had nothing to do with the manifest absence of ABC’s receipts from the participation statements. Celador Productions raised _other_ concerns, mostly concerning the size of merchandising deductions, APB19; ER1012-1014, but
despite this flyspecking, neither Celador Productions, nor WMA, nor the auditor ever claimed that ABC’s revenues belonged in DCC. APB19-20; Supra p.7.\(^5\)

The letter from WMA’s David Leffin makes this unmistakable. It says he reviewed the first participation statement and the “Contingent Compensation section(s)” of the Rights Agreement and concluded that “the structure of the statement[] appears to comply with the terms of your contract.” ER3299. It even notes that “the contract defines gross receipts as ‘all sums actually received by, or credited to BVT from all sources worldwide,’” ER3300—the very language Plaintiff omits from its brief. Plaintiff argues that Leffin reserved judgment on “the reasonableness of some of the figures” and “some of the calculations.” RB38. But it is inconceivable that a sophisticated agency, which under Plaintiff’s argument had just negotiated an unprecedented network-profit sharing agreement, simply overlooked the absence of the network’s profits. That goes to the “general structure” of the deal, not “the reasonableness of some of the figures.” And again, this evidence is entirely consistent with what the contract says.

3. Pre-Contract Notes. Plaintiff places great weight on the pre-contract notes of ABC’s Lee Bartlett. RB23; RB31-32. But because their content is

\(^5\) Plaintiff suggests that its failure to object resulted from the pace of Disney’s audit responses. RB37. But no audit was needed to recognize the absence of ABC’s receipts from the statements, nor did the audit even seek information on ABC’s receipts. Supra pp.8-9.
undisputed, these notes cannot establish an evidentiary conflict for the jury. Moreover, the inference Plaintiff would draw from them is baseless.

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Plaintiff infers from the notation “Disney 50/50” under the “Network side” heading that Bartlett contemplated a 50/50 split of ABC’s profits. RB31-32. But that inference is unsupported. Rather, this is shorthand for what appears four lines above under the syndication heading: a “backend 50/50” split “per [the] Disney definition”—what would later be codified as 50% of DCC as defined in Exhibit B. “Network side,” moreover, is not a reference to network profits, but to the network run. Indeed, Plaintiff omits that it asked Bartlett what these notations meant—in 2006, before it ever claimed entitlement to ABC’s profits—and he gave exactly this explanation: “Network side[] mean[s] if it’s on the broadcast network” and
“Disney 50/50 means the *Disney definition* with a 50/50 split.” ER2973-2974 (emphases added).

Plaintiff’s inference—that “‘Disney’ could *only* mean ABC” (RB32)—is also wrong. Plaintiff again omits that it asked Bartlett why the notes refer to Disney, not ABC, and he explained that, as a network, ABC would not have its own DCC definition. ER2972. Moreover, Lipstone’s subsequent notes confirm that the “Disney definition” refers to the producer’s profits definition, not the network’s. They state that “BVTV [and not ABC] has the right to reduce” Celador Productions’ share by adding additional profit participants. ER3148-3149.

Thus, Plaintiff’s marquee documents only confirm the understanding stated in the Agreement: Celador Productions would be a participant with “BVTV” per the “Disney definition” in Exhibit B. Plaintiff’s contrary inferences do not withstand scrutiny, and would not create a jury question even if they did.

4. *Smith and Gregson*. Plaintiff also argues that “both Smith and … Gregson had plenty of direct contact with ABC,” implying that they conveyed to Defendants an understanding that Celador Productions would receive 50% of ABC’s profits. RB33-35. Plaintiff never actually says this, however, because any such contention is unsupportable. There is no evidence Gregson even held the belief that ABC’s profits would go into DCC, let alone communicated it. Her only recorded communication—to her agent, Petillo—reflects that her “understanding
of the basic deal terms,” ER3304, was that contingent compensation was limited by the definition of Defined Receipts in Exhibit B, ER3307. Indeed, Gregson deferred to Petillo, ER3031, who unequivocally testified that she believed ABC’s receipts would not go into the DCC pot because they “never” do, ER2386. And Smith’s purported beliefs are irrelevant uncommunicated subjective intent, APB33-34—when asked about DCC and Exhibit B, Smith admitted that he left the negotiations with Defendants to Lipstone and Petillo, ER466; ER663-664, and had no way to know what Defendants were told, ER753-756. That Smith was on a “late-stage” conference call, RB35, regarding other issues, SER225; ER2264-2268, that he could not even recall, ER750-756, provides no evidence that he communicated anything to anyone.

Plaintiff’s evidence that Smith wanted a “network deal” is also irrelevant. RB33. Smith made clear why he wanted a “network deal”: to ensure that Millionaire aired on network television. ER654-655; ER428; ER455; ER771. Throughout its brief, Plaintiff relies on the unsupported inference that “network deal” meant much more—a right to share in network profits. E.g., RB31; RB39. But once again, Plaintiff’s inference is baseless and would not create a jury question even if it had support.

5. Industry Custom. Finally, Plaintiff does not dispute that no network in television history had ever agreed to share its profits with a participant. Plaintiff’s
response that this deal was “unique” in having a network as a party, RB38-39, ignores the record, and misses the point.

The witnesses testified that networks do purchase program rights from participants and convey them to producers in a “layoff.” ER977; ER1080. Yet no network had ever agreed to share its revenue with a participant, “whether there was a layoff company or whether there wasn’t a layoff company.” ER1237. Having a network sign the deal was hardly unique, but even if it was, that would not support the inference that ABC entered the first-ever network-profits participation agreement without any discussion of the issue, without the knowledge of Celador Productions’ agents, without bothering to include ABC in the controlling definition, and without anyone suggesting—for years—that ABC’s revenues belonged on BVT’s participation statements.

3. Plaintiff’s express-contract theory also fails because Plaintiff made no showing of damages

As previously shown, APB38, Plaintiff’s express-contract claim also failed for the separate reason that Plaintiff offered no corresponding damages case. Plaintiff makes no response on this dispositive point: it does not dispute the legal requirement, and it concedes that it “did not present direct evidence of ABC’s advertising revenue.” RB72. It is unclear how Plaintiff’s statement that it “did not

6 Plaintiff exaggerates Millionaire’s pre-contract success, implying that this required an unprecedented offer from ABC. RB38-39. As the district court found, no other U.S. network was even interested in Millionaire. SER3.
pursue” a direct claim on ABC’s receipts, RB74, could constitute anything other than a concession of the very express-contract theory presented to the jury.

ER108-111.

Plaintiff would excuse its failure to present a corresponding damages case because “defendants insisted below, and the district court required, that Celador not directly claim a share of [ABC’s] revenues.” RB74. That cannot help Plaintiff. Defendants moved to exclude that evidence because “[i]t was not until January 12, 2009, two years after the close of discovery … that Plaintiff[] disclosed for the first time—in a footnote—a potential claim that Celador Productions was entitled to directly share in ABC’s revenues.” ER3795. The court agreed, and “precluded [Plaintiff] at trial from claiming they are entitled to share directly in ABC’s revenues.” ER239. The barrier to an adequate damages case on the express-contract theory was of Plaintiff’s own making, and it forecloses Plaintiff’s express-contract claim.

B. Plaintiff’s Implied-Covenant Theory Failed As A Matter Of Law

Plaintiff’s implied-covenant theory is that the network-license fees for Millionaire undercompensated BVT, and thus Celador Productions. Yet much of Plaintiff’s response is devoted to unsupported insinuations of bad faith that have no connection to that claim. Once these distractions are swept aside, it is clear that Defendants are entitled to judgment on the implied-covenant claim for two
independent reasons. First, as a matter of law, conduct within “the reasonable expectation of the parties” cannot violate the covenant, *Wolf*, 162 Cal.App.4th at 1121, and the unimpeached, uncontradicted testimony shows that Celador Productions’ agent expected Defendants to perform exactly as they did. Second, it was Plaintiff’s burden to establish that Defendants’ conduct was “objectively unreasonable” by identifying some norm that Defendants violated, *Carma Developers v. Marathon*, 826 P.2d 710, 727 (Cal. 1992), and yet it still offers none.

1. **Plaintiff’s insinuations of bad faith are unsupported and irrelevant**

   Plaintiff’s brief, like its jury arguments, focuses on unsupported attacks on Defendants’ integrity—“secret[]” “backdated” deals and “extracontractual machinations” undertaken in “bad faith” for the purpose of “cheat[ing]” Celador Productions, RB9; RB15; RB43-46 & n.11. All of this is a distraction not appropriately raised, lacking record support, and bearing no relation to the claim that BVT was undercompensated.

   As an initial matter, Plaintiff makes no effort to explain how any of this is appropriately raised on appeal. The district court found no evidence of subjective bad faith, ER201, and thus instructed the jury only on objective unreasonableness, ER118. Plaintiff does not challenge the court’s conclusions. Even if it did, a jury verdict cannot be affirmed on an uninstructed theory. *E.g., Reynolds Metals v. Yturbiode*, 258 F.2d 321, 327 n.8 (9th Cir. 1958).
As the court’s holding suggests, Plaintiff’s insinuations are also baseless. ABC did not “unnecessarily transfer[] all of its rights … to BVT for nothing,” RB46, in some effort to “cheat” Celador Productions. Rather, consistent with WMA’s expectations, ABC and BVT effected a “layoff” allocating their respective rights so that ABC retained those needed by a broadcast network (i.e., the right to air the program) and BVT retained those needed by a producer (i.e., the right to make and sell it). Consistent with the industry’s typical allocation of risks and rewards, BVT received a network-license fee covering all its costs, leaving it with a no-risk opportunity to profit if the show’s popularity on network television led to downstream sales in syndication and merchandising. APB7-9; APB46. Celador Productions’ agent understood that such a layoff would occur. ER981; ER3164.

To make matters worse, Plaintiff never explains how its insinuations even relate to its contention that BVT was underpaid. The premise of Plaintiff’s implied-covenant theory is that ABC had to pay BVT a fair-market license fee—a fee ABC owed BVT only because of the layoff’s allocation of rights. Plaintiff cannot simultaneously claim that ABC should have paid BVT more money and attack the transaction that entitled BVT to a license fee in the first place.7

7 Similarly, Plaintiff’s contention that the “license-fee-equals-production-costs contract” was not properly documented (RB19; RB51 n.13) has nothing to do with the reasonableness of the fee actually paid. Nor is it defensible. The network license set a fee exactly equal to anticipated production costs and then allowed for overages. ER3287 (short-form); SER349-350 (long-form); ER3338 (budget);
Plaintiff also relies on its claim that, contrary to the text, the contract expressly promised 50% of ABC’s profits—repeating its earlier errors (and demonstrating that its implied-covenant claim cannot stand apart from its misreading of the text, infra pp.31-32). It contends, for example, that Defendants frustrated Celador Productions’ “contractual right to share Millionaire’s network-run broadcast profits.” RB39-40. But the contract contains no such right. The only relevant contractual concept is a single “pot” containing both network-run and syndication costs and receipts, and as Plaintiff does not dispute, Celador Productions could have earned DCC from this pot as a whole had Millionaire performed better in syndication. APB16-17; APB49.

Indeed, Lipstone testified without contradiction that he understood when he negotiated the deal that—viewed in isolation—the network run would result in a deficit for Celador Productions. ER987; ER1011. And all agree: the longer the run, the larger the deficit to be overcome in syndication. RB46; ER1018. But a longer network run builds a stronger brand for the show and generates greater per-episode fees for Celador Productions—$35,000 for every ABC broadcast. That

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8 Plaintiff mischaracterizes Lipstone’s testimony that he would not have agreed to a guaranteed loss on DCC. Lipstone was talking about DCC as a whole, not the network run alone. Compare RB27 with ER1029 (cited testimony); ER1011; ER1017-1020.

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was the balance Lipstone negotiated for his client. ER1017-1020. Plaintiff
obscures all this, casually asserting that Celador Productions received “nothing for
ABC’s network broadcast and BVT’s syndication of Millionaire.” RB18. In fact,
it received $250,000 upfront and per-episode fees totaling $21 million before trial.
APB12; APB16.9

Finally, Plaintiff cannot avoid the contract’s express warning that “profits”
for BVT or any exhibitor (i.e., ABC) do not guarantee that a participant will earn
DCC. ER3103. Plaintiff’s response—“[n]o quarrel there,” because “there’s never
any guarantee of success,” RB48—ignores the text, which required Celador
Productions to “acknowledge[] and agree[] that there is no guarantee whatsoever
[of] any … contingent participation as … defined herein, regardless of the level of
income, revenues, profits and/or receipts, if any, that BVT or any … exhibitor
realizes” from Millionaire. ER3103 (emphases added). The implied covenant is
not a license to rewrite this or any other term.

2. **Plaintiff cannot identify any conduct that was “objectively unreasonable” or beyond the parties’ expectations**

Plaintiff argues that Defendants’ conduct was “not indisputably reasonable.”
RB49. This inverts the standard. It was Plaintiff’s burden to present substantial
evidence showing that Defendants engaged in identifiable, objectively

9 Plaintiff’s footnote conceding this compensation wrongly asserts that it
was merely for “Smith’s services.” RB18 n.4. Smith testified that these payments
were “license fee[s]” covering “the right to acquire the format.” ER456.
unreasonable conduct that deprived Celador Productions of the benefit of its bargain. *Wolf*, 162 Cal.App.4th at 1121. Plaintiff resists this burden, arguing that “‘Defendants’ overall treatment of Plaintiff was objectively unreasonable.’” RB49. But Plaintiff cannot insulate the judgment from review by declining to say what Defendants did wrong.

When Plaintiff finally turns to the specific conduct it proffers as implied-covenant violations, it cites no evidence that any was outside “the reasonable expectation of the parties” or “objectively unreasonable” by any identifiable measure. If basic principles of contract have any meaning, Plaintiff’s contentions cannot provide a basis for revising the deal the parties actually struck.

**a. Perpetual license**

Plaintiff’s contention that the perpetual network-license agreement between ABC and BVT was objectively unreasonable, RB49, fails as a matter of law. Lipstone testified he was aware the network-license agreement would be perpetual. APB41. Plaintiff argues that the jury could disbelieve that testimony and that Lipstone did not testify that perpetual licenses are “always reasonable.” RB50. But the jury was not entitled to simply disbelieve Lipstone’s uncontradicted and unimpeached testimony. *Supra* p.15. And it is irrelevant whether perpetual licenses are “always” reasonable because Lipstone testified that he (and thus
Celador Productions) actually knew that this license would be perpetual. ER1021. Conduct actually anticipated cannot frustrate expectations.

Moreover, Plaintiff failed to carry its burden to show that a perpetual license was inconsistent with any objective norm. Plaintiff’s only evidence on this point was Richard Marks’s testimony that industry custom on perpetual licenses was unsettled at the time. RB49. But Plaintiff, not Defendants, needed to show a settled industry custom because it pointed to no other objective norm by which the jury could have determined that Defendants’ conduct was “objectively unreasonable.”

b. License fee

Plaintiff’s contention that paying a license fee equal to production costs was “objectively unreasonable” likewise fails. Plaintiff did not cite any show in history whose network-license fee exceeded its production costs. All the relevant witnesses, including Celador Productions’ agents, agreed that network-license fees for unscripted programming were typically equal to (and sometimes below) production costs. APB42-43. That is consistent with the industry’s allocation of risks and rewards among networks and producers, APB7-9; APB46, and thus with the “reasonable expectations” that govern implied-covenant claims. Lipstone’s uncontradicted testimony was that he expected a network-run deficit, ER1011, and understood that network-license fees for non-scripted programs typically equaled production costs. ER985-987. Plaintiff’s citations to evidence about when
Lipstone learned that BVT would in fact get all its costs covered, ER937-942, and whether success affects the outcome of renegotiations for scripted television, ER2345-2346, do nothing to undercut his dispositive testimony that he expected a network-rum deficit. ER987; ER1011; ER1017-1020.

Apart from again attempting to disavow WMA’s testimony, Plaintiff argues that Marks “controverted” it. RB50. He did not. Although Marks said that “a license-fee-equals-production-cost arrangement, ‘just doesn’t make sense,’”” RB50, his complete answer explained that a producer should not work “for basically just the costs and not even a fee,” ER1780; But BVT received a separate producer’s fee, making Marks’s answer irrelevant. APB43 n.12. Moreover, testimony about what generally “make[s] sense” or is “not a good place to finish” cannot overcome a showing that the negotiators actually expected this result.

In the face of undisputed evidence that a network-license fee equal to production costs is the best a producer hopes for in television, Plaintiff demurs that “[i]ndustry custom can be objectively unreasonable.” RB45 (citing Ladd v. Warner Bros. Entm’t, 184 Cal.App.4th 1298 (2010)). But this again evades Plaintiff’s burden. While Ladd suggests that compliance with industry custom is not an absolute defense, it does not relieve Plaintiff’s obligation to set forth some objective norm that Defendants violated. Plaintiff still offers none.
c. Failure to renegotiate

Plaintiff also contends that ABC and BVT acted unreasonably by failing to renegotiate their “perpetual” license. RB51-53. That argument fails as a matter of law—and common sense—on three grounds.

First, as the court correctly stated, “there is no obligation [under California law] to renegotiate a contract, and the case law is clear on that.” ER2490; APB47-48. Plaintiff would distinguish these cases on the ground that they dealt with a renegotiation between the opposing parties in the dispute, not third parties. RB51. The cases recognize no such distinction. The relevant principle is that contracts are meaningful precisely because they are binding during their terms.

Second, an implied-covenant violation is impossible because Lipstone testified that he actually knew ABC and BVT would enter into a perpetual network license, and that the purpose of such perpetual agreements was to avoid renegotiations. ER1020-1021. His testimony that he did not know “why you couldn’t renegotiate” a perpetual license, ER1027 (emphasis added), does not remotely suggest that anyone would expect such renegotiations to occur. Indeed, he said the opposite—that, typically, “resetting of license fees is characteristic of licenses that are for a set number of years.” ER2345-2346.

Third, Plaintiff once again fails to identify any evidence that Defendants’ conduct was “objectively unreasonable.” It cites an industry practice “to
renegotiate license fees on success,” RB51, but not perpetual contracts. Nor did ABC and BVT “renegotiate” the network-license fee. RB52. From day one, the license provided for a fee equal to the anticipated production costs plus any overages; payment of overages thus represented performance, not renegotiation. APB15 n.3; ER3287; SER350; ER1235. Unsurprisingly, no evidence suggests that renegotiating perpetual agreements is the objective norm.

d. Syndication delays

Finally, Plaintiff contends that Defendants violated the implied covenant by delaying Millionaire’s move to syndication. RB52. It omits that the district court barred it from pursuing this unpled theory. RER23-24; ER1455-1473.

C. Alternatively, The Failure Of Plaintiff’s Express-Contract Theory Alone Requires A New Trial

Even if this Court does not reject Plaintiff’s implied-covenant claim outright, the failure of Plaintiff’s express-contract theory would still require a new trial.

1. The erroneous contract interpretation taints the implied-covenant verdict

In deciding the implied-covenant claim, the jury was instructed to answer whether “Defendants unfairly interfered with Celador International’s right to receive the benefits of the contract.” ER118 (emphasis added). Because the erroneous submission of Plaintiff’s express-contract theory allowed the jury to

10 Plaintiff’s reference to “per-episode production fees” adds nothing. Those fees covered additional producing services required from BVT. APB12; ER1299.
conclude that 50% of ABC’s revenues was among “the benefits of the contract,” the jury’s consideration of the implied-covenant claim was necessarily tainted. APB50-51.

Plaintiff’s response actually confirms that its implied-covenant claim depends upon its express-contract interpretation because it emphasizes that interpretation throughout its implied-covenant argument. RB40 (“The implied covenant barred [Defendants] from frustrating Celador’s contractual right to … broadcast profits.” (emphasis added)); RB43; RB44; RB52 (same). It nonetheless argues that there is no taint because the implied covenant protects beyond the contract’s “express terms” and, to the extent the jury might have confused the issue, Defendants should have sought a clarifying instruction. RB55. That misses the point: the jury’s erroneous contract interpretation led it to answer the question whether Celador Productions was denied the “benefits of the contract” based on a misunderstanding of the contract’s benefits. No instruction—short of rejecting Plaintiff’s erroneous interpretation of the contract—could have avoided that flaw. APB50-51.

2. The award separately fails as a general verdict

The failure of the express-contract claim also requires a new trial under Syufy Enterprises v. American Multicinema, 793 F.2d 990 (9th Cir. 1986). The verdict form does not include any specific finding of an implied-covenant violation
with respect to the network-license claim, ER86-99, and the network-license award might therefore rest on the erroneous express-contract theory alone. Such a verdict is “general” and cannot be upheld if any theory fails on appeal. *Syufy*, 793 F.2d at 1001; APB51-52.

Plaintiff’s procedural objections are wrong (Defendants did request a verdict form without these flaws, RER9-17), but also miss the point. Defendants are not challenging any “defect” in the verdict form. RB53-54. Rather, the error was submitting Plaintiff’s express-contract interpretation to the jury. *Syufy* concerns only its consequences.

Finally, Plaintiff argues that *Syufy* is inapplicable because one might discern that the jury rejected the implied-covenant theory on merchandising. RB54. This not only requires the speculation Plaintiff itself condemns, RB55, it is also the opposite of Plaintiff’s position below. RER7-8 (jury could “conclude, as it did, that Defendants breached the implied covenant” on merchandising).

**D. Failure To Give Essential Jury Instructions Requires Retrial**

Plaintiff does not dispute that failure to instruct on a party’s “theory of the case is reversible error if the theory is legally sound and evidence in the case makes it applicable.” *Smith v. Sumner*, 994 F.2d 1401, 1404 (9th Cir. 1993). This principle requires reversal.
1. **Uncommunicated Understanding.** Over objection, Plaintiff repeatedly elicited testimony about Smith’s and Gregson’s subjective understandings of the Rights Agreement—including Smith’s supposed belief that Celador Productions would share in ABC’s receipts. *E.g.*, ER484-486. Because a party’s undisclosed subjective beliefs are irrelevant, Defendants requested a jury instruction not to rely on such evidence without first determining that the understanding had been disclosed. Plaintiff does not dispute that such an instruction is legally correct; it argues instead that Defendants’ proposed instruction was different and “argumentative.” RB56-57. The text of the proposed instruction demonstrates that these contentions are meritless. ER304. It also demonstrates that, contrary to Plaintiff’s assertion, RB56, Defendants did not limit their request to any single witness or issue. Defendants noted Gregson’s testimony only as an example of the instruction’s importance. ER304.11

Contrary to Plaintiff’s suggestion, it was not enough to instruct the jury to “decide what the *parties*—[plural]—intended,” RB57. Such pluralization does not remotely convey that what “the parties intended” is legally irrelevant unless they expressed those intentions to each other. The mistake is easy to make: the court itself

11 Nor did Defendants withdraw their objection. RB56. The court rejected the instruction, then sided with Defendants on a related issue, to which counsel responded, “Fine.” ER129. Neither Plaintiff nor the court suggested any waiver when this objection was reasserted post-trial. ER50.
twice relied on uncommunicated intent in its post-trial merchandising judgment—an error not even Plaintiff defends. *Infra* pp.57-58; APB83-84. Refusing this instruction invited the same prejudicial error on a $300 million claim. There is no justification for leaving this jury uninformed about such a critical rule of law.

2. *Renegotiation.* The district court rejected Plaintiff’s theory that ABC and BVT breached the implied covenant by failing to renegotiate the network-license fee between themselves. ER2489-2490. Yet the court refused to instruct the jury that this theory could not support a verdict. ER197. Plaintiff’s response that it contended only that the network license—not the Rights Agreement—should have been renegotiated is a non-sequitur: an obligation to renegotiate the network license is exactly what the court rejected. ER27; ER2490.

II. **EVIDENTIARY ERRORS REQUIRE RETRIAL**

A. **The WMA Spreadsheets**

Shortly after the Agreement was signed, and long before BVT’s first participation statement issued, WMA created a series of spreadsheets correctly anticipating every aspect of Defendants’ future performance that Plaintiff would attack at trial. These spreadsheets reflect the understanding that: (1) only BVT revenues would contribute to DCC; (2) license fees would equal production costs; (3) there would be no renegotiation for at least five seasons; (4) a “network deficit” would result; and (5) Celador Productions’ DCC would depend on syndication
revenues overcoming that deficit. APB55-57; RB46-48; ER3754. Excluding this
critical evidence was reversible error. APB55-68.

Plaintiff’s principal response is a slanted account of the facts surrounding
creation of the spreadsheets that attempts to undermine the probative weight of
what even Plaintiff previously recognized were “key, crucial document[s].”
ER3719-3720. But questions of meaning and weight are for the jury; they do not
determine the admissibility of critical evidence. Fairly read, the record shows that
Defendants made a far-more-than-sufficient evidentiary showing of the origin and
significance of these documents. Defendants were thus entitled to present that
theory to the jury.

That record shows that the spreadsheets were created by WMA accountant
Anna MacInnis and reviewed by her supervisor Leffin. APB58-59; APB61. Their
two-person group (ER3632) was responsible for “ensur[ing] … that [Celador
Productions’] contingent compensation was properly calculated.” ER3571. When
the first participation statement arrived—reflecting all the features correctly
predicted in the spreadsheets—it was Leffin who reviewed it and, after consulting
with Lipstone and Petillo, confirmed to Celador Productions that “the structure of
the statement appears to comply with the terms of your contract.” ER3295-3296;
ER3299. And MacInnis forwarded later statements with instructions to “call [her]
… if you should have any questions.” ER3112. WMA represented Celador...
Productions throughout this period, including in connection with review of the participation statements and the audit. ER3583-3584. The spreadsheets therefore confirm that Leffin wrote what he did because the first participation statement was exactly as Celador Productions’ agent expected in every relevant respect.

These documents were thus among the most important in Defendants’ case. That WMA anticipated all of Defendants’ disputed conduct would have fatally undermined the argument that these actions were “objectively unreasonable” and confirmed that Plaintiff’s interpretation of the contract is untenable. But the jury never saw these documents. Relying on MacInnis’s death and Leffin’s claim not to remember these devastating documents, Plaintiff pressed a misguided authenticity objection to keep them from the jury, and the court sustained it based on a misapplication of the standard. Plaintiff tries to save that holding with alternative grounds for exclusion, but none fares any better.

1. **The spreadsheets were relevant**

   Plaintiff devotes much of its argument to litigating the spreadsheets’ meaning. RB59-62. These are all jury arguments—a reason to admit the evidence to the factfinder, not exclude it.

   Plaintiff first disputes whether the spreadsheets even reflect WMA’s understanding, arguing that “no evidence” shows that “MacInnis did, in fact, create [them].” RB61. But Plaintiff concedes there is “forensic” evidence of MacInnis’s
authorship, including that: (1) the documents were located on WMA’s backup tapes; (2) MacInnis’s section of the server contained seven different versions; (3) the file properties identify MacInnis as the author of every iteration; and (4) “[a]nother employee” (MacInnis’s supervisor Leffin) viewed and printed the spreadsheet. APB58-59; RB59-60 & n.16. Lipstone testified to his “[belief] that this document relates to a comparison between the Celador Productions definition and how it would operate and the [WMA] commission.” ER3583. Indeed, Plaintiff’s theory below was that the spreadsheets did reflect WMA’s understanding, but not Smith’s. ER3687-3688. Because the meaning of the document is a question for the jury if any evidence supports Defendants’ theory, Plaintiff’s concessions foreclose this argument.

Plaintiff next disputes whether WMA’s understanding should be imputed to Celador Productions, attacking MacInnis’s status as an agent and arguing that an adverse relationship existed between WMA and Celador Productions when the spreadsheets were created because WMA was negotiating its own commission. RB62-63. These arguments also fail.

First, they are procedurally improper. “The existence [and extent] of an agency relationship … are questions of fact for the jury[.]” E.g., California Viking

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12 Plaintiff’s artful reference to “[a]nother WMA employee [who] reviewed and printed the file,” RB60, omits that—according to the same “forensic” evidence—that employee was Leffin, ER3459; ER3758.
Sprinkler v. Pacific Indem., 213 Cal.App.2d 844, 850 (1963). Thus, at most, this was a jury question. But here the court actually found and instructed that, “in this case, the William Morris Agency acted as the agent for Celador Productions,” ER121, without limiting that instruction to negotiation of the Agreement or any particular individuals. Contrary factual assertions cannot justify affirmance. Supra p.23.

Second, Plaintiff omits essential facts. Lipstone testified, with documentary confirmation, that WMA’s pursuit of a package commission was disclosed to and authorized by Celador Productions, ER3559-3560; ER3615-3616, and that package-commission negotiations related to matters within the agency relationship, ER3617. Indeed, the package commission actually benefited Celador Productions by relieving it of the obligation to pay the usual 10% commission on its receipts. ER3592-3593.

Third, Plaintiff is wrong on the law. MacInnis’s individual status as agent is clear: “When an agent is itself a corporation or other legal person, … employees … designated to work on the principal’s account are subagents.” Restatement (Third) of Agency §3.15 cmt.b, at 273 (2006); Moss v. Ole South Real Estate, 933 F.2d 1300, 1312-1313 (5th Cir. 1991) (this is “black letter law”). The jury instruction was that WMA acted as agent, not particular individuals. Moreover, Leffin’s agency status is undisputed, and he possessed and reviewed the documents.

Nor is there any merit to Plaintiff’s adverseness argument. Under settled law, knowledge of “matters in connection with” the agency which the principal
would desire to know about” is imputed, *Powell v. Goldsmith*, 152 Cal.App.3d 746, 750 (1984) (emphasis added), and Plaintiff does not dispute that Celador Productions would have wanted to know about the matters in the spreadsheets. It is irrelevant what was happening at the exact moment the spreadsheets were created; imputation turns not on when the understanding was acquired, but on whether it was “present in the mind of the agent while acting for the principal.” *O’Riordan v. Fed. Kemper Life Assurance*, 114 P.3d 753, 757 (Cal. 2005).\(^{13}\) Even if—contrary to the testimony—the spreadsheets’ *creation* was not part of the agency relationship, it is undisputed that WMA continued acting for Celador Productions long after their creation, ER3583-3584—specifically, in reviewing the participation statements, ER3570-3572. WMA’s knowledge relating to that representation is indisputably relevant to the agency relationship, reflected in the spreadsheets, and imputed to the principal.\(^{14}\)

*Finally*, the spreadsheets were plainly relevant whether the understanding they reflect is imputed or not. The spreadsheets demonstrate that a sophisticated

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\(^{13}\) Plaintiff misunderstands the adverseness rule. The California Supreme Court has explained that “cases holding that an agent’s knowledge is not imputed … when the agent is acting adversely” are applicable only where “the [third party] is acquainted with circumstances indicating that the agent will not advise his principal.” *Elfstrom v. New York Life*, 432 P.2d 731, 734-735 & n.3 (Cal. 1967). Plaintiff does not allege such circumstances here.

\(^{14}\) After settling with WMA, Plaintiff ratified the package-commission arrangement and retained its benefits, ER3610-3612, which also forecloses a claim of adverseness, *see Restatement (Third) of Agency §5.04*. 

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agency that would have benefited from Plaintiff’s interpretation, APB63, instead shared Defendants’ understanding of how the Agreement would work. APB66. Plaintiff’s argument that “[s]uch third-party opinions are irrelevant,” RB61 n.19, misses the critical distinction between testimony about the meaning of express terms, infra p.58, and testimony about whether a party’s actions are reasonable for implied-covenant purposes. Neal v. Farmers Ins. Exchange, 582 P.2d 980, 987-988 (Cal. 1978). In deciding whether Defendants actions were “objectively unreasonable,” the jury was entitled to know that, despite a pecuniary interest in maximizing the contract’s value, Celador Productions’ own agent correctly anticipated every single element of which Plaintiff complained.

Moreover, by establishing that WMA’s understanding was long held, the spreadsheets would have refuted Plaintiff’s present suggestion that WMA witnesses testified falsely to favor Defendants, RB34-35; RB86. Indeed, explaining the spreadsheets at the Rule 104 hearing, Lipstone agreed that “William Morris understood that the license fee would equal the production costs,” ER3577-3578, and that this explained why they were equal in the spreadsheets, ER3626-3627. Having questioned the veracity of WMA’s uncontradicted testimony, Plaintiff cannot deny the “relevance” of documents that confirm it.
2. The spreadsheets easily satisfied Rule 901

Overwhelming authority holds that a document introduced to show an entity’s knowledge or understanding is typically authenticated by that entity’s act of production. APB61-62. Plaintiff’s sole response is that these cases affirm authentication by discovery production, but do not require it. RB67. That distinction is meaningless where the standard is “evidence sufficient to support a finding” of authenticity, Fed.R.Evid. 901(a), and this Court has found private possession of documents sufficient to affirm authentication. United States v. Black, 767 F.2d 1334, 1342 (9th Cir. 1985) (approving authentication on “[t]hat fact alone”).

In any event, Plaintiff does not dispute that a prima facie showing of authorship is sufficient and concedes there is “forensic evidence” of authorship. RB59-60. That should end the matter.

Rule 901(a) requires only a prima facie showing “that the matter in question is what its proponent claims”—here, in Plaintiff’s words, “document[s] prepared by Anna MacInnis [at WMA].” RER34. The evidence Plaintiff concedes, supra pp.37-38, alone established what the district court initially found—that “Defendants have offered evidence showing that the Exhibits were likely prepared

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Plaintiff’s only contrary authority is a 1980 Eastern District of Pennsylvania opinion admitting challenged documents and acknowledging that production in discovery “tends to authenticate the documents.” Zenith Radio v. Matsushita, 505 F. Supp. 1190, 1223. Its only case upholding exclusion involved a document to be authenticated not as the producing party’s, but as an ancient document. Chemetall GMBH v. ZR Energy, 320 F.3d 714, 722 (7th Cir. 2003).
by Ms. MacInnis in late 1999.” ER236. That compels reversal: under what Plaintiff cites as the governing standard, RB66, if there “was competent evidence from which a reasonable mind could have concluded [the] exhibit [was authentic] … the trial court abused its discretion in excluding [it].” United States v. Caldwell, 776 F.2d 989, 1001 n.16 (11th Cir. 1985).

Plaintiff’s argument that the spreadsheets were properly excluded because its own “expert testified that the computer records were untrustworthy,” RB66, misconceives the inquiry. “Once the proponent has made the requisite showing, the trial court should admit the exhibit … in spite of any issues the opponent has raised,” because “[s]uch flaws go to the weight of the evidence instead of its admissibility” and are for the jury to resolve. 5 Weinstein’s Federal Evidence §901.02[3], at 901–17; United States v. Isiwele, 635 F.3d 196, 200 (5th Cir. 2011); APB61.

If anything is “speculative,” RB66-67, it is Plaintiff’s assertion that someone other than MacInnis created the spreadsheets. The disinterested IT specialist from WMA testified that “Anna MacInnis is the author,” ER3483, the files so indicating were reliable and unmodified, ER3510-3514, and Plaintiff counsel’s contrary speculations were inconsistent with his years of experience at WMA. ER3516. The record likewise refutes Plaintiff’s unsupported speculation that ABC created the documents. Compare APB61 with RB60. But, for admissibility, the relevant
question is not who was ultimately right about this. Having made the required, prima facie showing, Defendants were entitled to present the documents to the jury and let it decide.

3. **Exclusion under Rule 403 was improper**

Rule 403 permits exclusion only if evidence’s probative value is “substantially outweighed” by, *inter alia*, “confusion of the issues, or misleading the jury.” *Compare* ER236 (omitting “substantially outweighed”). As previously demonstrated, the court’s one-paragraph ruling on this point rested on two errors of California law and struck an untenable balance between any supposed risk of “juror confusion” and the enormous probative value of the evidence. APB64-67. Plaintiff does not address these flaws or even mention the court’s juror-confusion rationale—indeed, it never argued juror confusion below. Instead, Plaintiff ventures that exclusion was appropriate because MacInnis had died, making the evidence “prejudicial.” Review is *de novo* because the district court performed no balancing on this factor. *United States v. Moran*, 493 F.3d 1002, 1013 (9th Cir. 2007).

Plaintiff offers no authority for its theory of prejudice, and Defendants are aware of none. Plaintiff complains that Defendants would have had “free rein to argue to the jury a meaning without any basis in fact,” RB68, but deciding between competing “argu[ments]” about “meaning” is precisely the jury’s role.
Plaintiff suggests the spreadsheets could have had an “improper … allure,” RB68, but fails to say what that allure would be; the spreadsheets are neither emotional nor inflammatory. That Defendants’ interpretation of the evidence is more convincing on the merits makes the spreadsheets probative, not “unfairly prejudicial.” *United States v. Hankey,* 203 F.3d 1160, 1172 (9th Cir. 2000).

4. **The spreadsheets were not hearsay**

After trial, the district court held for the first time that the spreadsheets were hearsay, but not even Plaintiff defends the court’s theory that its (erroneous) authenticity concerns also render the spreadsheets hearsay. ER9. Instead, Plaintiff raises a multiple-hearsay argument never argued below, RB64-66. But this new argument also fails because the spreadsheets simply are not hearsay under Rule 801(c). Hearsay status is a legal question reviewed *de novo.* *United States v. Collicott,* 92 F.3d 973, 978 (9th Cir. 1996).

A document introduced to demonstrate knowledge or belief, rather than the truth of that knowledge or belief, is not hearsay. 5 *Weinstein* §801.11[5][a] (“Statements are not hearsay when they are offered … to prove the extent of a declarant’s knowledge[.]”); *id.* §801.11[5][c] (“Words or conduct offered as circumstantial evidence of an actor’s beliefs” are not hearsay.); *United States v. Parry,* 649 F.2d 292, 294-295 (5th Cir. 1981). Defendants did not offer these spreadsheets to prove that the license fee in fact equaled production costs or that a
“network deficit” in fact resulted—those facts are undisputed. Instead, the spreadsheets were offered to show WMA’s understanding, shortly after the Agreement and before any dispute, regarding the relevant aspects of Defendants’ future performance. That understanding is evident from the spreadsheets themselves—which predicted Defendants’ actions a year before the first participation statement—not from believing the “truth” of anything they “assert.” The district court recognized as much at the Rule 104 hearing, observing that the spreadsheets were “not really being offered for the truth of the matter.” ER3706.

Moreover, because the documents themselves constitute the relevant evidence, they are admissible regardless of any alleged “layers” of out-of-court statements. That is precisely what this Court said in Gray v. First Winthrop, 82 F.3d 877, 885 & n.10 (9th Cir. 1996) (memorandum from Fisher to Brown, stating what Fisher “underst[oo]d from” Wolk, admissible for state of mind). A second, “unnamed speaker need not be identified to conclude that [a] statement is nonhearsay” where the overall document “[i]s not offered for its truth.” United States v. Ferguson, 653 F.3d 61, 87 (2d Cir. 2011).

Plaintiff’s mistake is demonstrated by its argument that the spreadsheets must be hearsay because “cross examination as to the how’s, what’s and wherefore’s of the spreadsheet’s assertions” would be useful. RB65. The relevant principle is not that documents are hearsay whenever testimony would clarify them
(that is true of all documents), but that they are often hearsay when cross-examination is essential to test the credibility of their statements. 5 Weinstein §801.11[1]. Here, Plaintiff cannot identify any credibility issue because it is the mere fact that WMA created and reviewed these documents at the relevant time that shows WMA’s state of mind.

Finally, even if there were some hearsay use for the spreadsheets, that would not justify exclusion. Rather, a limiting instruction is “the appropriate way to limit the jury’s use of [nonhearsay statements].” Tennessee v. Street, 471 U.S. 409, 417 (1985).

B. Off-Network Performance

Plaintiff also cannot defend the exclusion of important evidence regarding Millionaire’s off-network performance in foreign licensing and syndication. As explained, supra p.12, the contract makes network-license fees one part of a larger “non-merchandising” pot that also included syndication revenues. Frequently, this pot would also include merchandising and foreign rights, but Celador Productions wanted merchandising treated separately and kept all foreign rights for itself. Defendants’ theory of the case was that, while these were enormous benefits to Celador Productions, removing these revenue streams increased the likelihood that the non-merchandising pot would show an overall deficit. The erroneous
exclusion of foreign licensing and syndication evidence hamstrung Defendants in presenting that explanation to the jury.

Plaintiff’s only response is to recite its unsupported contention that it had an independent right to receive network-run profits and to attack the evidence’s relevance to that theory. But a defendant is entitled to present its theory, United States v. Pineda-Doval, 614 F.3d 1019, 1032-1033 (9th Cir. 2010), and evidence is relevant if it tends to prove any fact relating thereto. Id.; United States v. Boulware, 384 F.3d 794, 805 & n.3 (9th Cir. 2004). Both categories of excluded evidence easily satisfy this standard.

1. Foreign licensing

Plaintiff concedes that the court’s only reason for excluding foreign-licensing evidence—that Defendants did not seek foreign rights—was wrong. Compare APB68-70 (court’s conclusion “demonstrably wrong”) with RB69 (“So what?”). Instead, Plaintiff argues that foreign rights “had no bearing” on its claim. RB70. That new argument is also wrong.

To respond to Plaintiff’s suggestion that “Hollywood accounting” kept Celador Productions from earning non-merchandising DCC, Defendants sought to show the jury how much non-merchandising DCC Celador Productions would have received if it had not retained all of Millionaire’s lucrative foreign rights for itself. This evidence would have shown that the absence of non-merchandising
DCC was attributable not to any allegedly unreasonable behavior by Defendants, but to Celador Productions’ decision to retain certain benefits entirely for itself. That evidence was central to the defense, and no court could hold it irrelevant absent the mistake Plaintiff now concedes.

2. **Syndication**

The exclusion of evidence about *Millionaire*’s syndication performance exacerbated this problem. The reality, which Plaintiff does not contest, is that *Millionaire* was not particularly successful in syndication. But the jury never heard why: syndicators quickly dropped *Millionaire* because of low ratings, BVT struggled finding major-market buyers, *Millionaire* “wasn’t a hit” like “Wheel of Fortune [or] Jeopardy,” and was outperformed by *The People’s Court*. ER3075-3084. This would have been highly probative in showing the jury that *Millionaire* unexpectedly bucked the trend for game shows and failed to match its network success in syndication, providing an essential counterpoint to Plaintiff’s singular focus on *Millionaire*’s network success.\(^{16}\)

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\(^{16}\) Plaintiff also argues that this evidence was “prejudicial” because Plaintiff was barred from claiming that *Millionaire* was held out of syndication too long. But Plaintiff forfeited that claim by never pleading it, *supra* p.31, and such forfeiture cannot diminish the evidence’s importance to the defense of claims that were presented, APB71.
C. Harmlessness

Plaintiff does not dispute prejudice, waiving the issue. *Clem v. Lomeli*, 566 F.3d 1177, 1182 (9th Cir. 2009) (issue waived where appellee “failed to address prejudice in his answering brief”).

III. Plaintiff’s Introduction of Inadmissible Damages Evidence Requires Retrial

A. Sills’ Episode 1 Model And Testimony Were Inadmissible

It is an abuse of discretion to admit expert testimony based on assumptions lacking any foundation in the record. APB76. Nevertheless, over Defendants’ objection, Plaintiff introduced exhibits and expert testimony from Steven Sills that took the “fair market” license-fee approximations that Plaintiff’s other experts had calculated based on a hypothetical renegotiation between ABC and BVT at some point after Episode 108—figures those experts testified would not apply retroactively, ER1801; ER1971—and applied them retroactively to *Millionaire*’s first episode. The chart Sills created, with the caption “Based Upon … Expert Reports” and the number $395,635,556 in the bottom right corner, featured prominently in closing argument. ER2087; ER2776-2777. After trial, Plaintiff admitted that this presentation was inconsistent with “[t]he great weight of the evidence.” ER285-286 n.14. It now argues that the “Episode 1 assumption” was supported. RB75-77. But Plaintiff still offers not one authority tying the Episode 1 assumption to any legally permissible theory of contract damages, nor
any plausible justification for showing the jury a grossly inflated calculation inconsistent with even its own experts’ testimony.

Plaintiff’s argument is that it was acceptable for Sills to calculate a back-to-inception damages claim because Defendants renegotiated “retroactively” with other parties. RB75. Even if true, this is irrelevant as a matter of law. Contract damages are a measure of the harm to the Plaintiff resulting from the breach. Cal. Civ. Code §3300; Coughlin v. Blair, 262 P.2d 305, 314 (Cal. 1953). Here, Plaintiff’s alleged harm from the breach was ABC’s failure to pay BVT a “fair-market” network-license fee. RB72. But Plaintiff does not dispute that every witness, including Plaintiff’s experts, testified that the initial license fee was perfectly fair. APB74; RB75-77. Plaintiff identifies no contract-law theory on which different negotiations with a different party using far-smaller numbers under a different contract could justify taking a license-fee hypothesis specifically crafted “not [to] apply retroactively,” ER1801, and applying it retroactively.

All Plaintiff says—citing nothing—is that its “Episode 1 calculation is a damages estimate, not a theory of liability.” RB76. But that is precisely the problem: the “damages estimate” must estimate damages from the alleged breach, not seek windfalls. Cal. Civ. Code §3300. Celador Productions had no harm to remedy at Episode 1 because the initial license fee was concededly fair.
Plaintiff cites *GHK Associates v. Mayer Group*, 224 Cal.App.3d 856, 873 (1990), for the uncontroversial proposition that “the amount of damages need not be calculated with absolute certainty.” That does not authorize a party to submit damages calculations unsupported by the very expert testimony on which they rely, inflating the “estimate” by roughly $100 million. Indeed, *GHK Associates* confirms Plaintiff’s error by acknowledging another uncontroversial proposition—that a plaintiff cannot recover more than the value of the performance it claims was required. *Id.* at 874-875.

**B. The Error Was Prejudicial**

Plaintiff argues that the error was harmless because the jury’s award was below Sills’s Episode 1 estimates. That is insufficient to demonstrate harmlessness and ignores Plaintiff’s own argument against “invad[ing] the jury’s thought process.” *Id.*

If conjecture is required to conclude that an award was based solely on proper evidence, then a reviewing court is “unable to say ‘that the jury’s verdict is more probably than not untainted by the error,’” and the judgment must be reversed. *Dorn v. BNSF*, 397 F.3d 1183, 1197 (9th Cir. 2005). In *Dorn*, evidence of “hedonic” damages was inappropriately admitted. The Court noted that “[m]athematically, the [award] could be construed” as denying “any award of hedonic damages,” but found that “such an interpretation would be founded on
conjecture,” and so rejected a harmlessness argument. *Id.* at 1196-1197. The same is true here. The jury did not accept any of Plaintiff’s proffered numbers, and as Plaintiff points out, RB78, this Court should not speculate about how the jury reached the amount it chose.

Even were such speculation permissible, there is substantial reason to believe that the inadmissible evidence affected the verdict.17

*First*, presenting grossly inflated damages calculations ranging up to $400 million “len[t] legitimacy” to an enormous award. *Uniloc USA v. Microsoft*, 632 F.3d 1292, 1321 (Fed. Cir. 2011). Anchoring deliberations with such large, unsupportable numbers is inherently prejudicial.

*Second*, contrary to Plaintiff’s characterization, RB77, Plaintiff prominently featured the back-to-inception evidence. Plaintiff spent more trial time on the Episode 1 calculations, ER2085-2091, than the Episode 108 calculations, ER2091-2092, and likewise featured them first and more prominently in closing argument. ER2776-2778. *Cameron v. City of N.Y.*, 598 F.3d 50, 61 (2d Cir. 2010) (error not harmless where “the wrongly admitted evidence was emphasized in arguments to the jury”).

17 Plaintiff argues that substantial evidence supported the award, RB78-80, but this misses the point. Defendants have shown an evidentiary error, the question is whether that error was harmless, and Plaintiff’s cases and discussion do not concern harmlessness at all.
Third, Plaintiff’s experts reached different conclusions about the “fair-market” fee, and the evidence supporting the higher fee—which the jury would have needed to accept to reach its award without crediting the Episode 1 calculations—was unusually weak. See Mukhtar v. California State Univ., 299 F.3d 1053, 1068 (9th Cir. 2002) (expert testimony not harmless where other evidence was “less-than-convincing”). Marks’s $3 million hypothesis was predicated on comparing Millionaire to a single, manifestly different show, and was 25% higher than Plaintiff’s own statistical analysis. APB72-73. Even starting the calculation as early as Episode 108 was contrary to Plaintiff’s own statistical analysis. APB74 n.20. For harmless-error purposes, there is little reason to believe the jury credited Marks’s methodology over Plaintiff’s own economist’s.

Fourth, Plaintiff’s damage theory was weak overall. Seeking four times the cost of production at the end of the network run—and fifteen times the cost of production at the outset—Plaintiff could not identify a single show whose network-license fee ever exceeded its production costs by even a dollar. The uncontroverted testimony was that 100% of production costs was as good as it gets on network runs. APB42-43.

Ultimately, Plaintiff invited reversal when, over objection, it featured a grossly inflated damages calculation inconsistent with its own experts’ testimony. Its contention that this error should be disregarded on appeal is equally baseless.
IV. **Plaintiff’s Merchandising Claim Should Not Have Gone To The Jury**

The merchandising dispute turns on whether the Agreement permits deducting out-of-pocket merchandising costs. RB80-81. Plaintiff’s position is that merchandising costs were not deductible because they were implicitly included in BVT’s merchandising fee. RB80-81. But it cannot reconcile that theory with Petillo’s uncontradicted and unimpeached testimony that she sought exactly this result for Celador Productions in negotiations—that “expenses [be] included within the distribution fees, instead of on top of them”—and “did not prevail.” ER2376.

The Agreement—especially in light of this undisputed evidence—is not reasonably susceptible to Plaintiff’s reading. But even if it were, Plaintiff cannot identify any conflict in the material extrinsic evidence, making it error to submit this claim to the jury. Review is *de novo*. *Supra* pp.4-5.

A. **Text**

The text refutes Plaintiff’s reading in three respects:

*First*, it would transform a profit-sharing agreement into a revenue-sharing agreement—contrary to Plaintiff’s own position, RB11. Under Plaintiff’s view,

---

18 Plaintiff no longer argues that it has a viable implied-covenant claim on merchandising. APB85-86; RB80-86; RB54.
BVT could lose money on a merchandising campaign and still owe Celador Productions a large percentage of its gross receipts. Nothing supports this view.

Second, Plaintiff’s interpretation reads language entirely out of the contract. The “separate pot” provision says that “costs and revenues in connection with merchandising shall not be cross-collateralized.” ER3089 (emphasis added). This language expressly contemplates deducting merchandising costs. Plaintiff suggests that, here, “costs” means BVT’s “fees.” But as Plaintiff itself points out, when different words are used “the rule of construction is that the words have different meanings.” RB84.

Third, Plaintiff’s interpretation is linguistically untenable. Plaintiff does not dispute that Celador Productions only receives DCC “derived” from “the exploitation of any Pilot and Series,” ER3088, and therefore must agree that the “Pilot and Series” language includes merchandising. But virtually identical language is used in the contested deduction, ER3102 ¶2 (“the Pilot and/or Series”), so that provision must also include merchandising. Plaintiff is thus left to argue that the phrase “derived from” is necessarily broader than “directly related to.” RB84. That contention, however, is at odds with common usage, the other terms of the agreement, and the testimony of Celador Productions’ own agent.

Moreover, Plaintiff’s argument that Exhibit B “distinguishes” between “the episodes of the Series” and “ancillary and subsidiary rights” is backwards. RB82;
RB84. While Exhibit B identifies them separately, it treats both as “Defined Receipts,” and subjects all “Defined Receipts” to the same deductions. ER3102. The fact that Defined Receipts refers separately to “episode” and “ancillary” revenues, but the relevant deduction does not use those words, only confirms that the deduction does not make the same distinction, and instead applies to “episode” costs and “ancillary” costs alike.

B. **Extrinsic Evidence**

The extrinsic evidence also forecloses Plaintiff’s interpretation. The witnesses who negotiated the contract testified that merchandising costs were deductible, Petillo confirmed that this issue was raised and resolved in negotiations, and Rierson’s notes memorialize this communicated intent. APB82-83. Plaintiff offers no relevant contrary testimony from anyone affiliated with either party. RB85-86. Indeed, while Plaintiff claims there is a dispute about why the word “directly” was added to Exhibit B, the only testimony it cites on this point is from Defendant’s expert. RB86 (citing ER2597). If that addition was intended to create the odd effects identified above, there would be some evidence that this intent was discussed in negotiations.

The court nonetheless found a conflict in the extrinsic evidence based on four witnesses’ testimony. ER48. As previously shown, all this testimony was irrelevant: Smith’s and Gregson’s because it was admittedly undisclosed subjective
understanding; Crudeli’s because she was instructed to take that position for her audit; and Marks’s because, as an expert, he could not testify to the parties’ intent. APB83-85. Plaintiff abandons the first three, relying solely on Marks. RB85-86. But his testimony could not create a material conflict in the relevant extrinsic evidence; indeed, Plaintiff does not even discuss the authorities Defendants cited for the proposition that expert testimony does not create a conflict in extrinsic evidence for purposes of contract interpretation. APB84-85 & n.25.

Plaintiff does cite one case for the undisputed proposition that Marks could testify regarding the facts of industry custom and practice. RB85-86. But that does not allow Marks to offer his opinion on the legal question of contract meaning. E.g., Summers v. A.L. Gilbert, 69 Cal.App.4th 1155, 1178-1182 (1999). And contrary to Plaintiff’s suggestion, RB85, that is exactly what Marks did. ER1805-1806 (stating “opinion” about whether provisions “apply to merchandising”). Plaintiff does not even state what fact about industry custom Marks was asserting, nor how that conflicted with any other testimony. RB85-86.

Most important, this kind of expert testimony cannot conflict with evidence of the parties’ actual understanding, like Petillo’s admission that she “did not prevail” in seeking Plaintiff’s now-asserted outcome in negotiations. ER2376. As with the network-license claim, Plaintiff identifies only contested (and implausible) inferences based on non-conflicting evidence. This claim should not have gone to the jury.
V. **Exclusion of Evidence on Plaintiff’s Right to Sue Requires Retrial**

Because Celador Productions signed the Rights Agreement and is identified as the contracting party and owner of the rights, ER3085; ER3095-3096, Plaintiff Celador International’s right to sue was suspect from the start. Plaintiff’s Complaints averred that it could sue as the “successor-in-interest to Celador Productions,” ER3803; ER3797-3798, and Smith signed a sworn declaration to that effect, ER3340. But Smith later acknowledged this was false, ER784-785; ER781; ER2731-2732, and when an effort was made to “moot” this issue by adding Celador Productions and relating back its by-then-untimely suit, leave to amend was denied for lack of good cause, ER3786-3793. Plaintiff could thus sue only if it proved an entirely new contention first proffered four years into litigation: that, contrary to its own earlier assertions, Celador International held the Millionaire rights all along, and Celador Productions only signed on its behalf “as the agent of an undisclosed principal.” ER2733-2734; ER83.

The only testimony supporting this newly-minted theory came from interested witnesses with millions at stake: Smith ($64 million) and Gregson ($16 million). APB89. Meanwhile, discovery yielded a document—signed by Smith himself—that proved this testimony untruthful. ER3313-3337; see ER219. As Plaintiff concedes, the 2006 “Step One Agreement,” prepared in anticipation of Celador International’s sale, “appears to describe numerous rights as among [the]
commonly-owned entities.” RB88. In fact, it identifies the parties to the Rights Agreement as ABC, BVT, Smith, and Celador Productions—not Celador International, ER3331—and shows that Celador Productions owned the Rights Agreement and could not transfer it without a novation. ER3316; ER3331. This evidence could hardly be more relevant. It showed not only that Plaintiff’s key witness was untrustworthy, but also that, in truth, Celador Productions held the Millionaire rights and owned the Agreement at all relevant times, and was the only party who could assert its now time-barred claim.

The court excluded this evidence as “not relevant to any issues before the jury.” ER15; ER248. As Defendants explained, APB87-88, that holding is indefensible, especially because the court acknowledged that it “weighs against the testimony” of Smith and Gregson. ER15.

Plaintiff’s response demonstrates the importance of this evidence by assuming the truth of the very fact it was offered to dispute. Plaintiff argues that Celador Productions must have signed as Celador International’s agent because Celador International owned Millionaire’s rights and the contract would otherwise have failed to transfer them. RB87-88 (citing Smith and Gregson). But Defendants’ position is that this is untrue—that Celador Productions had held the Millionaire rights since receiving them in 1998 from Celador International’s predecessor in connection with the U.K. show, ER413; ER2796, and so signed the
Rights Agreement for itself. The Step One Agreement, an official legal document between Celador Productions and Celador International, would have proved it. This is precisely why Defendants needed to show it to the jury when Smith took the stand to offer his revisionist account. ER477-479.

Because this evidence clearly was relevant—and critically so—Plaintiff offers meritless alternative grounds for affirmance.

Plaintiff first argues that Defendants “cannot claim error” because they never proffered evidence on the existence and meaning of a Welsh “novation.” RB88. But Plaintiff admitted by interrogatory that Celador Productions never transferred the Agreement to Celador International, ER2732, making such a proffer unnecessary. The only relevant point is that Smith stated in an important legal document that Celador Productions owned the Agreement throughout the suit.

Plaintiff next invokes Rule 403. RB89. “To the extent the ruling was based on Rule 403, [this Court] review[s] it de novo because the court did not engage in explicit balancing of the Rule 403 factors.” Moran, 493 F.3d at 1013; see ER15; ER248; ER230. Plaintiff’s only argument here is a kind of preemptive waiver, suggesting that Defendants had an obligation to address every Rule 403 consideration in their opening brief. RB89. This argument is specious: the post-trial ruling makes clear that the evidence was excluded on relevance grounds, ER15 (referring to ER248)—whether under Rule 401 or Rule 403—and
Defendants’ opening brief argues relevance at length, APB88; see also ER230 (referring to ER248).

To the extent Plaintiff actually argues the merits under Rule 403, its argument is trivial. It cites every Rule 403 consideration, specifically argues for none, cites no authority on the merits, and avers only that the evidence was “complex.” RB89. Documents that simultaneously undermine the credibility of Plaintiff’s star witness and prove a legally dispositive fact cannot be excluded on such insubstantial concerns. *Weinstein’s Evidence Manual §6.02[2], at 6–22."

Finally, Plaintiff argues harmlessness, asserting that “overwhelming evidence” supported the undisclosed-agent theory. If the evidence favoring this theory were “overwhelming,” Plaintiff would not have awaited the failure of its original averments—four years into litigation—to assert it. Nor would Smith have found himself entangled in contradictory testimony, ER778 (admitting to testifying that *Millionaire’s* rights were both transferred to Celador Productions and retained by Celador International). Nor, of course, would the contract be precisely to the contrary. *E.g.*, ER3092 (upon expiration, “the Property and the rights therein shall revert to Owner”—defined as “Celador Productions,” ER3085).

In fact, beyond Smith’s testimony, Plaintiff’s “overwhelming evidence” consists entirely of an indirect inference from the letterhead on two or three documents. SER203; SER226; SER239. Such inferences pale in comparison to
direct evidence, under Smith’s own signature on an important legal document, about which company held the Agreement. This evidence is also dubious: for example, the “invoice” Plaintiff cites, SER203, arrived under a Celador Productions cover letter, SER202, and BVT responded to and paid Celador Productions, SER204-205. But more importantly, Celador Productions received every participation statement, ER3112-3134, hired WMA and the auditors, ER3301; ER3280, and signed the contract, ER3096. It would be surprising if the evidence that it did so as part of an “undisclosed” and undocumented agency relationship “overwhelmed” Smith’s signed statements to the contrary.

CROSS APPEAL

I. PLAINTIFF’S APPEAL IS MERITLESS AND WAIVED

Plaintiff based its fraudulent inducement claim on five general, vague, and opinionated pre-contract statements, among them that ABC would be the “best,” “perfect,” “cleanest,” and “only” home for Millionaire. RER18-19. Finding the evidence undisputed that (1) Smith was a sophisticated industry participant; (2) Smith was represented by a sophisticated agent; and (3) no other network was even interested in Millionaire, the district court rejected the claim at the close of Plaintiff’s case, concluding that the relevant statements could not establish fraud. SER2-4. Plaintiff does not contest the factual conclusions, but argues they are irrelevant. RB94-95. Its appeal should be rejected for three independent reasons.
First, the court’s holding is correct. Plaintiff’s identified statements are classic puffery, Schonfeld v. Vallejo, 50 Cal.App.3d 401, 412 (1975), and no reasonable juror could conclude that some of the industry’s most sophisticated parties would justifiably rely on a vague impression arising from such statements over the terms of the contract itself.

Second, Plaintiff makes no effort to show that any of these statements meets the fraud standard—or even was false—and instead cobbles them together into a different promise: that Celador Productions was getting a “network deal” with ABC alone, which was allegedly untrue because ABC intended to inject BVT and create a “production company deal.” RB92. This theory is incomprehensible: Celador Productions knowingly signed a contract with ABC and BVT.

Finally, Plaintiff’s sole articulation of its fraud theory is new on appeal and should be disregarded. Plaintiff’s cross-appeal repeatedly refers to a “network deal” promise it has never articulated before—the term appears nowhere in the Complaints, RER39-47, the Pretrial Order, ER3358-3360, Plaintiff’s opposition to judgment on this issue, RER19-22, and its oral argument, ER2492-2497. Among all claims, the “circumstances constituting fraud” must be specifically articulated, Fed.R.Civ.P. 9(b), and when Plaintiff re-pledged to meet this standard below, RER48-54 (dismissing on particularity); RER43-47 (repleading), it adopted a very different theory from its new “network-deal” promise. Indeed, Plaintiff’s fraud
theory for trial was that Defendants “falsely assured Plaintiffs that an agreement with ABC and BVT would maximize the Series potential.” ER3359 (emphasis added). It is far too late for yet another change in Plaintiff’s allegations.

CONCLUSION

The judgment should be reversed and remanded for entry in Defendants’ favor. Alternatively, the judgment should be vacated and remanded for retrial. The cross-appealed judgment should be affirmed.

Respectfully submitted.

/s/ Seth P. Waxman

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November 30, 2011
CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 28.1(e)(2)(A)(i), the undersigned hereby certifies that:

1. This brief contains 13,995 words, excluding portions exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the type size and type face requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6). The brief has been prepared in proportionally spaced typeface using Microsoft Word 2003 in 14 point Times New Roman font. As permitted by Federal Rule of Appellate Procedure 32(a)(7)(C)(i), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

/s/ Seth P. Waxman
SETH P. WAXMAN

November 30, 2011
CERTIFICATE OF SERVICE

I hereby certify that 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 on November 30, 2011. All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ Seth P. Waxman
SETH P. WAXMAN
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.

**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 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.

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. 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.”)

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, BVT had supposedly transferred its rights to BVP. 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, 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-BVP license agreement so that BVP cannot syndicate Millionaire in its second year without ABC’s approval—eliminating the “home run” profit opportunity BVT thought it had. ER1166, 1189-94, 3286-88. Shortly thereafter, ABC’s president

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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 BVP-ABC license agreement): Valleycrest purports to license Millionaire to ABC on the same terms as the ABC-BVP assignment. SER347-82. It can do this because, again at some unknown time and for no stated reason or consideration, BVT supposedly orally transferred its rights to Valleycrest. ER1277-78, 1406-07. (Thus, BVT claimed to transfer its rights separately to both BVP 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 denoting 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

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\(^4\) 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. 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.

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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.,

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. 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

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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”).

- 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 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”

• 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:
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. 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,

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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

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 affirnance on the network license claim.

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.”


- 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 performance.’” 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 (co-tenant 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. \textit{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. \textit{See} Burton, \textit{Breach of Contract and the Common Law Duty to Perform in Good Faith}, 94 Harv. L. Rev. at 379, 386 & n.79.

\textit{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.” \textit{Id.}; \textit{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.\textsuperscript{11}

\textsuperscript{11} \textit{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.

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”).

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.\(^\text{13}\)

*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*.\(^\text{14}\) 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*
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.\(^\text{15}\)

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”).

\(^{15}\) 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.

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. 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.

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

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.

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.\(^\text{19}\)

*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.

\(^\text{19}\) 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.

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”).
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. 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). 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

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 & Assoc., Inc., 35 Cal. 3d 498, 503

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

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 is 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 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

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SERIESMILLIONAIRE-RIGHTS-APA.DOC

ER3085
*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 5 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 one-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-
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 participation, 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 multimedia 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
carried 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
Sr. Program Attorney
Buena Vista Television

By: _________

Its: VP, Business Affairs

CELADOR PRODUCTIONS

By: _________

Its: VP, Business 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.

______________________________
Paul Smith
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 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, by 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.
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"
**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 thence to 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 no 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.
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 practice 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 SBT 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.
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