SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

WIND DANCER PRODUCTION GROUP, a California partnership, et al., Plaintiffs, vs. WALT DISNEY PICTURES d/b/a WALT DISNEY TELEVISION, a California corporation, et al., Defendants.	Case No.: BC501953 Consolidated with Case No.: BC533570 [TENTATIVE] ORDER GRANTING DISNEY'S MOTION FOR SUMMARY ADJUDICATION and DENYING PLAINTIFFS' MOTION TO FILE SUPPLEMENTAL BRIEF Hearing Date: May 14, 2019 Dept.: 7

The plaintiffs in this action are Wind Dancer Production Group, Wind Dancer Entertainment, Inc., Wind Dancer Productions, Inc. ("Wind Dancer"), Matt Williams, Whisper Entertainment, Inc., Finestra Productions, Inc., Carmen Finestra, Tam O'Shanter Productions, Inc., McFadzean Productions, Inc., and David McFadzean (collectively "Plaintiffs"). The Defendants are Walt Disney Pictures dba Walt Disney Television, Buena Vista Television, LLC, and The Walt Disney Company (collectively "Disney" or "Defendants"). Williams, Finestra and

McFadzean are writer/producers ("Artists") who, through their various loan out companies ("Production Companies") contracted with Disney to render services writing and producing scripts for television and motion pictures. Plaintiffs complain that Disney has failed to properly account to and properly compensate them for their services on *Home Improvement*, a successful television series ("Series") Plaintiffs' collaboratively wrote and produced for Disney under various agreements.

At issue in this motion for summary adjudication is the second cause of action for Breach of the Covenant of Good Faith and Fair Dealing from Plaintiffs' February 27, 2013 complaint (the "Complaint") alleging that Disney (a) licensed the Series' second cycle syndication rights to WCBS in New York City for "well below" the fair market value and (b) received undisclosed consideration for doing so. (Compl. ¶ 52.)

For the following reasons, the Court GRANTS the motion for summary adjudication.

I. Standard for Summary Adjudication

A motion for summary judgment seeks a determination by the court that an entire action or defense to an action has no merit. (Code Civ. Proc. § 437c(a).) "A defendant has met its burden of showing that a cause of action has no merit if it has shown that one or more elements of the cause of action cannot be established, or that there is a complete defense to that cause of action." (*Whitmire v. Ingersoll-Rand Co.* (2010) 184 Cal.App.4th 1078, 1083.)

The standards for summary adjudication are identical except that summary adjudication will lie to completely dispose of a cause of action, affirmative defense, a claim for damages, or an issue of duty even though it does not completely dispose of the entire action. (Code Civ. Proc. § 437c(f)(1), (2).) "Summary adjudication of an affirmative defense is properly granted when there is no triable issue of material fact as to the defense, and the moving party is entitled to judgment on the defense as a matter of law." (*Kendall-Jackson Winery, Ltd. v. Superior Court* (1999) 76 Cal.app.4th 970, 977-78.)

"Initially, the moving party bears a burden of production to make a prima facie showing of the nonexistence of any genuine issue of material fact. If he carries his burden of production, he causes a shift: the opposing party is then subjected to a burden of production of his own to make a prima facie showing of the existence of a genuine issue of material fact." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 845.) "There is a genuine issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Id.*) Courts must review all the evidence and all of the reasonable inferences drawn therefrom in the light most favorable to the non-moving party. (*Intrieri v. Superior Court* (2004) 117 Cal.App.4th 72, 81.) All evidentiary doubts or ambiguities must be resolved in favor of the non-moving party. (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768.)

"A moving defendant . . . has two means by which to shift the burden of proof under subdivision (o)(2) of section 437c to the plaintiff to produce evidence creating a triable issue of fact. The defendant may rely upon factually insufficient discovery responses by the plaintiff to show that the plaintiff cannot establish an essential element of the cause of action sued upon…. Alternatively, the defendant may utilize the tried and true technique of negating ('disproving') an essential element of the plaintiff's cause of action." (*Brantley v. Pisaro*, (1996) 42 Cal.App.4th 1591, 1598; see also CCP §437c(p)(2).)

II. Evidence Submitted to the Court

A. Defendants' Separate Statement of Undisputed Facts

Disney's Separate Statement, No. 1 states that "Disney did not receive a cash license fee from WCBS for second-cycle syndication rights to *Home Improvement* or divert money for *Home Improvement* to its agreement with WCBS regarding [the show *Who Wants To Be A] Millionaire*." In support of this statement, Disney submits the following admissible evidence:

(1) a copy of the July 26, 2001 agreement licensing the Series to WCBS New York for barter consideration only (Volpe Decl., Exh. 10);

(2) a copy of the June 26, 2001 agreement licensing the series *Who Wants To Be A Millionaire* ("*Millionaire*") to WCBS New York for a weekly license fee (during 2002-2003) of either $62,500 or $71,875 (Volpe Decl., Exh. 11);

(3) internal Disney memoranda detailing the negotiations for licensing *Home Improvement* and *Millionaire* without any discussion of diverting funds from one show to the other (Volpe Decl., Exhs. 12-18);

(4) deposition testimony from persons involved in the license negotiations for *Millionaire* and *Home Improvement* describing the two deals as separate and unrelated (Volpe Decl., Exhs. 25-28);

Disney's Separate Statement, No. 2 states: "Plaintiffs entered into written agreements with Walt Disney Pictures concerning the Series." Disney submits a copy of a document entitled "Exhibit NP-T." (Volpe Decl. ¶ 2, Exh. 1.)

Paragraph VII of Exhibit NP-T provides, in part:

(1) As between [Disney] and [Plaintiffs], [Disney] shall have exclusive and perpetual control of the distribution, advertising, publicizing, exploitation, sale, use or other disposition of the [Series] and may distribute, or withhold or withdraw the [Series] or any part thereof from distribution at its sole discretion with respect to one or more countries or media. [Disney] may distribute the [Series] with other pictures whether or not [Disney] has any ownership, interest or Participation in such other pictures. ...

(3) [Disney] can make percentage or flat sales and grant others rights to distribute the [Series] on terms determined by [Disney] and may make and cancel contracts, adjust and settle disputes, and give allowances and rebates to distributors, licensees, exhibitors or other persons whether or not any such entity is owned, operated or controlled by [Disney]. All adjustments, settlements, allowances and rebates will be applied in a fair and equitable manner.

(Volpe Decl., Exh. 1.) Disney also submits a copy of an agreement between Wind Dancer Productions, Inc., Finestra Productions, Inc., Tam O'Shanter Productions, Inc., and David McFadzean, on the one hand, and Walt Disney Pictures and Television, on the other hand, dated December 24, 1992 (the "1992 Agreement"). (Volpe Decl. ¶ 6, Exh. 5.) Paragraph 5 of the 1992 Agreement states that "not withstanding anything to the contrary in any Overall or Home Improvement Agreement, net profits for the purposes of this Agreement shall be defined and accounted for pursuant to the Net Profit Definition set forth in the Williams Overall Agreement." (*Ibid.*) Paragraph 10 of the 1992 Agreement states:

> Disney and Artists will mutually approve in good faith a consultant with whom Disney will have ongoing meaningful consultations concerning Disney's exercise of its distribution rights in connection with the Series. Disney hereby pre-approves Keith Samples, Michael Lambert, and Mort Marcus. Disney will inform the consultant of all material aspects regarding Disney's advertising, marketing and sales plans for the distribution of the Series, however, and the material terms of distribution agreements, Disney's decision with respect thereto will be final. No casual or inadvertent failure by Disney to consult will constitute a breach of this Agreement.

(Volpe Decl., Exh. 5.)

Disney asserts, in Separate Statement No. 5 that "[p]rior to the second cycle commencing in 2002, WCBS was the only station in New York willing to license second-cycle syndication rights to the Series, but for barter only." In support of this statement, Disney again points to: (1) the *Home Improvement* and *Millionaire* license deals (Exhs. 10-11), internal memoranda (Exhs. 12-18) and deposition testimony (Exhs. 25-28).

B. Plaintiffs' Response to Defendants' Separate Statement ("SS Response")

In response, Plaintiffs admit that Disney did not receive a cash license fee from WCBS for second-cycle syndication rights to *Home Improvement*, but dispute Disney's contention that it did not divert money from *Home Improvement* to Disney's licensing deal with WCBS for the rights to *Millionaire*. Plaintiffs submit the Declaration of Barbara Beebe ("Beebe"), a CPA specializing in conducting profit participation audits of major entertainment companies, who audited the Participation Statements covering the second syndication cycle of the Series. (Beebe Decl. ¶ 5.) Beebe attaches, as Exhibit A to her declaration, a list of "all of the cash license fees received by Disney from various stations throughout the country for the second cycle syndication rights to the Series." (*Ibid.*) According to Exhibit A, Disney licensed the second cycle syndication rights of the Series to Fox in Los Angeles for $5.2 million, Tribune in Chicago for $12.2 million, KTXA in Dallas for $3.6 million, KMAX in Sacramento for $2.1 million, KSTW in Seattle for $2.1 million, and WSKB in Boston for $3.1 million. (Beebe Decl. ¶ 6.)

Plaintiffs also submit the Declaration of James N. Dertouzos, a former economics professor who has experience analyzing the value of television programming. (Dertouzos Decl.

¶¶ 1-8.) Dertouzon reviewed "Nielsen ratings, advertising rates, and license fees for numerous television programs, including *Home* improvement, that have aired since 1995. (*Id.* ¶ 10.) Dertouzon concludes that "[b]ased on industry standards and the fees paid to acquire other, comparable programs (including *Home Improvement* during the first cycle), the evidence demonstrates that cash license fees for *Home Improvement* during the second cycle should have exceeded $10 million for New York alone. (*Id.* ¶ 14.)

Plaintiffs cite Paragraph 10 of the 1992 Agreement (quoted above). (Volpe Decl., Exh. 5.) Plaintiffs Matt Williams and David McFazdean declare that Disney never consulted with them regarding distribution of *Home Improvement*. (Leland Decl., Exhs. D, E.)

Plaintiffs also submit evidence purportedly showing that WCBS overpaid for the licensing rights to *Millionaire* including: (1) a profit participation statement showing that *Millionaire's* license fee was not payable to any of *Millionaire's* profit participants (Leland Decl., Exh. B.); (2) a Wikipedia article stating that at the start of the 2001-02 season *Millionaire's* ratings were "only a fraction of what they had been one year before" (Leland Decl., Exh. F.); and (3) an agreement showing that in 2003, Buena Vista Television licensed *Millionaire* to ABC in New York for a weekly cash license fee of $8,500 (Leland Decl., Exh. I).

III. Evidentiary Objections

Pursuant to Code of Civil Procedure section 437c(q), "[i]n granting or denying a motion for summary judgment or summary adjudication, the court need rule only on those objections to evidence that it deems material to its disposition of the motion. Objections to evidence that are not ruled on for purposes of the motion shall be preserved for appellate review."

A. Plaintiffs' Objections

Objection No. 1: The Court SUSTAINS IN PART Plaintiffs' objection to Paragraph 1 of the Volpe Declaration as to the phrase: "which governs the terms of Plaintiffs' participation in and Disney's distribution of Home Improvement." Whether Exhibit NP-T governs Disney's distribution of the Series is a legal question that is reserved for the Court. (Cal. Evid. Code § 702.)

Objection Nos. 2-8, 10, 11: The Court SUSTAINS Plaintiffs' objections to Paragraphs 13 19, 22, 25 and Exhibits 12-18, 21, 24 to the Volpe Declaration. Volpe declares that these exhibits are faxes, e-mails and interoffice memoranda between third parties discussing the licensing of *Home Improvement* and *Millionaire* to WCBS. These documents contain inadmissible hearsay and do not qualify for any exception to the hearsay rule. (Evid. Code § 1200.)

Objection Nos. 9: The Court SUSTAINS Plaintiffs' objection to Paragraph 9 and Exhibit 20 to the Volpe Declaration. Volpe declares that Exhibit 20 is a copy of the Third Amended Complaint from the case *Celador International Limited v. The Walt Disney Company*, Case No. 4-3541. The representations of Plaintiffs' counsel in a complaint from another case are hearsay and not relevant to the Court's determination. (Evid. Code §§ 210, 1200.)

Objection Nos. 12, 13: The Court SUSTAINS Plaintiffs' objections to Paragraphs 30 and 31 and Exhibits 29 and 30 to the Volpe Declaration. Volpe declares that these two exhibits are spreadsheets containing Nielsen ratings data for *Home Improvement* and *Millionaire* in New York. However, Volpe fails to establish a foundation based on personal knowledge for authenticating these documents. (Evid. Code §§ 702, 1401.)

IV. Analysis

" 'The [implied] covenant of good faith and fair dealing [is] implied by law in every contract.' [Citation.] The covenant is read into contracts and functions 'as a *supplement* to the express contractual covenants, to prevent a contracting party from engaging in conduct which (while not technically transgressing the express covenants) frustrates the other party's rights to the benefits of the contract.' [Citation.]" (*Thrifty Payless, Inc. v. The Americana at Brand, LLC* (2013) 218 Cal.App.4th 1230, 1244.) "However, the implied covenant will only be recognized to further the contract's purpose; it will not be read into a contract to prohibit a party from doing that which is expressly permitted by the agreement itself." (*Wolf v. Walt Disney Pictures & Television* (2008) 162 Cal.App.4th 1107, 1120 [citing *Carma Developers (Cal.), Inc. v. Marathon Development California, Inc.* (1992) 2 Cal.4th 342, 374].) To establish a cause of action for breach of the implied covenant of good faith and fair dealing, a plaintiff must prove a contract, plaintiff's performance or excuse for nonperformance, that defendant unfairly interfered with the plaintiff's right to receive the benefits of the contract, and the resulting damages to the plaintiff. (BAJI No. 325 (March 2019 Update).)

Defendants seek summary adjudication of Plaintiffs' second cause of action in which Plaintiffs allege that Defendants breached the implied covenant in the parties' operative agreements by "licens[ing] the second cycle syndication television rights [to the Series] to WCBS in New York City for well below the fair market value of such rights" (Compl. ¶ 52(a)) and "receiv[ing] undisclosed consideration for the sale of the second cycle syndication rights to the Series to WCBS." (Compl. ¶¶ 28, 52(b)).

Defendants contend and the Court agrees that Plaintiffs' second cause of action fails as a matter of law because the parties' agreements grant Disney exclusive control to distribute the Series at Disney's sole discretion. The decisions in *Third Story Music, Inc. v. Waits* (1995) 41 Cal.App.4th 798 ("*Third Story*") and *Wolf v. Walt Disney Pictures & Television* (2008) 162 Cal.App.4th 1107 ("*Wolf*") are on point.

In *Third Story Music, Inc. v. Waits* (1995) 41 Cal.App.4th 798, Warner obtained from Third Story Music, Inc. ("TSM") the "worldwide right" to license or "refrain from" licensing Tom Waits 'music in exchange for an advance and share of royalties. (*Id.* at 801.) Thereafter, TSM sued Warner "for contract damages based on breach of the implied covenant of good faith and fair dealing," claiming that Warner deprived it of royalties by declining TSM's licensing proposal. (*Id.* at 802.) Warner demurred "that the clause in the agreement permitting it to 'at [its] election refrain' from doing anything to profitably exploit the music . . . preclude[d] application of any implied covenant." (*Ibid.*) The trial court sustained the demurrer. (*Ibid.*) On appeal, TSM argued that Warner was required to exercise its discretionary right to license Waits' music in "good faith." (*Ibid.*) The appellate court held that "courts are not at liberty to imply a covenant directly at odds with a contract's express grant of discretionary power except in those relatively rare instances when reading the provision literally would, contrary to the parties' clear intention, result in an unenforceable, illusory agreement." (*Id.* at 808.) The appellate court concluded that because "Warner bargained for and obtained all rights to [Waits' music] and paid legally adequate consideration," the fact that it "chose not to grant a license in a particular instance cannot be the basis for complaint on the part of TSM as long as Warner made the agreed minimum payments and paid royalties when it did exploit the work." (*Id.* at 808-809.)

In *Wolf v. Walt Disney Pictures & Television* (2008) 162 Cal.App.4th 1107, Walt Disney Pictures and Television ("WDP") entered into an agreement with writer Gary Wolf which granted WDP the right to license the *Roger Rabbit* cartoon characters depicted in Wolf's novel. (*Id.* at 1112.) The agreement stated in relevant part that WDP "shall not be under any obligation to exercise any of the rights granted to [WDP]" and may assign or grant licenses "as [WDP] may see fit." (*Id.* at 1121, n. 7.) Wolf sued WDP claiming that WDP breached the implied covenant by "purposefully orchestrating promotional agreements for which it received no monetary consideration." (*Id.* at 1121.) The trial court granted WDP's motion for a directed verdict on this issue. (*Ibid.*) On appeal, Wolf argued "that Disney's failure to receive monetary consideration in some (but not all) of its promotional agreements [was] unfair or unjust because it prevented . . . Wolf from receiving royalties in some circumstances." (*Id.* at 1122.) The appellate court found that this claim was "simply beside the point" because Wolf had agreed to the terms of the agreement and, having done so, "[could not] look to the courts to amend the terms that prove unsatisfactory." (*Ibid.*) Wolf further argued that while Disney could refrain from exploiting the rights granted to it, "once Disney elected to enter into licensing agreements with third parties . . . it had a duty to do so fairly and in good faith so as not to deliberately thwart [Wolf's] opportunity to obtain a royalty." (*Id.* at 1122-1123.) The appellate court also rejected this argument explaining:

> [Wolf's] argument rests on a distortion of the language in the 1983 Agreement, which did not merely grant Disney the ability to refrain from exercising the rights conveyed, but also conferred the express authority to "grant licenses" to third parties in connection with the exploitation of the Roger Rabbit characters in any manner it "saw fit." ***As explained, recognizing an implied term that would limit the unfettered discretion given to Disney to license the characters as it saw fit would be at odds with the express terms of the agreement.***

(*Id.* at 1123, emphasis added.)

In this case, Plaintiffs do not dispute that Disney's distribution of the Series is governed by Paragraph VII of Exhibit NP-T which provides in relevant part that Disney has "exclusive and perpetual control of . . . distribution . . . and may distribute, or withhold or withdraw the [Series] . . . at its sole discretion." (Volpe Decl., Exh. 1.) Paragraph VII.B(3) further provides that Disney "can make percentage or flat sales and grant others rights to distribute the [Series] on terms determined by [Disney] . . . ." (*Ibid.*) As explained in *Third Story Music* and *Wolf*, because Exhibit NP-T grants Disney "sole discretion" over distribution, an implied covenant cannot be read into Exhibit NP-T to limit that discretion.

In opposition, Plaintiffs argue that Disney's reliance on *Third Story Music* and *Wolf* is misplaced because in those cases "the defendant expressly reserved the right to 'refrain' from acting or was given an express right to act as it 'saw fit'" whereas in this case "Defendants were not given the same discretion . . . ." (Opp. at 11:16-18.) The Court is not persuaded by this argument. Contrary to Plaintiffs' assertion, Exhibit NP-T gives Disney "sole discretion" over distribution including the discretion to "distribute, ***or withhold*** or withdraw the [Series]." (Emphasis added.) This language parallels the language in the contracts discussed in *Third Story* and *Wolf*.

Second, Plaintiffs argue that "Defendants . . . were required pursuant to the terms of the parties' agreement to act fairly and equitabl[y] . . . ." (Opp. at 11:18-21.) Plaintiffs reference language in Section VII.B(3) of Exhibit NP-T requiring Disney to apply "[a]ll adjustments, settlements, allowances and rebates . . . in a fair and equitable manner." On its face, the term "fair and equitable" applies only to "adjustments, settlements, allowances and rebates." Plaintiffs' position that this phrase limits Disney's ability to license the Series is not a reasonable interpretation of the contract.

Third, Plaintiffs argue that Disney does not have unfettered discretion to distribute the Series because Disney is required by the parties' agreements "to consult with Plaintiffs in good faith regarding distribution of the Series." (Opp. at 11:18-21.) Plaintiffs reference Paragraph 10 of the 1992 Agreement, which states:

> Disney and Artists will mutually approve in good faith a consultant with whom Disney will have ongoing meaningful consultations concerning Disney's exercise of its distribution rights in connection with the Series. Disney hereby pre-approves Keith Samples, Michael Lambert, and Mort Marcus. Disney will inform the consultant of all material aspects regarding Disney's advertising, marketing and sales plans for the distribution of the

> Series, however, and the material terms of distribution agreements, Disney's decision with respect thereto will be final. No casual or inadvertent failure by Disney to consult will constitute a breach of this Agreement.

(Volpe Decl., Exh. 5.) Plaintiffs' suggestion that this provision limits Disney's discretion over licensing decisions is not persuasive. Paragraph 1 of the 1992 Agreement states that the Agreement incorporates "all of the terms and conditions set forth" in prior agreements including Exhibit NP-T. (*Ibid.*) While Paragraph 10 imposes an additional requirement on Disney (to work with a consultant), it does not change Disney's discretion over distribution decisions. On the contrary, Paragraph 10 reaffirms Disney's discretion by stating that "Disney's decision with respect to [the exercise of its distribution rights] will be final."

Plaintiffs' citation to *Locke v. Warner Bros., Inc.* (1997) 57 Cal.App.4th 354 is unavailing. In that case, Warner had a "first look deal" with actress Sondra Locke pursuant to which Locke would, for an annual fee, "submit to Warner any picture she was interested in developing before submitting it to any other studio." (*Id.* at 358.) "Warner then had 30 days either to approve or reject a submission." (*Ibid.*) The contract also gave the studio the option of either using Locke as a director or paying her director fee. (*Ibid.*) Over the three years, Warner paid Locke her guaranteed compensation but "did not develop any of Locke's proposed projects or hire her to direct any films." (*Ibid.*) Locke sued Warner alleging among other claims that Warner breached the implied covenant of good faith and fair dealing. (*Id.* at 359.) The trial court granted summary judgment finding that "the implied covenant of good faith and fair dealing cannot be imposed to create a contract different from the one the parties negotiated for themselves." (*Id.* at 360-61.) The appellate court reversed finding a triable issue whether Warner breached the implied covenant "by categorically refusing to work with [Locke], irrespective of the merits of her proposals." (*Id.* at 365.) On appeal, Warner, citing *Third Story*, argued that the implied covenant could not be "extended to create obligations not contemplated in the contract." (*Id.* at 365.) The appellate court determined that "Warner's reliance . . . on *Third Story Music, Inc.*, [was] misplaced" because the Locke/Warner agreement gave Warner only "*discretion* with respect to developing Locke's projects," not "the express right to refrain from working with Locke." (*Id.* at 367.) Thus, the court concluded that the "implied covenant of good faith and fair dealing obligated Warner to exercise that discretion honestly and in good faith." (*Ibid.*)

Here, unlike in *Locke*, Exhibit NP-T gave Disney "sole discretion" over licensing decisions including the discretion to "distribute, or withhold or withdraw" the Series. *Locke* is further distinguishable because in this case Disney has not refused to distribute the Series. On the contrary, Disney has licensed the second cycle distribution rights of the Series to numerous stations across the country resulting in significant profits for Plaintiffs. (See Beebe Decl., Exh. A.) The remaining cases cited by Plaintiffs are also distinguishable. (See *Ladd v. Warner Bros. Entertainment, Inc.* (2010) 184 Cal.App.4th 1298, 1300 [finding the existence of an implied covenant where a Warner executive conceded that "Warner had an obligation . . . to 'fairly and accurately allocate license fees . . .'"]; *Gabana Gulf Distribution, Ltd. v. GAP Intern. Sales, Inc.* (N.D. Cal., Jan. 9, 2008, No. C 06-02584 CRB) 2008 WL 111223, at *8 [holding that the case "is controlled by *Locke* rather than [*Third Story*] because Gap merely bargained for the right to exercise 'discretion' over proposals made by Gabana," but "did not bargain for the right to refrain from approving all proposals altogether"].)

The Court therefore concludes that Plaintiffs' breach of implied covenant claim fails as a matter of law.

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V. Conclusion

For the foregoing reasons, the Court GRANTS Defendants' motion for summary adjudication of Plaintiffs' second cause of action. [1]

[1] At the May 14, 2019 Hearing, Plaintiffs sought leave to submit a Supplemental Brief. The Court DENIES their request because it is untimely. The Court is also not persuaded Plaintiffs' supplemental arguments have merit. Plaintiffs urge the Court to deny Disney's motion based on Paragraph 13 of the April 11, 1989 Overall Agreement (to which Exhibit NP-T was attached), which states in relevant part:

> 13. CONTROLS. As between Disney and Artist, Artist will have full creative control with respect to the production of television projects hereunder . . . and of storylines, scripts, characters, locations, production and postproduction facilities and music . . . ; provided, however, that Artist will consult fully and in good faith with Disney concerning, and will give good faith consideration to Disney's views with respect to, all material creative matters, but Artist will have full control concerning creative matters relating to the production of television projects. . . . **Disney will consult fully and in good faith with Artist concerning, and will give good faith consideration to Artist's views with respect to, all material business matters, but Disney will have full control concerning business matters relating to television projects. Artist and Disney agree to exercise their aforesaid respective controls reasonably and in good faith.**

(April 11, 1989 Overall Agreement, p. 27, emphasis added.) Plaintiffs argue Disney's decision to license the *Home Improvement* series to WCBS was a "material business matter" requiring Disney to "consult fully and in good faith." Plaintiffs also argue Disney's promise to exercise its control "reasonably and in good faith" is grounds for denying summary adjudication of the implied covenant claim. The Court rejects these arguments because Disney's promises to consult and exercise control "reasonably and in good faith" are *express* promises. They are therefore not relevant to the pending motion to adjudicate Plaintiffs' asserted breach of an *implied* covenant. Moreover, it is not reasonable to interpret Paragraph 13 as memorializing a promise about control over *distribution* of finished television *programs* as distinct from the *writing and producing* of television *projects*. Paragraph 13 addresses the latter, i.e., the Artist's "creative control with respect to the production of television *projects*" and Disney's "full control concerning business matters relating to television *projects*." Other language in the April 11, 1989 Overall Agreement underscores the parties' express distinction between television projects and completed programs, e.g. ¶ 5(b)(vii)(D) [explaining that "net profits" for the WILD HEARTS Project will be accounted for differently depending on if "the . . . *Project* is produced intended for initial exhibition as a *television program* or . . . if such Project is produced intended for initial exhibition as a theatrical motion picture . . ."], emphasis added; Exhibit NP-T ¶ VII.B [discussing distribution of "television *programs*"], emphasis added.) The Court is therefore not persuaded that the arguments raised in Plaintiffs' proposed Supplemental Brief have merit.

Dated: ____________ ___________________________________

AMY D. HOGUE
JUDGE OF THE SUPERIOR COURT