JAMS ARBITRATION CASE REFERENCE NO. 1220052735

TWENTIETH CENTURY FOX FILM CORPORATION, a Delaware corporation; FOX ENTERTAINMENT GROUP, LLC, a Delaware limited liability corporation; TWENTY-FIRST CENTURY FOX, INC., a Delaware corporation; and FOX BROADCASTING COMPANY, a Delaware corporation,

Claimants,

vs.

WARK ENTERTAINMENT, INC. f/s/o BARRY JOSEPHSON; TEMPERANCE BRENNAN, L.P. f/s/o KATHLEEN REICHS; SNOOKER DOODLE PRODUCTIONS, INC. f/s/o EMILY DESCHANEL; and BERTHA BLUE, INC. f/s/o DAVID BOREANAZ,

Respondents.

Amended Final Award

WARK ENTERTAINMENT, INC. f/s/o BARRY JOSEPHSON; TEMPERANCE BRENNAN, L.P. f/s/o KATHLEEN REICHS; SNOOKER DOODLE PRODUCTIONS, INC. f/s/o EMILY DESCHANEL; and BERTHA BLUE, INC. f/s/o DAVID BOREANAZ,

Counter-Claimants,

vs.

TWENTIETH CENTURY FOX FILM CORPORATION, a Delaware corporation; FOX ENTERTAINMENT GROUP, LLC, a Delaware limited liability corporation; TWENTY-FIRST CENTURY FOX, INC., a Delaware corporation; and FOX BROADCASTING COMPANY, a Delaware corporation,

Counter-Respondents.

AMENDED FINAL AWARD

The Undersigned Arbitrator, having been designated by the parties, and having read and considered the submissions, documentary and testimonial proof, arguments and allegations of the parties, finds, concludes and issues this Final Award, as follows:

I.

INTRODUCTION

Summary of Contentions

At issue in this Arbitration are the claims of Respondents Wark Entertainment, Inc. f/s/o Barry Josephson ("Josephson"), Temperance Brennan, L.P. f/s/o Kathleen Reichs ("Reichs"), Snooker Doodle Productions, Inc. f/s/o Emily Deschanel ("Deschanel"), and Bertha Blue, Inc. f/s/o David Boreanaz ("Boreanaz") (collectively, "Respondents" or "Participants") against Twentieth Century Fox Film Corporation ("TCFTV"), Fox Entertainment Group, LLC ("FEG"), Twenty-First Century Fox, Inc. ("21CF"), and Fox Broadcasting Company ("FBC") (collectively, "Claimants" or "Fox") relating to the television series "Bones." The series was based on the best-selling fiction novels by Reichs, and the characters were played by Deschanel and Boreanaz. Josephson served as the executive producer who developed the Series.

The claims emanate from Respondents' agreements with TCFTV ("Agreements") which include "backend" contingent compensation. Respondents contend that Fox breached its obligations under these Agreements in multiple licensing transactions – domestic broadcasting, international licensing, and streaming - and they assert claims for breach of contract, fraud, tortious interference with contract and inducing breach of contract. Fox denies the claims brought by Respondents and asserts that it carried out all of its contractual obligations and duties. Fox further contends that contrary to the allegations and assertions of Respondents, its comportment and business decisions affecting the show actually secured the show's future and at the same time enhanced the remuneration ultimately paid to its Participants.

In that regard, Fox determined that it did not make business sense to exercise a full cost of production option for Season 5 as it would have resulted in a loss of millions of dollars if those fees were paid over the two-season period. To quote Fox's opening brief: *"Bones was a middling show with middling ratings"* and did not justify a license fee of that magnitude. Rather,

Fox declined its option for Bones and negotiated a new license fee with TCFTV. The parties eventually agreed on a $2 million per episode fee, along with a [redacted], for two seasons.

Fox argues that the evidence demonstrates unequivocally that its only viable business alternative was to pay a $2 million per episode license fee or let the show be cancelled. Moreover, the license agreement finally negotiated for Bones Seasons 5 and 6 (i.e. the $2,000,000 per episode amount) actually kept the show alive and in the end generated millions more in revenue for Respondents. Fox is adamant that the license fee eventually agreed upon and negotiated for the show was on "monetary terms comparable" to "similar transactions" for licenses between itself and third parties for "comparable programs."

Fox believed that not one of its competitors would pay a higher license fee and in Fox's view, it was better off losing Bones than risking millions of dollars with a full cost fee. Additionally, Fox contends that Josephson and Reichs are barred from challenging the license fees for Seasons 5 and 6 as they both knowingly and willingly executed a Release.

While each side has proffered many more contentions and defenses than outlined above, their respective arguments will be addressed in further detail below.

II.

PRELIMINARY ISSUES

All Claims Presented Are Arbitrable

At the outset, the Arbitrator finds it necessary to address an issue that was long ago put to bed and long ago the subject of a painstakingly detailed stipulation by and among counsel. Astonishingly, Fox, now for the first time, takes the position that certain critical issues presented and argued by Respondents are not arbitrable and as such outside the purview and authority of this Arbitrator and the matters before him. [1]

[1] To provide perspective as to the timeliness of this contention, it is to be noted that Fox raised this argument for the first time in the final hour of closing arguments, after 4+ weeks of hearings and 2 &1/2 years of proceedings. Not one word of arbitrability was ever mentioned or addressed in any pre-trial hearings or in Fox's opening briefs.

To highlight the Arbitrator's dismay as well as Fox's indefensible position in this regard, a chronology of Fox's actions will be discussed. It must be noted that the following facts are incontrovertible.

First, it was Fox that filed the Demand for Arbitration which gave rise to the proceedings herein. Fox did not wait to compel arbitration; it actually proceeded with its demand and initiated the arbitration prior to any motion and always took the position that all claims presented were and are arbitrable, save and except Respondents' claims for an audit.

Second, and perhaps most interesting to this analysis is that while counsel for Respondents did pursue a State Court action *attempting to avoid arbitration*, it was Fox who, once again, took the position that arbitration of Respondents' claims was mandated per the terms of the agreements between TCFTV and its Participants. In fact, Fox doubled down on this position before the Honorable Richard E. Rico when it filed its motion to compel arbitration. Fox prevailed, and arbitration was ordered, and the State Court action was stayed. Accordingly, the doctrine of judicial estoppel precludes any late proffered position to the contrary.

Third, having prevailed in State Court with its motion to compel and once again raising this issue with the Arbitrator at the first Arbitration Management Conference, the parties not only stipulated that the claims presented here are to be arbitrated but in addition thereto *highlighted by hand* those pleadings and causes of action that are the subject of these proceedings so as to avoid the very issue and argument now being proffered at the stroke of midnight. The parties did exactly what was ordered by the Arbitrator. Not only was a stipulation entered into, but with their own hands, the parties highlighted all claims subject to these proceedings and the jurisdiction of the Arbitrator so as to leave no doubt that this argument should not have been brought.

Hence, Fox, in presenting this belated contention, must overcome the following:

1. Judicial estoppel which precludes any and all assertions to the contrary;
2. A Stipulation that it willingly entered into; and
3. Waiver with respect to any argument to the contrary.

Each of these points will be addressed below so as to leave no doubt that Fox's position is disingenuous at best and specious at worst.

Fox specifically addresses two claims which it argues are not arbitrable:

(1) Respondents' ownership claim related to Hulu, and

(2) Respondents' "reasonable and nondiscriminatory" claim.

Under California law, "parties may expressly agree to arbitrate: (1) in a contract signed before a dispute arises, . . .; or (2) in a binding stipulation to arbitrate entered into after a dispute has arisen." Douglass v. Serenivision, Inc., 20 Cal. App. 5th 376, 387 (2018). In this instance, both a signed contract and a binding stipulation are present and cannot be argued to the contrary.

In January 2016, Fox submitted its Statement of Claim to JAMS. In its Statement of Claim, Fox set forth the claims alleged in the Complaint: against TCFTV for breach of contract, breach of the covenant of good faith and fair dealing, and declaratory judgment; against FBC, FEG and 21CF for inducing breach of contract and intentional interference with contract; against TCFTV, FBC and FEG for unfair competition; and against all Claimants for fraudulent inducement, fraudulent concealment, and an accounting. (Statement of Claim, ¶ 25.) Fox's demand went on to state: ***"All of the claims raised in those Complaints, however, are subject to the parties' agreements to arbitrate. Indeed, binding and applicable arbitration provisions are found in the very Agreements that the Respondents claim they want enforced."*** (Statement of Claim, ¶ 26.) (Emphasis added.)

Fox explicitly states that through its Demand, it "seeks to enforce the parties' agreement to arbitrate these disputes." (Id. at ¶ 32.) It went on to state that ***"[t]o the extent that Respondents seek to raise any additional claims against Fox in their Superior Court Complaints on the basis of those Agreements, Fox also seeks to resolve those disputes in this binding arbitration before JAMS."*** (Id.)(Emphasis added)

Thereafter, Fox moved to compel arbitration of the claims brought by Respondents in the Superior Court. On April 8, 2016, Judge Rico issued an Order granting Fox's motion to compel and staying the non-arbitrable claims. More specifically, he found that the Self-Dealing, 2009 Release, and Non-Contractual Claims are all subject to arbitration, and the Contingent Compensation Claims are not subject to arbitration. (See 4/8/16 Order, pp. 3-7.) Fox, having obtained the relief it sought in Superior Court, is now prevented from currently asserting an inconsistent position under the doctrine of judicial estoppel.

Even beyond Judge Rico's Order, during the Arbitration Management Conference held on April 26, 2016 (a mere 18 days after the Court's order), the Arbitrator, in a desire to ensure that all parties were clear about the issues subject to arbitration and the claims to be resolved, raised this very issue so as to put to rest the potential for a later claim that the arbitrator resolved a matter reserved for the court. As a result, the Arbitrator ordered the parties to meet and confer to reach a formal stipulation as to each and every claim that is the subject of the Cross Demands for Arbitration. (Scheduling Order No. 1 dated May 2, 2016)

Subsequently, the parties submitted such a stipulation entitled "Stipulation Regarding Claims in Arbitration" and to it is attached the Statement of Claim. The parties set forth their understanding of Judge Rico's April 8, 2016 Order regarding the claims subject to arbitration. As they represent in the Stipulation:

> [T]he parties understand the April 8 Order to pertain to four categories of claims alleged in the KBTF Respondents' Complaint: (1) "Self-Dealing Claims," which are claims related to the allegations that TCFTV entered into transactions with affiliates on terms that were not comparable to the terms on which the affiliated entity entered into similar transactions with unrelated third parties; (2) "2009 Release Claims," which are claims related to 2009 release agreements concerning Seasons 5 and 6 of Bones; (3) "Contingent Compensation Claims," which are claims that TCFTV miscalculated, misclassified, or improperly allocated the contingent compensation to which the KBTF Respondents are due or failed to negotiate their contingent compensation to which the KBTF Respondents are due or failed to negotiate their contingent compensation definitions in good faith; and (4) "Failure to Permit Audit Claims," which are allegations by the KBTF Respondents that TCFTV failed to provide the auditor with documents it was contractually obligated to provide.

(Stipulation, ¶ 2.) The parties then state: "The Self-Dealing and 2009 Release Claims are arbitrable; the Contingent Compensation and Failure to Permit Audit Claims are not." (Id.) They even highlighted the exact claims in the Complaint that "are fully arbitrable." (Id. at ¶ 2.)

To be clear, Fox belatedly challenges only two claims. In its Reply Brief re Arbitrability, it argues that it was the Superior Court ruling that set the scope of the arbitration and cannot be challenged. It is interesting to note that it was Fox that sought the Superior Court ruling and entered into the very stipulation it now seeks to disavow. Having initiated the Demand for Arbitration and having likewise stipulated to arbitrate the very claims presented by the Respondents, Fox now argues that Judge Rico's order actually circumscribes these proceedings

and somehow likewise circumscribes/nullifies the stipulation it entered into. Judge Rico's order does no such thing and does not void the operative stipulation.

Simply put, the two claims challenged by Fox are clearly within the scope of this Arbitration, as they relate to the Self-Dealing Claims which the parties explicitly agreed to arbitrate - in both a signed agreement before a dispute arose and in a "binding stipulation to arbitrate entered into after a dispute has arisen."

As analyzed herein, the Hulu ownership claim is part of Respondents' claim that Fox licensed in-season streaming rights for Bones to its affiliate Hulu on artificially low monetary terms in violation of the self-dealing protections. More specifically, the issue of whether TCFTV or FBC owned the in-streaming rights to Bones must be decided as a factual predicate to the self-dealing claim. Respondents' claim to their share of $95.9 million that should have been included in TCFTV's Gross Receipts presupposes that TCFTV possessed the in-season streaming rights for Bones on Hulu.

The reasonable and nondiscriminatory claims look at the same conduct by TCFTV in its licensing that is challenged by Respondents and examines whether it also breached TCFTV's obligation to distribute Bones "on a reasonable and non-discriminatory basis." "Several contracts relating to the same matters, between the same parties, and made as parts of substantially one transaction, are to be taken together." Cal. Civ. Code § 1642. Here, the "reasonable and non-discriminatory" standard of Paragraph VII.BB applies to the "distribution . . . of the Program directly or by any Subsidiary, Affiliate, or other Party," and thus modifies the "complete, exclusive and unqualified discretion and control as to time, manner, and terms of [] distribution" standard found in Paragraph 10(a) of the Agreements. To determine whether Fox breached its contractual obligations through self-dealing, it is necessary to look at Paragraph VII.BB in conjunction with Paragraphs 10(a) and (b) to ascertain what those obligations were.

Certainly, the Hulu ownership and reasonable and non-discriminatory claims do not fall within the ambit of the Contingent Compensation and Failure to Permit Audit Claims which are the only claims remaining in Superior Court. Judge Rico's order distinguished between claims that "challenge Fox's calculation or reporting of Plaintiff's contingent compensation under . . . the MAGR Definition," which are not arbitrable, and claims that "challenge Fox's decision to broadcast the series on Fox," which are arbitrable.

Even if the parties' explicit agreements to arbitrate are not enough, which the Arbitrator finds that they are, Fox has waived the right to make jurisdictional challenges regarding any of the claims. Under JAMS Comprehensive Arbitration Rules & Procedures, "jurisdictional and arbitrability disputes, including disputes over the formation, existence, validity, interpretation or scope of the agreements under which Arbitration is sought, and who are proper Parties to the Arbitration, shall be submitted to and ruled on by the Arbitrator." JAMS Rule 11(b). The California Court of Appeal has held that the incorporation of JAMS Rule 11 "serves as clear and unmistakable evidence of the parties' intent to delegate such issues [of arbitrability] to an arbitrator" and "authorized the arbitrator to make the *final* decision regarding what issues were arbitrable." Greenspan v. LADT, LLC, 185 Cal. App. 4th 1413, 1442-43 (2010) (internal quotations and citation omitted; emphasis in original).

"Jurisdictional challenges under Rule 11 shall be deemed waived, unless asserted in a response to a Demand or counterclaim or promptly thereafter, when circumstances first suggest an issue of arbitrability." JAMS Rule 9(f). Fox has waived any challenge to the arbitrability of any of the claims in this matter by willingly participating over the past two and a half years without contesting the Arbitrator's jurisdiction. Not only did Fox initiate this Arbitration, but it has willingly engaged in discovery, submitted discovery disputes to the Arbitrator, offered witnesses for deposition, and notably, engaged in an over a month-long arbitration hearing. During all this time, Fox has never disputed that the Arbitrator had authority to make a final disposition of all claims presented. [2]

Fox asserts that the Hulu ownership claim was first raised in Ms. Zigler's April 30, 2018 expert report, yet Fox does not even attempt to explain its delay of over four months to first raise an objection to arbitrability. Moreover, as Fox points out, this issue was raised much earlier – in one of the Superior Court complaints that Fox compelled to arbitration and in the first depositions in this case. (Respondents' Arb. Br. Ex. 1 at Ex. B, p. 13, ¶ 25; Ex. 5 at 178:9-

[2] Fox argues that it could not have waived its arbitrability argument because the burden was on Respondents to amend their claims. However, no amendment was needed since the claims are within the scope of arbitration. Moreover, the burden was on Fox as the party challenging arbitrability to raise this issue "when circumstances first suggest an issue of arbitrability." Clearly, Fox did not do so and likewise Fox gave no hint of any arbitrability issues at any time during this case as it cannot point to any time prior to the closing hours of the hearing wherein it even suggested such an issue.

179:2.) Similarly, Fox was aware of Respondents' Paragraph VII. BB breach claims before the hearing yet failed to raise any objections. (Respondents' Pre Hrg. Br. at 2, 4.)

Not only is a finding of waiver compelled by JAMS Rules, but it is also supported by case law independent of Rule 9(f). Fox, relying on Ficek v. S. Pac. Co., 338 F.2d 665, 657 (9th Cir. 1964), suggests that waiver can only apply if a party waits until after the arbitrator's decision to raise an objection. However, the Ninth Circuit held that Ficek is "equally applicable" to objections raised before the arbitrator's decision, reasoning that "[i]t would be unreasonable and unjust to allow [the defendant] to challenge the legitimacy of the arbitration process, in which he had voluntarily participated over a period of several months." Fortune, Alsweet & Eldridge, Inc. v. Daniel, 724 F.2d 1355, 1357 (9th Cir. 1983) (per curiam).

The Arbitrator disagrees entirely with Fox's assertions, which represent a transparent attempt to derail this Arbitration before the final award is issued. See Nghiem v. NEC Elec., Inc., 25 F.3d 1437, 1440 (9th Cir. 1994) (affirming arbitrator's decision where claimant initiated arbitration, attended hearing with representation, presented evidence, and submitted closing brief before getting cold feet and filing suit in state court prior to decision; stating "[o]nce a claimant submits to the authority of the arbitrator and pursues arbitration, he cannot suddenly change his mind and assert lack of authority"). It is frivolous for Fox to claim belatedly that certain claims have arisen that suggest an issue of arbitrability. These very same arguments and issues have been heavily litigated throughout this case and certainly during the month and a half arbitration hearing.

In sum, from the inception of this case, Fox sought to compel arbitration of the present claims, and its attempt to offer last-minute arguments otherwise is unsupported factually and legally. Accordingly, all claims presented herein are arbitrable and the Arbitrator has the power to issue a binding award as to the claims presented herein.

Punitive Damages Are Available for the Tort Claims

Another issue raised by Fox for the first time during its closing argument and in its Post-Hearing Brief is the availability of punitive damages. Fox argues that the Agreements expressly bar Participants' claim for punitive damages. Fox relies on the following from Paragraph 10(b):

> Each of Company and Artist agrees that Company's and Artist's sole remedy against Fox for any alleged failure by Fox to comply with the terms of this paragraph shall be actual damages, and Company and Artist hereby waive any right to seek or obtain preliminary or permanent injunctive relief ***or punitive relief*** in connection with any such alleged failure (Emphasis added).

The Arbitrator finds that this limit on punitive damages in Paragraph 10(b) does not apply to the alleged tortious conduct of Fox. To begin with, on its face, the waiver applies only to "any alleged failure by Fox to comply with the terms of [Paragraph 10(b)]." In other words, it applies to the contract claims only, and Respondents do not seek punitive damages related to the contract claims.

Furthermore, "Fox" as used in Respondents' agreements is defined as "Twentieth Century Fox Television, a unit of Twentieth Century Fox Film Corporation." Therefore, the "alleged failure" referenced in the waiver is the Studio's failure to comply with Paragraph 10(b). The waiver does not apply to Respondents' tort claims against the non-studio Claimants and fraud claim against TCFTV.

Even beyond the plain language of the waiver and its inapplicability to the tort claims here, California Civil Code § 1668 provides:

> All contracts, which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the persons or property of another, or violation of law, whether willful or negligent, are against the policy of the law.

As courts have found, "This section made it clear that a party could not contract away liability for his fraudulent or intentional acts . . . ." Gardner v. Downtown Porsche Audi, 180 Cal. App. 3d 713, 716 (1986). Indeed, "[i]t is now settled—and in full accord with the language of the statute—that notwithstanding its different treatment of ordinary negligence, under section 1668, a party [cannot] contract away liability for his fraudulent or intentional acts or for his negligent violations of statutory law, regardless of whether the public interest is affected." Health Net of Cal., Inc. v. Dept. of Health Servs., 113 Cal. App. 4th 224, 234 (2003) (internal quotations and citations omitted). Thus, any alleged waiver of tort claims and punitive damages in Paragraph 10(b) is barred by Section 1668. See Ting v. AT&T, 182 F. Supp. 2d 902, 925 (N.D. Cal. 2002) (contractual provision limiting recovery to direct damages, but precluding

punitive damages, was impermissible under section 1668), aff'd in part, rev'd in part on other grounds, 319 F. 3d 1126 (9th Cir. 2003).

Fox seeks to argue that it "does not matter that Participants are alleging tort, rather than contract, claims as the basis for punitive damages." It relies on Judge Rico's order that tort claims are only arbitrable because they arise out of Paragraph 10(b) as "self-dealing claims." Fox's reliance on Judge Rico's finding regarding the *arbitrability* of the tort claims is sorely misplaced. In no way can Judge Rico's determination that tort claims that arise out of the contractual relationship are subject to the parties' arbitration provision be twisted to bar available remedies at law for intentional torts.

Thus, Fox overreaches with its argument based on the language of Paragraph 10(b). The plain language of Paragraph 10(b) does not apply to prevent an award of punitive damages against the non-Studio Claimants for intentional torts and against TCFTV for fraud.

III.

BREACH OF CONTRACT THROUGH THE RELEASE AND FRAUD

The Claim for Breach of Contract

Respondents argue that TCFTV (also sometimes referred to as the Studio) breached the Affiliate Transaction Protection provision in all of Respondents' Agreements for Seasons 5-8. They argue that not only did TCFTV fail to transact with its affiliates on comparable monetary terms to its transactions with unrelated third-party distributors for comparable programs, but that it likewise had no intention of complying.

Fox, on the other hand, argues that FBC (also sometimes referred to as the Network) determined that it did not make business sense to exercise the full-cost option for Season 5 because Bones was a middling show with middling ratings. Instead, Fox claims, FBC declined its option for Bones and negotiated a new license with the Studio. It asserts that the Bones Seasons 5 and 6 license agreement not only permitted Bones to stay on the air and continue generating millions in revenue for Respondents, but it was also on "monetary terms comparable" to "similar transactions" for licenses between FBC and third parties for "comparable programs," as were the licenses for Seasons 7 and 8. These assertions, however, do not comport with the evidence presented.

As early as January 2009 there is no doubt, based on the email sent by Peter Ligouri dated January 11, 2009 (Exhibit 417A), that FBC had already decided, resolved and determined that it was not going to pay a full cost-of-production license fee for the fifth and sixth seasons of Bones. As far as FBC was concerned, Bones was not worth the cost or effort of further production on a full cost-of-production basis. Or so it led its talent to believe. These facts are undisputed and confirmed by both the documentary evidence and the testimony of the FBC witnesses themselves. Additionally, this was confirmed by the Fox Studio witnesses who were supposed to be aligned with Respondents.

Hence, with zero surprise, FBC declined its option. While FBC takes the position that it knew it might risk losing the show to another network the real question is, did FBC truly intend on cancelling the show or was another strategy in play? Once again and without any controverting evidence, the Fox Studio executives (TCFTV), knowing the fate of its show as early as January 2009, did absolutely nothing to ensure its survivability until the stroke of midnight whereupon the testimony demonstrates a feckless effort to protect its own interests and the interests of Respondents.

While feigning protest and an inability to do nothing other than capitulate, the Studio executives (TCFTV) became willing partners with the Network (Fox) to lead its talent into a deal that was not only favorable to the its parent network but likewise assuring itself no participant leakage. The parties did eventually agree on a $2 million per episode license fee, along with a [redacted] for two seasons, but the cost of doing so for Respondents came at the cost of a release and a complete disregard for the contractual obligations owed by TCFTV.

The analysis begins with the Affiliate Transaction Protection provision found in Paragraph 10(b) of the Participant Agreements ("Paragraph 10(b)"), which provides:

> b. Dealings with Affiliates: Each of Company and Artist acknowledges that Fox is part of a diversified, multi-faceted, international company, whose affiliates include, or may in the future include, among others, exhibitors, television "platforms", networks, stations and programming services, video device distributors, record companies, internet companies, so called "E. Commerce companies", publishers (literary and electronic) and wholesale and retail outlets (individually or collectively, "Affiliated Company or Companies"). In consideration thereof, Fox agrees that Fox's transactions with Affiliated Companies will be on monetary terms comparable to the terms on which the

Affiliated Company enters into similar transactions with unrelated third-party distributors for comparable programs.

The Arbitrator agrees with Respondents that not only did TCFTV fail to comply with Paragraph 10(b) but that it also never intended to comply with Paragraph 10(b).

Fox's documents and testimony establish that TCFTV had no intention or ability to transact with its affiliates "on monetary terms comparable to the terms on which [Fox Affiliates] enter[ ] into similar transactions with unrelated third party distributors for comparable programs." The evidence in this regard is uncontroverted by both the Fox Studio witnesses and the Network witnesses. Every witness from both TCFTV and FBC testified that TCFTV executives did not have access to, or they did not seek, information concerning FBC's transactions with unaffiliated third-party studios at the time they entered into any of the agreements for Bones.

First, Mr. Howard Kurtzman, head of Business Affairs for TCFTV, testified that he has no recollection of ever having conversations with FBC about comparable programs. (7/12/18 Tr. at 800:9-801:17; 905:15-907:6; 942:14-943:23; 950: 9-951:2; 907:2-6.) He testified that he had no access to FBC's license fee information with third party distributors. (Id. at 943:5-12.) When asked whether TCFTV ever asked for third party agreements in connection with Seasons 5 and 6 license negotiations, Kurtzman responded, "I don't believe so. We weren't - - we weren't privy to those agreements." (Id. at 943:19-23.)

Next, Ms. Dana Walden, Co-President of TCFTV, testified as follows:

Q. In fact, you didn't make any effort as part of the negotiations over Season 5 of Bones to learn what FBC paid any unaffiliated third-party studio for any other series in Seasons 5 and 6; correct?

A. We were not allowed to get that information from the Network.

(7/16/18 Tr. at 1307:20-1308:18.) In fact, she testified that she never read or understood the participant agreements. (Id. at 1263:23-1266:23.)

Although Ms. Walden claimed that she was more on the "creative" side as Co-President of TCFTV, her complete lack of knowledge of the agreements of those whose interests she represented is either shocking if true, or disingenuous if false. Her understanding of the Studio's obligation to participants under the Affiliate Transaction Protection clause is that the "deals must

be as good as marketplace deals. So that when we're making a deal with a sister company, we are making a deal that we feel is a fair marketplace deal." (Id. at 1265: 1-7.) Ms. Walden, at this point in time in 2009, had been a co-head of the Studio for ten years and had absolutely no idea what the standard was with respect to dealing with affiliates.

Mr. Barron, the Studio CFO, similarly testified that he had no access to the information and no insight to share. (8/13/18 Tr. at 5169:8-20; 5170:3-9.) He was not involved in anything at FBC, so there was no comparability analysis involving FBC numbers. (Id. at 5155:15-23.)

This testimony of the Studio was consistent on the Network side. Mr. Ira Kurgan, Head of Business Affairs for FBC, testified that nobody ever mentioned the comparable terms standard. When asked whether the Studio ever told him that he was obligated to pay the license fee for Bones on monetary terms comparable to what the Network was paying for other shows, he said "that never came up":

> Q. And nobody from the Studio ever said the license fee for Bones has to be on comparable terms to your agreements with unaffiliated studios because we have a contractual obligation to the participants, right?
>
> A. Yeah, that never came up.

(7/18/18 Tr. at 1814:10-21.) As a result, he never told the Studio what FBC was paying for comparable programs. (Id. at 1815: 22-25.)

Mr. Peter Rice, Chairman of FBC, testified that he did not look at comparable programs or ask anybody to do so:

> Q. I'll do this one slowly again. At any time during the year 2009, did you personally ever embark upon the task of trying to figure out if there was a show that was comparable to Bones?
>
> A. Not that I recall.
>
> Q. Did you ever instruct anybody to do that?
>
> A. Not that I recall.
>
> Q. At any time during the time you were negotiating the license fee for Seasons 5 and 6 of Bones, did you ever embark upon the task of trying to find out what comparable programs of Bones here were on other networks?
>
> A. Not that I recall.

(7/13/18 Tr. at 1057:9-1058:9.)

As Respondents point out, it is necessary to address Mr. Gary Newman's testimony last since everybody pointed to Mr. Newman as the person who would know about the comparability standard. Mr. Newman, the other Co-President of TCFTV, testified he did not recall whether he asked anybody at the Network for the requisite comparable information, and he did not recall whether anybody from the Network ever provided him with that information. (7/23/18 Tr. at 2381: 5-18.)

Then, Mr. Newman revealed that he was involved in the group that conceived of Paragraph 10(b):

> Q. Now, from being involved in the group that conceived this paragraph, do you have an understanding of what the goals were in terms of this particular language?
>
> A. Yes.
>
> Q. What are the goals?
>
> A. You know, as we were trying to come up with a standard of dealing that, that would be as objective as we could make it, we decided to utilize the comparable terms that the affiliated company, so in our case it would have been the Fox network, had entered into with third parties."

(Id. at 2543:17-2544:10.)

In direct contrast to Ms. Walden's understanding of the Studio's obligation to participants, Mr. Newman stated that the goal of Paragraph 10(b) was to make an objective standard. He explained why:

> [W]e felt that was a better standard than the more subjective ones, like fair market value or other such things. We wanted something that you could actually go find data and be able to draw your conclusions from, from that data.

(Id. at 2544:1-10.)

Not only do each of the co-presidents of the Studio initially vary widely in their understanding of the obligations the Studio had toward its talent, Ms. Walden actually attempted to provide a completely different interpretation, enabling Fox to defend itself on the basis of fair market value. This concept nowhere appears in the contract.

Ironically, when Mr. Newman was recalled to the stand on behalf of Fox, he then tried to adopt Ms. Walden's concept of fair market value and move away from the very language of the provision itself and one he helped develop. By attempting to morph the language of the

operative contract to one of fair market value, both the Network and the Studio are in sync with one another in their defense of the breach claims. However, this attempt to adopt the same understanding only serves to highlight the breach and their impeachment.

Even after stating that the standard was an objective one requiring data, Mr. Newman did not recall whether he himself ever did any research or asked anybody to do research to aid in the Studio's negotiations with the Network. (Id. at 4088:14-24.) Instead, Mr. Newman claims he went to agents to get marketplace information regarding Season 5. (Id. at 4087:15-4089:4.) Essentially, this "marketplace information" was gathered from a single lunch conversation about CBS's renegotiation on Ghost Whisperer with ABC Studios. (Respondents' Ex. 2159-0001.) Not only did this testimony lack any specificity, but more importantly, to reiterate, *"market information"* is not the standard under Paragraph 10(b).

Fox's own witnesses – from the Studio and the Network - establish that Fox did not even attempt to comply with Paragraph 10(b). In fact, there is no evidence that even one Fox employee asked for, received, or reviewed a "similar transaction[] with unrelated third party distributors for comparable programs."

The testimony of both Mr. Newman and Ms. Walden regarding "marketplace information" is not only troubling but extremely disconcerting. The more these individuals testified the more incredulous their testimony appeared. Specifically, their testimony was not only *"NOT"* at odds with the Network but actually served the interests of the Network, meaning if they could successfully morph the standard of third party comparables to some marketplace value it would then serve to argue that no breach occurred since the value of Bones was fairly calculated and achieved.

This is not a case of insufficient, questionable, or unreliable information. Rather, this is a case of a complete absence of information, and the plain words of Paragraph 10(b) require that Fox look at "similar transactions with unrelated third- party distributors for comparable programs." This was not done, and Fox cannot deny this fact.

While admitting that it did not look at similar transactions at the time it negotiated for Seasons 5-6, 7 and 8-9 of Bones, Fox argues that the express language of Paragraph 10(b) allows it to look to later transactions. In other words, faced with an undisputed and undeniable breach,

Fox now asserts an interpretation that strains credulity and devoid of common sense. Fox argues that it can look both prospectively and presently – "in the event of any dispute" - to other similar transactions between itself and a third-party to justify what it plainly did not do.

Fox relies on the word "enters" in Paragraph 10(b). However, Fox's interpretation ignores the words "will be" – "Fox's transactions with Affiliated Companies will be on monetary terms comparable . . . ." This mandatory language does not mean the challenged transaction "was" on comparable monetary terms with third-party deals. Furthermore, "enters" is present tense, not future tense, and plainly refers to other transactions existing at the time of the affiliate transaction when read in conjunction with the promise that the monetary terms of future affiliate transactions "will be comparable" to those of third-party transactions.

Both parties contend that the language of Paragraph 10(b) is not ambiguous. It is well-settled that the interpretation of a contract involves a two-step process whereby the court provisionally receives evidence concerning the parties' intentions to determine "ambiguity," i.e. whether the language is "reasonably susceptible" to the interpretation urged by a party. See Wolf v. Superior Court, 114 Cal. App. 4th 1343, 1351 (2004) (describing two-step approach to consideration of extrinsic evidence). It is hardly surprising that Fox argues that the language of Paragraph 10(b) is not ambiguous since the extrinsic evidence from its own witnesses directly contradicts Fox's interpretation and unequivocally establishes the breach.

In this regard, it is interesting to note that Fox, in both of its closing briefs, distances itself greatly from the testimony of its own witnesses. In fact, the post-hearing briefs submitted resemble a motion for summary adjudication rather than a closing brief. Fox goes to great lengths to ignore the testimony of its witnesses, as it must, since to do otherwise would unquestionably establish the breach Respondents assert.

Mr. Newman testified that TCFTV was looking for the most "objective" standard of dealing possible, so that *"when we make a deal with an affiliated party we're going to be able to anticipate whether or not we're opening ourselves up for liability from claims profit participants."* (7/23/18 Tr. at 2543:17-3545:13.) Mr. Chernin (another high-ranking executive) also confirmed his understanding that the standard "will be applied at the time Fox enters into self-dealing transactions so that [participants] will be paid fairly when the accounting statements arrive." (7/16/18 Tr. at 1392:5-1394:1, 1482:9-20.) Upon a review of this extrinsic evidence,

the Arbitrator determines that the language of Paragraph 10(b) is not reasonably susceptible to the interpretation proffered by Fox, and no extrinsic evidence is needed to aid in the interpretation of the contract. See Wolf, 114 Cal. App. 4th at 1351 ("If in light of the extrinsic evidence the court decides the language is 'reasonably susceptible' to the interpretation urged, the extrinsic evidence is then admitted to aid in the second step – interpreting the contract.").

According to Fox's present assertion, the standard of Paragraph 10(b) will only be employed if a particular transaction is challenged. Under this scenario, then, there is no metric by which the Studio and Participants have to measure the fairness of the transaction, no certainty that what the Network indeed agreed to was fair, and no way for the Studio to belatedly bring the transaction into compliance. In fact, under Fox's construction, a transaction that complies with Paragraph 10(b) at the time of licensing could subsequently become non-compliant if TCFTV's affiliates thereafter enter into benchmark agreements on more favorable monetary terms. Fox cannot seriously contend that any party, let alone the Studio and Participants, actually agreed to unknown, subsequently occurring "similar transactions" standard to be the controlling standard. This interpretation is illogical and untenable.

Following this assertion that later transactions can be examined, Fox claims that Bones' license fees are comparable to those of Fringe. However, having determined that Fox's interpretation of Paragraph 10(b) is not proper, the Arbitrator does not reach the parties' arguments regarding the comparability of Fringe. Once again, the Arbitrator is somewhat surprised by this latest contention by Fox since Fringe *premiered three years after Bones*. As such, its fifth- year license fee could not have been considered at the time of licensing. To state it plainly, Fringe was not even in existence at the time the parties were negotiating Seasons 5 & 6 of Bones. How could Fringe be used for anything in this analysis? It can't.

With respect to House, both parties presented arguments regarding the comparability of House. Respondents claim that House is the only comparable program to Bones since its Seasons 5-8 each preceded Bones by one year. However, the evidence shows that Fox did not even request information regarding House during the requisite time period.

Ms. Walden stated that she never requested information regarding House. (7/16/18 Tr. at 1307:6-15.) Mr. Rice stated that he did not discuss House with Mr. Newman or Ms. Walden. (7/13/18 Tr. at 1059:14-1060:4.) Mr. Newman testified that he did not analyze House as a

comparable program. (7/23/18 Tr. at 2404:14-19.) He stated that Mr. Kurtzman would have done research, but he didn't know whether Mr. Kurtzman ever asked for any House information. (Id. at 2385:5-8.)

Moreover, Fox erroneously argues that Respondents have not carried their burden to establish a breach of Paragraph 10(b) because they do not properly evaluate Bones and House by taking into account differences in ratings, rankings, advertising revenue, awards and brand impact that affect their relative values and overall profitability. Again, this is not the test – the test is measured by Fox's actions in entering into transactions with Affiliated Companies on comparable monetary terms to transactions with unrelated third-party distributors for comparable programs.

Thus, it is undisputed that the Studio had the contractual obligation set forth in Paragraph 10(b) and simply did not comply. More specifically, this meant that Ms. Walden, Mr. Newman and Mr. Kurtzman were obligated to protect the Participants' interests when negotiating with the Network by ensuring that the license fees for Bones were comparable to the license fees entered into with third parties. This was not done.

Interestingly, both Ms. Walden and Mr. Newman testified that they engaged in tough negotiations and fought for the Participants. However, the evidence belies these assertions. How could they fight if they were not properly armed with the requisite information? What negotiations were there if the information mandated by the contract was not examined, called for or even investigated?

Moreover, additional and troubling evidence reveals that not only did the Studio know that it would be in breach of the "Dealing with Affiliates" provision, but that it sought indemnity from FBC to cover the breach.

On May 6, 2009, Mr. Kurtzman wrote to Mr. Kurgan reminding him that "[redacted]" (Respondents Ex. 490.) Similarly, in the later negotiations, there was an email regarding splitting liability of Season 7. (Respondents Ex. 762.) On May 2, 2011, Mr. Kurtzman wrote that TCFTV and FBC "[redacted]" (Respondents Ex. 767.) Again, for

Seasons 8-9, there also appears to have been consideration of extending the "[redacted]" from Season 7 to Seasons 8-9, though it is unclear whether that occurred. (Respondents Ex 863.)

There is no doubt that the Studio realized that it was not going to win the fight with its affiliate and therefore not only capitulated to the wishes of the Network but also became an accomplice to fraud with respect to the Network's desire to limit both the Studio's and Network's exposure for its breach and failure to negotiate in accord with the operative contractual standards. A breach occurred, was known to have occurred, and was attempted to be papered over by way of a release.

The Release and Fraud

Fox argues that Josephson and Reichs are barred from challenging the license fees for Seasons 5 and 6 since they both signed a release. "In general, a written release extinguishes any obligation covered by the release's terms, provided it has not been obtained by fraud, deception, misrepresentation, duress, or undue influence." Skrbina v. Fleming Companies, 45 Cal. App. 4th 1353, 1366 (1996). However, as argued by Respondents and established at the Hearing, the release was procured by fraud and is a nullity on its face. To prove fraudulent inducement, Josephson and Reichs must prove: (1) a "fraudulent statement" by TCFTV/FBC; (2) that TCFTV/FBC "knew that the representation was not true"; (3) that TCFTV/FBC "made the representation to persuade [Respondents] to agree to the [Release]"; (4) that Respondents "reasonably relied on this representation"; and (5) that Respondents "would not have entered into the contract if [they] had known that the representation was not true." CACI No. 334.[3]

As a starting point, there is no reasonable dispute that executives and lawyers from both TCFTV and FBC told Participants that Fox would cancel Bones unless it received a signed release from ***all*** Participants. This point is simply incontrovertible.

On May 13, 2009, Josephson got a call from Mr. Newman and Ms. Walden and another call from Mr. Rice saying the show will be cancelled if all Participants do not sign off on the license fee. (Respondents Ex. 2202.) However, Mr. Rice testified that a deal was already in

[3] The elements of fraudulent concealment are identical, except instead of making a fraudulent statement, the defendant must have "concealed or suppressed a material fact." Prakashpalan v. Engstrom, Lipscomb & Lack, 223 Cal. App. 4th 1105, 1129 (2014).

place with the Studio to put the show on the air before he called Josephson. (7/13/18 Tr. at 1138:21-1139:5; 1247:20-1248:2.)

On May 15, 2009, Ms. Bowles sends the draft release ("Release") to all Participants. (Respondents Ex. 2253.) "Participants" is a defined term inclusive of all profit participants, and the Recital provides:

> (b) The Participants accept the terms for renewal of the Series for the fifth and sixth production seasons ("Renewal") as follows: an order for 2 full seasons, the fifth and sixth production seasons, at a license fee of $2,000,000 per episode. The defined term indicates that all profit participants agree to the terms. The signature page contains lines for all Participants.
>
> (c) The Participants acknowledge that Fox has consulted with them regarding the Renewal and accordingly will not and hereby expressly waive any right to assert any claim in connection with the Renewal, the license fee and Fox's acceptance thereof, with the exception of claims for the enforcement of the terms and conditions of the Renewal.

As Respondents point out, "Participants" includes Boreanaz and Deschanel, and at the time this document was prepared and signed, Fox knew that Boreanaz and Deschanel were not going to sign the prepared release. Boreanaz and Deschanel did not agree to waive any right to assert any claim in connection with the renewal of the license fee.

On May 15, 2009 (the same date as set forth above), Mr. Sam Bramhall said Participants need to approve the Release that day but have the weekend to execute the release itself. (Fox Ex. 2254.) Ms. Lauren Whitney, Mr. Josephson's agent, testified that it was made very clear by Mr. Bramhall that the series would not be picked up unless all Participants signed. (7/10/18 Tr. at 426:6-10.)

Again, on May 15, 2009, there was an email exchange between Mr. Newman and Mr. Bramhall. (Respondents Ex. 578.) Mr. Newman knew full well that Boreanaz was not signing. (Id.) Interestingly, and contrary to the representations made by Mr. Bramhall to the Participants' representatives, Mr. Newman took a contrary view and made it clear that he did not care if Boreanaz and Deschanel signed the Release. Yet, Mr. Newman was the very person who called Josephson on this date and told him everybody had to sign. (See also 7/23/18 Tr. at 2467:13-2468: 8.)

Mr. Bramhall was concerned that others would balk if Fox went forward without Boreanaz signing. (Respondents Ex. 578.) Once again, on May 15, 2009, Mr. Bramhall told Boreanaz' representatives good luck in finding Boreanaz another job. (Respondents Ex. 573.) This was either a statement of total dissatisfaction (at best) or a veiled threat of consequences (at worst). There can be no other inferences drawn from such a statement.

On May 16, 2009, Mr. Bramhall tells Ms. Whitney and Mr. Collier, Josephson's attorney, that he "[redacted]" and claims that the only changes were "[redacted]" and he did not want to open a "[redacted]" by putting another version out. (Respondents Ex. 587.) He concludes that "[redacted]" (Id.) Again, this is misleading, at best. Mr. Bramhall does not correct the recitals, nor does he remove the signature blocks for Boreanaz and Deschanel. As will be discussed below, the failure to remove the signature blocks is critical.

While Mr. Bramhall claims that he told Whitney and Josephson's representatives that the actors were not signing, this statement is without any documentary proof and stands directly contrary to the testimony from other witnesses and is both troubling and incredulous when juxtaposed with Mr. Rice's testimony below. Nobody corroborates this testimony. (7/10/18 Tr. at 428:12-18, 433:21-434:18 (Whitney); 7/10/18 Tr. at 497:5-498:9 (Collier); 7/25/18 Tr. at 3173:2-3174:10 (Schenkman).)

Unlike Mr. Bramhall, Mr. Rice admits that he knew that Deschanel and Boreanaz were not signing the Release, but he did not tell Josephson or Reichs or instruct anyone to inform them. (7/13/18 Tr. at 1149:17-1150:13.) Both Josephson and Reichs testified that they would not have signed the Release had they known that not all Participants were signing. (7/9/18 Reichs Tr. at 171:8-16; 7/9/18 Josephson Tr. at 272:5-19.) They had no desire to risk cancellation of the Show. Ms. Whitney, agent for both Reichs and Josephson, testified that had she known that Boreanaz and Deschanel were not going to sign the Release, "it would have changed the conversation completely." (7/10/18 Tr. at 440:1-22.)

Notwithstanding the insurmountable evidence that Fox did, in fact, mislead Participants, Fox takes the position that it did not hide anything and the lack of signatures on the Release itself clearly demonstrates that Boreanaz and Deschanel did not sign the Release. Hence, Fox proffers and concludes that the evidence is quite plain, unambiguous and straightforward: *Anyone signing*

would have seen blank signature spaces and could only conclude that someone was not signing. Once again, Fox presents a very troubling argument both in terms of credibility and intent. The mere fact that the copy sent to Josephson and Reichs did not contain all the executed signatures of Participants but did contain the signature blocks for the missing signatories is simply not enough and is quite sophomoric.

As is often the case with a document requiring the signatures of many individuals in various locations, it is signed in counterparts. This is especially true when, as in the case here, signatures are needed in a very short time frame from signatories that are scattered throughout the state or country. In fact, unless the parties are to sign altogether in the same room and at the same time, virtually all transactional matters nowadays are signed in counterparts. This is the rule and not the exception. [4]

Again, as already set forth above, Mr. Bramhall represented that he did not circulate a revised version (which would have clearly shown a deletion of signature blocks for Boreanaz and Deschanel) because, as he stated, only insubstantial changes had been made. But the question that is most critical to this part of the case is the following: *How were Josephson and Reichs to divine that Boreanaz and Deschanel did not sign when they were explicitly told the opposite, and the signature blocks for those individuals still remained on the circulated Release?* The answer is simple. *They could not have known* such a fact from the document itself. To argue or proffer to the contrary is specious.

There was no way to infer such a fact by the document itself since the original version was circulated with signature blocks for all Participants and that version had never been changed or edited to reflect the true state of intentions by Boreanaz and Deschanel. Nor is there any evidence to support Mr. Bramhall's assertion that he had informed their representatives. To the contrary, the executives from the Network and the Studio all stated the opposite. All along, Fox's representation had been that all Participants had to sign, or the show would be cancelled. It

[4] For the same reasons, Fox's assertion that the fraud claims should be barred by the three-year statute of limitations is without merit. The receipt of an agreement signed in counterparts would hardly put Josephson and Reichs on constructive notice that they had been defrauded.

was safe for the signatories to assume that if Boreanaz and Deschanel were not signing, the Show would be cancelled.[5]

In conjunction with the evidence discussed above, there is an additional disturbing nuance supportive of fraud. Mr. Hart Hanson, the showrunner for Bones, was likewise presented with the Release. However, Josephson testified that initially both he and Mr. Hanson spoke of the Release, and Mr. Hanson had expressed his reservations about the document since it clearly impacted each's participation points.

It was clear to Josephson that Mr. Hanson was, in all likelihood, not going to sign the Release. Josephson testified that in their initial conversation(s) Mr. Hanson simply did not want to sign. Yet somehow, as the Network's deadline to sign the release was approaching, Mr. Hanson changed his position and so indicated to Josephson, which undoubtedly, put more pressure on Josephson since not to sign would put many jobs at risk.

While there is no one to refute the testimony of Josephson about these conversations (Mr. Hanson did not testify at the hearing) and while Fox argues that Josephson knew Mr. Hanson was seeking a benefit based on a May 14, 2009 email, wherein he stated that "other participants have and are negotiating to gain" (Ex. 3650-0002), there is one fact that is immutable and cannot be denied. Mr. Hanson, on the eve of signing the Release, received from Fox a new "overall agreement" that was clearly to his liking and was kept hidden from the other Participants.

Respondents argue that the secret Hart Hanson modifications make the language of the Release false. In the Release, the integration clause provides:

> No covenants, agreements, representations or warranties of any kind whatsoever have been made by any party hereto with respect to the subject matter of this Agreement, except as specifically set forth in this Agreement.

(Release, ¶ 8.) However, as was revealed at the very end of the Arbitration Hearing, Fox was, in fact, negotiating with Mr. Hanson at this critical time "with respect to the subject matter of this Agreement."

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[5] Another fraud claimed by Respondents is Fox's failure to disclose material changes in the Release regarding deficit recoupment and ranking bonuses. The Release makes no reference to elimination of deficit recoupment and ranking bonuses. (Respondents Exs. 561, 2680.) Ms. Whitney testified that she didn't learn about removal of the deficit recoupment until the Audit Report. (Tr. 7/11/18 at 616:16-617:4.) Similarly, Ms. Felker testified that Bramhall never mentioned the deficit recoupment term going away. (7/11/18 at 616: 6-617:4.)

On May 15, 2009, Jeanne Newman, Mr. Gary Newman's wife, sent an email to Mr. Bramhall stating that Hanson "[redacted]" (Respondents Ex. 566; see also Respondents Ex. 1483.) To reiterate, Mr. Gary Newman was co-president of TCFTV. After claiming privacy and objecting to producing this document throughout the Arbitration, Respondents finally produced Hanson's Overall Amendment dated May 18, 2009. This is the very same date that Hanson and Josephson signed the Release. There is no doubt that Mr. Hanson's Overall Amendment violated Paragraph 8 of the Release.

It is clear that Fox had no intention of cancelling Bones. It could not proceed without the creator, writer and producer of the Show. It had no choice but to agree to Mr. Hanson's "[redacted]" in order to get him to agree to the Release language which, in turn, would set in motion an assurance for the signatures of both Josephson and Reichs. Hence, another critical, yet rhetorical question which highlights this point is: *Why would the Network and Studio go to all the trouble of negotiating a new deal with its showrunner and at the same time make sure that the creator and producer signed a release if the show was truly going to be cancelled?*

The answer is self-evident: The show was not going to be cancelled and there never was an intent to do so. The intent was to continue with the show and at the same time bar any chance for a lawsuit to be brought.

In addition to all of the above, it needs to be pointed out and likewise asked: Why is Fox the Network requesting releases from Participants who have no contractual relationship with it? There is no privity between the Network and Participants and the contractual obligations set forth in the Agreements run only between the Studio and Participants. In a vertically integrated set up between the Studio and the Network, the release became essential so as to continue on with the Show and likewise eliminate any potential liability previously discussed.

It is convenient, coincidental and suspicious that Fox entered into a last-minute overall deal with Mr. Hanson that was not disclosed to the other Participants. In fact, this new overall agreement was not disclosed until the actual arbitration hearing was underway and only upon the issuance of an order from the Arbitrator. All inferences point to a false, hidden and duplicative scenario being presented by Fox.

As a result of the above, Respondents argue that the threat to cancel Bones was fraudulent in and of itself and was the actual launch point for the fraud. To evidence and support this, the Studio, on January 10, 2008, made a presentation of Bones when they were attempting to syndicate the show. (Respondents Ex. 287.). The presentation is quite telling because the Studio sets forth compelling data and reasons as to why the show should continue and clearly establishes the basis as to why Fox had no intent to cancel the show.

In this presentation, Bones was portrayed as the darling of the Network and not the middling show with middling ratings that every Fox witness testified to at the Arbitration hearing.

[redacted]

As the evidence progresses from this point in time, it is revealed that no one seriously contemplated cancelling the Show. For example,

- On January 5, 2009, Mr. Ligouri wrote in an email that Bones, along with Idol and House, were being used to launch new shows. (Respondents Ex. 413.)
- On January 13, 2009, an FBC internal email, copying Kurgan, Ligouri and Beckman, states that Bones is the only show on entire network with an upward trajectory. (Respondents Ex. 419.)
- Mr. Reilly, President of the Network, admits that it "would be highly unusual" not to pick up a show that was on an upward trajectory, and he could not think of a single example where it happened. (7/26/18 Tr. at 3317:22-3318:2.)
- On March 3, 2009, Mr. Reilly sent an email to Mr. Rice regarding discussion of a three season pick up. (Respondents Ex. 457.)
- This would not have been discussed if the Show was being cancelled. (Reilly Tr. 7/26/18 at 3256: 2-22.)
- On March 20, 2009, Mr. Beckman explained to Mr. Rice that Bones is a "[redacted]" (Respondents Ex. 449.)

- On March 24, 2009, the Network orders six scripts for Season 5, noting the series has boosted Thursday 18-49 age group by 43%. (Respondents Ex. 451.)
- On May 6, 2009, a Bones presentation took place. Among many glowing statements, it states: "[redacted]" "[redacted]" (Respondents Ex. 510.)
- On May 7, 2009, which is the same day FBC sends the cancellation letter, Kurgan and Beckman exchange emails discussing whether Bones will air on Thursday or move to Friday and noting that Bones will stay on Thursday due to sales success. (Respondents Ex. 531.)
- Mr. Kurgan testified that he has no recollection, despite the May 7 letter, of any discussion of replacing Bones with another show (7/18/18 Tr. at 1882: 2-5) or about actually cancelling Bones (Id. at 1921:16-18.).
- On May 13, 2009, Mr. Acosta tells Norma Ceres, "[redacted]" which is the no-Bones version. (Respondents Ex. 2208.)
- Ms. Ceres emails the team "[redacted]" which is the version with Bones. (Respondents Ex. 549.)
- Mr. Acosta acknowledges that he must have been told by Rice or Kurgan that there was an affirmative decision to go with Bones as of May 13, 2009. (8/7/18 Tr. at 3958:24-3960:14.)
- On May 13, 2009, Mr. Rice tells Earley to book Deschanel's upfront travel, after Earley says, "[redacted]" (Respondents Ex. 548.)

Finally, Respondents point to another exhibit that was presented at the last minute. This exhibit (Exhibit 1456) shows that American Dad, which was in the Ligouri memo, was picked up at [redacted] for '08-'09, '09-'10, '10-'11, '11-'12, and '12-'13. In every single one of those years, Bones' rankings were superior. (Id.)

When viewed in totality, the evidence surrounding the Release, from its inception and design to its presentation to Participants, supports a finding of fraud with the intent to get Participants to sign off on their points and at the same time preclude litigation and Participant leakage. Bones was not going to be cancelled, and the Release was procured through a series of

misrepresentations and fraudulent conduct that, in reality, had the Participants known the true facts, they would not have signed since to do so would have cut off their back-end points. The only parties to have gained from the Release were the Studio and the Network, which in a non-vertically integrated world would never have happened.

Accordingly, the Release is void ab initio. The Arbitrator finds that Respondents have established their claims for breach of contract and fraud.

IV.

INTENTIONAL INTERFERENCE WITH PARTICIPANTS' AGREEMENTS

Respondents claim that the conduct of FBC, FEG and 21CF concerning the license negotiations and the Release constitute intentional interference with the Participants' agreements with TCFTV. To establish a tortious interference claim, a plaintiff must prove: (1) a valid contract between plaintiff and a third party; (2) defendant's knowledge of this contract; (3) defendant's intentional acts designed to induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage. Pacific Gas & Electric Co. v. Bear Stearns & Co., 50 Cal. 3d 1118, 1126 (1990). The elements of inducement of breach of contract require an actual breach. See Contemporary Invs., Inc. v. Safeco Title Ins. Co., 145 Cal. App. 3d 999, 1002 (1983).

The Arbitrator once again finds and concludes that the facts presented at the Hearing meet these elements. Specifically, the "Legal Action Plan" and the Release support intentional interference by the Network and FEG/21CF.

The Legal Action Plan

On January 12, 2009, Mr. Ligouri sent an email to Mr. Chernin, the Chairman and CEO of the network, referencing "[redacted]" (Respondents Ex. 417A.) He states that "[redacted]" (Id.) He then outlines the "Issue," including: "[redacted]" (Id.) This reflects his knowledge that the Studio has

agreements with Participants that will be affected. As a result, Mr. Ligouri outlines "Next Steps:"

[redacted]

(Id.)

In response, Mr. Chernin forwarded this email to Mr. Gelfan stating, "[redacted]" (Id.) Mr. Chernin also copied this email to Studio executives, including Ms. Walden, Mr. Newman and Mr. Kurtzman. (Id.) When asked why he forwarded this email to both the Network and the Studio, Mr. Chernin replied:

> Because I, I read Mr. Ligouri's thing, it sounded like there were issues coming to these intercompany license fees, specifically, and I wanted to make sure that my directives were being listened to, ...
>
> I wanted everybody to figure out a way to have these negotiations, to do the best they could for their individual divisions, to honor the profit participants, and have us pay market, market-level license fees.

(7/16/18 Tr. at 1401:12-1402:1.) Nonetheless, when asked why the Studio, Network and Parent were involved in this memo, Mr. Rice testified that he thought it was "unusual." (7/13/18 Tr. at 1009:4-18). Mr. Kurtzman stated he thought it was "odd." (7/12/18 Tr. at 890:15-891: 6.)

On January 13, 2009, two days after this directive from Chernin, Mr. Barron of the Finance Department ran an analysis calculating the effect on TCFTV's profitability for Season 5 of Bones of: (1) full-cost license fees (based on the then-estimated cost of production of $[redacted] million/episode), which would have resulted in over $[redacted] million in payments to Participants; (2) the "TCFTV Breakeven" license fee – the lowest license fee TCFTV could receive without incurring any losses – of $[redacted] episode; and (3) the "Participant Breakeven" license fee – the highest license fee TCFTV could receive without triggering any leakage to Participants – calculated as $[redacted] million/episode. (Respondents Ex. 418; 8/13/18 Tr. at 5148:7-21, 5149:20-24; 5150:13-21, 5151:2-5153:4 (Barron).) Interestingly, the Participant Breakeven license fee is virtually identical to the $2 million/episode license fee that TCFTV and FBC eventually agreed to for Seasons 5-6 of Bones. (8/13/18 Tr. at 5153:5-24 (Barron).)

Other evidence reveals that the Network was aware of the Studio's contractual duty to Participants. On January 23, 2009, Mr. Gelfan reached out to Mr. Kurtzman, Mr. Kurgan, Mr. Kender and Mr. Chernin regarding a meeting on 5th year license fees for Bones and American Dad, "[redacted]" (Respondents Ex. 424A.) On April 3, 2009, Mr. Acosta asked Mr. Mayberry whether the parent is up to speed on the Bones license fee issue, and Mr. Mayberry responds, "[redacted]" (Respondents Ex. 456.) On May 6, 2009, Mr. Kurtzman and Mr. Kurgan had an email exchange regarding their discussions of whether the Network had made an offer to the Studio regarding Bones. (Respondents Ex. 490.) The discussions included splitting liability to the Participants "[redacted]" (Id.) Mr. Kurtzman could not think of other shows between the Network and the Studio wherein the Network floated the idea to cover the participants' claims. (7/12/18 Tr. at 929:10-930:6, 959:1-961:4.)

Finally, Mr. Newman was asked whether he took any measures to try to build leverage in his negotiations with the Network. He responded:

> Yes. We did everything that we knew how to do, from threatening to take the show to other networks to quoting him deals that other networks were paying, Ghost Whisperer being at the time the most recent deal. You know, telling him he was going to end up getting us sued by the participants because the license fee wouldn't stand up to the standard of dealing.

(7/23/18 Tr. at 2597: 2-14.)

Despite full knowledge of the terms of the license agreement and Bones' relatively strong performance, there is no indication that anyone from TCFTV ever asked FBC to renew Bones under those terms – even though there was no precedent for FBC paying anything less than full-cost license fees with deficit recoupment and rankings bonuses to any third-party studio for any series licensed for Season 5 or beyond. (7/17/18 Tr. at 1538:23-1543:15 (Walden); 7/18/18 Tr. at 1856:23-1859:5 (Kurgan); 7/23/18 Tr. 2441:23-2443:2, 2457:23-2459:7, 2594:19-2595:15 (Newman); 7/26/18 Tr. 3333:11-15 (Younger).) Indeed, Walden was aware that "the network was setting a new precedent," that "there were different terms that the network was trying to create, a different deal they were trying to create on the fifth season of Bones." (7/17/18 Tr. at 1541:12-20, 1542:6-1543:11, 1646:25-1647:6.)

This can only be explained by the fact that FBC and 21CF/FEG sought to induce TCFTV to accept license fees that were inconsistent with Paragraph 10(b) and FBC's custom, and they knew that entering into below-market licensing agreements with TCFTV was "certain or substantially certain" to cause interference or disruption of Respondents' expectations under their contracts with TCFTV.

Fox attempts to argue that Mr. Ligouri's "legal action plan" email is "ultimately innocuous." However, Fox's own actions surrounding this email belies its argument. Fox originally produced this document in redacted form, and then during the first week of Arbitration and after a warning from the Arbitrator, it produced the unredacted document. Further, it should be noted that shortly after Mr. Liguori's Legal Action Plan memo in 2009, Mr. Liguori left Fox and Mr. Peter Rice stepped to be Mr. Liguori's replacement. Somehow, Mr. Liguori does not surface again on Fox's radar until just after January of 2018.

For some reason, Fox now takes another look at Mr. Liguori and believes they need his talent as a producer. This quizzical interest leads to a "First Look Agreement" between FX (a Fox affiliate) and Mr. Liguori. However, this document is never produced and during Mr. Liguori's first trip to the witness box is never mentioned. Yet, near the conclusion of the Arbitration hearing, the Ligouri "First Look Agreement" was revealed.

In this First Look Agreement, FX provided Ligouri with [redacted], and fixed episodic fees and contingent compensation far exceeding that of top executive producers in Hollywood. (Ex. 1454; 8/9/18 Tr. at 4605:20-4620:4 (Cline).) Why and how did this come about? Mr. Liguori had virtually no experience whatsoever as a Producer, yet the First Look Agreement, when compared to those of top producers in Hollywood, rivals those and in some instances surpasses those deals.

FX President John Landgraf, who reports to Mr. Rice, directed his head of business affairs to make this unprecedented deal with Ligouri right after January 1, 2018 (8/9/18 Tr. at 4563:21-4564:10, 4637:21-24 (Cline)), while Respondents' motion to compel production of the

Ligouri memo and related documents was pending.[6] Despite the fact that [redacted], FX apparently issued no press release reporting its deal with Ligouri. (8/9/18 Tr. at 4616:7-4617:23 (Cline).)

When viewed in light of these circumstances, the Ligouri "legal action plan" is far from innocuous. If one juxtaposes the First Look Agreement with Mr. Liguori's testimony at the hearing (wherein he downplays the significance of the plan itself), it seems coincidental that Mr. Liguori disappears for 9 years (from Fox's radar) and then magically reappears with a First Look Agreement 7 months before he is to testify in these proceedings with a deal in hand that most producers in Hollywood have strived to have their entire entertainment career.

The contents of the Legal Action Plan were followed by both the Studio and the Network from January 2009 through May 2009, and the conduct of each clearly reflects the key components of that plan.

The Release in Relation to the Intentional Interference Claim

Respondents also argue that the evidence surrounding the Release supports intentional interference. Mr. Rice testified that the Release was his idea. (7/13/1 Tr. at 1123:17-1124:7; 1218:14-20.) He claimed that he suggested the Release because he had conversations in which concerns about liability to Participants came up. (7/13/18 Tr. at 1029:21-1031:9.) Specifically, he stated, "I think I must have had conversations about potential liability because that must -- that was my motivation for asking for the release to be signed." (Id.) This begs the question of why Mr. Rice would be concerned about the Studio's liability to Participants.

In an email exchange between Mr. Kurgan and Mr. Kurtzman, Mr. Kurgan actually suggests to "[redacted]" (Respondents Ex. 2152.) Then, on May 7, 2009, Ms. Minna Taylor sent a letter to Mr. Kurtzman which stated:

[redacted]

[6] The Agreement itself is dated three days after Fox agreed to produce the redacted version of the Ligouri memo and related documents. (Ex. 1607; Ex. 1606-0011-12.)

(Respondents Ex. 518.) During the testimony, this became known as the "cancellation letter" and was shown to be highly unusual, to say the least. Mr. Newman testified that this letter was unprecedented in his career. (7/23/18 Tr. at 2432:7-17.) Ms. Walden testified that she had never seen a letter like it before in her career. (7/16/18 Tr. at 1353:12-21.)

Clearly, an unaffiliated network would not have needed to send this letter because cancellation would have occurred by telling the studio that the show would not be renewed or by allowing the option deadline to expire. Here, however, this unprecedented letter was part of the legal action plan.

The sharing of this "legal action plan" between the Studio and the Network evidences the beginning of the Network's process to ensure the Show continued at less than a full-cost of production license fee. When it received the legal action plan memo, the Studio should have realized that the Network had no intention of paying a full-cost of production license. The Network suggested the Release, but it was the Studio's contractual exposure to Participants, not the Network's. The Network had no privity with the Participants with any contractual agreements.

So why is the Network interested in a release that could only be between the Studio and its talent? For example, if NBC network was negotiating with TCFTV about a license fee, why would NBC be interested in making sure the participants of the show issue some sort of contractual waiver or release of claims? The answer is they would not. However, if the Studio and the Network are integrated (as is the case here) then the conflict and the reasons therefor become obvious.

Moreover, it is unclear why Mr. Rice made the phone call to Josephson about the Release when it was the Studio's responsibility to look out for its participants. An unaffiliated network would never have an interest in a contract between talent and the studio, and certainly, it would not seek a release from the talent or speak to talent about such a document. To reiterate, there is simply no privity between the participants and the network. An unaffiliated studio would have no interest or reason to seek a release from its talent. It would present the following options to its participants:

(1) they can proceed with a less than full-cost license knowing that their backend points would be delayed;

(2) inform them that the network is seeking a release, and they can decide what they want to do; or

(3) negotiate hard with the network as to the license fee and actually represent the participants.

However, here, the Studio knew in January 2009 that the Network was not going to pay the full cost of production license. Yet, as alluded to above with respect to the breach of contract claim, the Studio not only failed to apply the standard set forth in the Agreement, but it also failed to zealously negotiate on behalf of its Participants. As the evidence developed, it became difficult to distinguish between the actions of the Studio and the Network.

Thus, the Arbitrator determines that both the "legal action plan"—originated by FBC—and FBC's origination of the Release make abundantly clear that FBC and 21CF pulled the strings and guided the sham "renegotiations" of the Bones license agreement to the detriment of the Series' license fees and Respondents' profit participation interests.

The Arbitrator finds Respondents have established their claim for intentional interference with contract and are entitled to recovery on this claim.

V.

BREACH OF PARTICIPANTS' AGREEMENTS BASED ON THE INTERNATIONAL TRANSACTIONS

The same Paragraph 10(b) standard applies equally in the international marketplace, and Respondents allege breaches of Paragraph 10(b) with respect to TCFTV licensing of Bones to foreign affiliates. Specifically, Respondents claim that TCFTV breached the Agreements in the United Kingdom, Italy, Spain and other territories. As set forth below, the Arbitrator agrees with Respondents regarding the U.K, Spain and Italy but finds that Respondents have not established their claim regarding the other territories.

United Kingdom

Similar to the analysis set forth above with respect to the domestic licensing, TCFTV never complied with Paragraph 10(b) with respect to the international licensing of Bones.

Mr. Scott Gregg, Executive Vice President of Strategic Operations for TCFTV Distribution, testified, "We do not look at third-party studio agreements with Sky or other affiliates, and we do not ask for them." (7/19/18 Tr. at 2072:19-2073:9; 2074:19-2075:13; 2128:9-2129:11.) He stated that there were no discussions of how a negotiator would comply with Paragraph 10(b). (Id. at 2070: 12-19.) Mr. Gregg testified that TCFTV determined its license fees based on TCFTV's historical licensing practices in territories, not the affiliate's historical licensing practices, and he admitted that TCFTV's practice was inconsistent with the plain language of the standard set forth in the ATP. (Id. at 2070:12-19, 2072: 19-2073:11, 2128:18-2129:11.)

Similarly, Mr. Londono, COO of Fox Networks Group Europe and Africa, testified that he had no knowledge of the Paragraph 10(b) language, and that he had never seen the standard. (7/24/18 Tr. at 2665:9-2666:7.) He stated that he never provided agreements to the Studio. (Id. at 2666:24-2667:20.) Mr. Londono testified that it would be difficult to find comparable programs, and that no one at the affiliated networks was ever told the agreements with the Studio needed to be on comparable terms to unaffiliated deals. (Id. at 2667:21-2668:10.)

Fox argues that Respondents fail to satisfy Paragraph 10(b) because there is no evidence of third-party deals with BSkyB. It asserts that because Respondents made no effort to obtain such third-party deals, no third-party license agreements with BSkyB are in the record, and therefore, Respondents have not met their burden.

Fox's argument turns the standard of Paragraph 10(b) on its head. To begin with, TCFTV is the party that promised to comply with Paragraph 10(b) in exchange for Respondents' waiver of any right to challenge TCFTV's ability to license to its affiliates, thereby making it TCFTV's duty to obtain the comparable information in order to comply. However, as testified to by its own employees, the key negotiators were not even aware of the standard or their obligations under Paragraph 10(b). Moreover, as stated above with respect to the domestic licenses, Fox was contractually obligated to meet this standard at the time it entered into the

license agreements with the affiliated studios. It therefore makes absolutely no sense for Fox to argue that Respondents have not met their burden because Respondents did not seek third-party deals at this time.

Spain and Italy

Similar to the U.K., TCFTV's negotiators made no effort to comply with Paragraph 10(b) with respect to licensing in Italy and Spain. They did not request the Fox-affiliated networks' agreements with unaffiliated studios, and never inquired about what the Fox-affiliated networks were paying unaffiliated studios for comparable programs. (7/19/18 Tr. at 2122:18-21, 2123:15-2124:1 (Gregg); 7/24/18 Tr. at 2665:12-2666:7, 2667:7-20, 2668:4-10 (Londono).)

Other Territories

In their Post-Hearing Liability Brief, Respondents appear to specify the "other territories" as Latin America. Regardless, Respondents' international claim(s) concerning the remainder of territories fails as it is based on an extrapolation analysis. This extrapolation, based on the United Kingdom, Italy and Spain, when applied to the remainder of territories is too speculative to serve as the basis for an award of damages.

As Fox argues, extrapolation is not compatible with a Paragraph 10(b) claim which requires Respondents to make an evidentiary showing with respect to each territory. This is true for both a breach and damages. With respect to the latter, the evidence showed that each international market is unique; the buying practices and patterns in one territory cannot be used as a proxy for the buying practices and patterns in another. (7/19/28 Tr. at 2149:5-17 (Gregg); 7/24/18 Tr. at 2634:12-16 (Londono); Cornish Tr. at 4163:4-11; Ex. 3626-0006.) Many factors affect the level and range of pricing and vary from territory to territory. Economies, competitive conditions, licensing structures, and market interest in U.S. content all vary. (Id.) As such, the Arbitrator cannot find a breach regarding the licensing in the remainder of the territories.

MundoFox

Respondents appear to have abandoned their MundoFox claim, recognizing that the testimony was in conflict. Steve McDonald testified that he personally called Telemundo, TeleFutura and Univision. (7/16/18 Tr. at 1696:2-6.) Ms. Anjelica Cohn testified that she spoke

to Diana Mogollan and Flavio Morales, the two executives at mun2, and these two said that they had not been contacted about Bones, would have been interested, and would have paid $50,000. (Cohn Tr. at 2044:3-2047:24.) However, Ms. Mogollan and Mr. Morales both testified that they never spoke to Ms. Cohn about Bones, would not have been interested, and could not have afforded to pay anywhere near $50,000 for it. (Mogollan Tr. at 4481:15-4482:24; Morales Tr. at 4500:1-4501:25.)

Given this conflicting testimony and with the absence of any other testimony or proof, Respondents have not established their claim as it pertains to MundoFox.

VI.

CLAIMS BASED ON FOX'S LICENSING ARRANGEMENTS WITH HULU

Respondents also allege that Fox breached the Participant Agreements through its licensing arrangements with Hulu. They argue that although FEG earned over $[redacted] million from licensing Bones to Hulu, it passed less than $[redacted] million on to profit Participants, choosing instead to minimize "leakage" by ensuring that 100% of revenue from full current-season streaming rights was funneled to FBC, even though TCFTV had never licensed those rights to FBC and, thus, retained the right to those revenues. Respondents contend that the same sweetheart agreements also dramatically undervalued both past and current-season rights to Bones.

Initial Inquiry: Ownership Rights

Respondents argue that TCFTV is, and at all relevant times was, the copyright owner of Bones. Inexplicably, though, TCFTV permitted parent company FEG, which had no streaming rights, to exploit those rights anyway—and to give nearly all of the revenue from that exploitation to FBC so that this revenue would not be shared with Respondents. Respondents conclude that TCFV's decision to license to Hulu rights worth at least [redacted], without receiving any of that consideration for itself, was a clear breach of its obligation to distribute the series "in good faith." (Ex. 54, ¶ 10(a).) And further, the implied covenant of good faith and fair dealing mandates that TCFTV act in good faith toward profit Participants in the licensing process.

The preliminary question is whether there was an agreement wherein the Network was given the right to exploit Bones by the Studio. To begin with, testimony from both the Studio and FBC is consistent that the Studio was the copyright owner for Bones, and FBC could obtain the digital rights only through a grant of those rights from the Studio. (7/18/18 Tr. at 1922:25-1923:11 (Kurgan); 7/12/18 Tr. at 948:2-11 (Kurtzman); 7/24/18 Tr. at 2678:14-19 (Pearson).) Next, it is clear that there was no written agreement between the Studio and the Network concerning the digital rights to Bones. (7/24/18 Tr. at 2692:11-15 (Pearson); 7/12/18 Tr. at 879:11-18 (Kurtzman); 7/23/18 Tr. at 2493:7-13, 23-25 (Newman).) The question, then, is how did the Studio give full current-season stacking rights to the Network?

To understand the arguments between the parties with respect to these digital rights discussed above, one needs to start with what Fox represented in its Opening Statement:[7]

> So there was a deal struck between the Network and the Studio and in this deal they traded off rights. The Network got in-season streaming, meaning the same year that they put the show on TV they could also put it on Hulu and get the revenue stream from that. The Studio got something arguably even more valuable; they got to pierce into this four-year window and sell DVDs earlier, sell re-runs into syndication earlier than the four years, and sell out-of-season episodes earlier than they otherwise would have in this four-year window.

(7/9/19 Tr. at 147:18-148:2.) The Arbitrator asked counsel when this deal, which was represented as an "oral deal," was cut, and the response was "2008/2007." (Id. at 148:10-25.) However, Mr. Pearson's testimony at the hearing (the witness that all Fox witnesses pointed to as the person most knowledgeable in this regard) was that this alleged "deal" was struck in 2010.[8]

Specifically, Mr. Pearson testified as follows:

> Q: Now, did you testify at your deposition that with respect to digital rights, not just this more narrow full current season, all digital rights, "hard to say we ever had an understanding, we had an ongoing dialogue." Do you remember giving that testimony?
>
> A: Yes.
>
> Q: And was that truthful testimony?

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[7] The Arbitrator is fully aware that opening statements are not evidence. However, Fox's position with respect to these digital rights has been extremely difficult to follow since it has been somewhat of a moving target. To evaluate Fox's oft times shifting arguments it is necessary to understand what its own counsel represented at the outset of the hearings before testimony was taken under oath.

[8] This differed from his deposition testimony.

A: Yes.

(7/24/18 Tr. at 2712:4-11.)

Once again, a pause here is required to acknowledge that Fox witnesses, including the heads of the Studio and Network, testified that they did not know about a digital rights agreement, but that Mark Pearson was the person who would know. Indeed, Mr. Kurtzman, Mr. Newman and Mr. Kurgan, among others, all deferred to Mr. Pearson, who Mr. Chernin identified as "a middle-level strategy guy for the television studio." (7/16/18 Tr. at 1432:3-6.)

At the hearing, Mr. Pearson, who testified at his deposition that as late as May 2014 he did not believe there was an agreement that FBC would possess the current in-season rights to Bones, claimed to recall an "understanding:"

> A: I'm recalling now specificity as it relates to that exploitation on Hulu Plus, that that was part of the proposal, and that in fall of 2010 Hulu Plus was to launch and the network needed those rights to satisfy Hulu Plus.
>
> Q: So you're now recalling that specificity. When did you first recall it? Was it right here on the stand or was it sometime in between your deposition and now?
>
> A: It was right here on the stand when I looked at that timeline and started scrawling some notes, and I made a note to myself 2010 Hulu Plus launch.
>
> . . .
>
> Q: This is important for this case. You referred to that as an agreement when you made your line. Do you want to stick with this being an agreement or is it something different?
>
> A: As I said, I'm not an attorney and I don't understand the legal difference between what an agreement is and what an understanding is. I think it was an understanding and not an agreement, so if I can at this point in time go back and mark it with a green marker, that's what I would do.

(Id. at 2709:10-25, 2710:20-23, 2711:5-14.)

Mr. Pearson confirmed his testimony that in 2010 there was an understanding with respect to Bones that the Network would get full-season stacking rights for Hulu Plus going forward for the 2010/2011 season. (Id. at 2706:15-21.) However, this testimony was impeached by other testimony showing that the Studio, after 2010, continued to assert that there was no digital rights agreement and that it was reserving its right. According to an email written by Mr. Kurtzman on April 28, 2014 and confirmed by him in his testimony, "[redacted]

[redacted]" (Respondents Ex. 1075; 7/12/18 Tr. at 875:1-16.)

On May 1, 2010, Ms. Harris wrote an email to Mr. Kurtzman stating that FBC is currently seeking full stack rights for Hulu Plus subscribers on all of its licensed series going forward. (Respondents Ex. 1075.) Mr. Kurtzman responded that "[redacted]" (Respondents Ex. 1075.) Mr. Kurtzman again confirmed this in his testimony at the hearing. On the Network side, Mr. Kurgan confirmed that at least as of May 1, 2014, there was no [redacted] (7/18/187 Tr. at 1930:6-9.)

Next, an examination of Mr. Pearson's claim of what the Studio received in exchange for the digital rights is required. Mr. Pearson stated:

> So what the studio got in return for giving the network expanded digital rights for full stacking, the studio got 30-day, prior to subsequent premier, SVOD rights, the studio got early repurposing, early syndication rights.

(7/24/18 Tr. at 2696:11-15.)

Again, however, this testimony is impeached because the Studio already had been exploiting these rights. Mr. Pearson confirmed that in 2008 Bones was licensed to Turner in early repurpose which was more than two years before he claims the Studio had the right to license that early repurpose, and also that the Studio licensed the syndication rights to Turner before he claims the Studio had right to do so. (7/24/18 Tr. at 2728:13-2729:5.) Mr. Barron confirmed the Studio did not need early syndication because it was already syndicated. (8/13/18 Tr. at 5218:15-22.) Finally, with respect to the past-season SVOD rights, Mr. Pearson confirmed that under the Netflix deal, which was entered into prior to June 2010, the Studio already had the right to license those past-season rights. (7/24/18 Tr. at 2729:13-23.)

After confirming that the Studio was already exploiting all the rights related to all of the consideration that it purportedly received in return for giving the Network the Hulu SVOD rights, Mr. Pearson was asked what the Studio got in return for giving these rights to the Network. Incredibly, Mr. Pearson stated, "We got their agreement that we would be able to continue to do that." (7/24/18 Tr. at 2732:25-2733:7.) Mr. Pearson first testified at his

deposition that there never was any understanding between FBC and TCFTV about any Bones digital rights. Then, at this Hearing, after all other witnesses claimed that Mr. Pearson was the person who would know about the digital rights, Mr. Pearson recalled, at that moment, the understanding discussed above.

Simply stated, the Studio did not get those early syndication and past-season SVOD rights in exchange for full current-season stacking. If one were to ask why, the answer would be simple: Because the Studio already had them and were exploiting them. Hence, it received no consideration in exchange for the purported digital rights trade-offs. Moreover, no exhibit, emails, or other documentary evidence was shown to support Mr. Pearson's testimony. Only the impeached testimony of Mr. Pearson himself is the support for this alleged agreement. More specifically, Mr. Pearson had to impeach himself to arrive at some purported understanding. In a few words, the Arbitrator finds Fox's position in this regard to be patently absurd.

Based on the evidence presented, the Arbitrator finds no agreement between the Studio and the Network giving the Network current in-season streaming rights.

Fox argues that the Studio's granting to FBC of certain in-season new media rights was "comparable" under the Distribution Controls Paragraph. It claims that the Network's deal with the Studio in terms of the exchange of digital rights was the same deal the Network had with third-party studios such as NBC Universal and WB. However, again no evidence was presented of any third-party studio granting full current-season stacking rights to FBC. Mr. Kurgan testified that [redacted] (7/18/18 Tr. at 2005:6-8; 1007:24-2998:1.)

Accordingly, Respondents have established that TCFTV breached the Participants' Agreements by permitting FEG to grant Hulu full current-season stacking rights, which no unaffiliated third-party studio had ever granted to FBC, and receiving no consideration, and instead allowing that consideration to be directed to FBC and keeping the $70,690,961 out of the Participants "Gross Receipts."

Breach of Agreements Based on Self-dealing

Respondents argue that the [redacted] FBC received from the Hulu licensing agreement for Bones was artificially deflated as a result of self-dealing between Fox and its affiliate Hulu,

because those deals were based on a share of speculative advertising revenue that no third-party distributor has agreed to when licensing a premium scripted television series to Hulu. Respondents assert that with respect to past-season episodes (episodes from seasons not currently airing), FEG licensed at least the entire first season of Bones to Hulu Classic from 2008-2010 in exchange for a highly speculative [redacted] share of advertising revenue with no minimum guarantee.

Mr. Chernin testified that when the [redacted] split was agreed to with Hulu, Fox had no idea what the ad revenues would look like that it might later receive from Hulu. (7/16/18 Tr. at 1459:19-23.) He stated that the terms were based on calculating what was needed to keep Hulu at breakeven (meaning viable). (7/16/18 Tr. at 1458:4-20.) The deal was negotiated between the joint venture partners, Fox and NBC, and there was no third party to negotiate. (7/24/18 Tr. 2826:19-24.) Ms. Zigler testified how a third party dealing at arm's length would have arrived at the monetary terms of the Hulu content license agreements: by negotiating a fixed license fee that was commensurate with the exploitation of their content. (7/25/18 Tr. 2901:12-18.)

However, Ms. Brennan, Fox's PMK regarding the Hulu deals, testified that FEG did not even discuss the possibility of getting fixed episodic license fees, or any minimum guarantee, in return for licensing its content to Hulu. (7/24/18 Tr. 2832:21-2833:4.) Mr. Chernin did not recall anyone ever looking into the question of whether the [redacted] ad revenue split was reasonable within the industry. (7/16/18 Tr. 1460:13-17.) Indeed, when the Arbitrator asked Mr. Chernin where the negotiation aspect of this deal was, Mr. Chernin responded, "I don't, I don't know whether the agreement reflects negotiations or not." (7/16/18 Tr. at 1447:18-25.)

Neither of Fox's experts was aware of any third party who had been willing to license content to Hulu for a share of ad revenue. (See Wunderlich Testimony, 8/10/18 Tr. 4930:23-4913:4; Homonoff Testimony, 8/8/18 Tr. 4412:22-4413:1.) So, when Fox contends that there is no evidence of a better deal struck by another studio in terms of the percentage of ad revenue, this is true because *no other studio would make such a deal based on the percentage of ad revenue.*

Fox agreed to the same [redacted] ad revenue split for the full current-season stacking rights for Bones Seasons 6 through 12 to Hulu Plus. There was no evidence that these rights had ever been licensed to any third-party streaming platform at any price. Indeed, no witness or expert

was aware of any third-party studio licensing full current-season stacking rights for any scripted drama to FBC or Hulu. Thus, it seems that Fox was able to license the current-season stacking rights of Bones to Hulu because Hulu was a Fox affiliate.

In addition to all of the above, the Arbitrator now addresses perhaps the most shocking piece of evidence related to the Hulu issues, which is the Fox Content License Agreement itself. Fox actually signed both sides of this agreement. Mr. Dan Fawcett signed the Fox Content License Agreement on behalf of both FEG and Hulu. (Respondents Ex. 278.)

The signature page represents that Mr. Fawcett was President, Digital Media, of FEG and at the same time he was Vice President of Hulu. This puzzle was never resolved at the Arbitration Hearing since Mr. Fawcett was not called by Fox, and Respondents stated that he could not be found since they had no idea where he could be located. When Mr. Chernin was asked how this was possible (meaning a Fox representative signing on behalf of both parties), he replied *"I have no idea."* (7/16/18 Tr. at 1447:18-25.)

Indeed, the self-dealing analysis is hardly surprising considering that the Fox/FEG executive who negotiated and agreed to the original [redacted] ad revenue split was also representing Hulu's interests at the time. As already stated above, Mr. Fawcett literally signed the agreement for both parties in his representative capacity for both sides. The obvious inferences of self-dealing, conflict of interest and the lack of any arm's length negotiations leap off the page.

Claim for Tortious Interference/Inducement of Breach

Respondents argue that TCFTV's parent company FEG, under pressure of its own parent News Corp./21CF, licensed Bones to Fox affiliate Hulu for highly speculative, below-market monetary terms. Specifically, they claim that the setting of the licensing terms, the [redacted] ad revenue split, and the allocation of the current-season revenues to the Network establish tortious interference and inducement of breach by 21CF, FEG, and FBC.

On April 23, 2010, Mr. Newman stated in an email that he opposed splitting 50% of the revenue from the Hulu Plus model with FBC. (Respondents Ex. 669.) He stated that "after the initial rolling period, the availability of the episodes on Hulu+ impacts EST, DVD and syndication all of which are studio business. Therefore, the studio ought to get the revenue." (Id.)

Mr. Kurgan was asked if there was some larger corporate mandate about digital rights, and he responded that "[t]here were a couple of them. Obviously we had our agreements with Hulu and what we were going to provide Hulu as a company in terms of what rights they were going to be able to exploit." (7/18/18 Tr. at 1925:22-1926:2.) He further testified that "there was an understanding on a corporate-wide basis that the studio was going to grant us these rights, the network was going to exploit them . . . ." (7/18/1/8 Tr. at 1951: 19-25.) Mr. Chernin confirmed this when he testified with respect to his Hulu dealing that he "was focused on the conglomerate at large, which included the individual divisions." (7/16/18 Tr. at 1463:8-18.)

It is undisputed that the Fox conglomerate had an equity stake in Hulu, and the evidence established that "Fox writ large" essentially handed over the digital rights at a low cost to build up value of that enterprise. Even when Mr. Kurtzman was asked whether the digital rights were owned by his company, he said, "Well, our company, we're a division of a bigger company, so I would say our company is, is, you know, the big organization, 21CF." (7/12/18 Tr. at 873:2-7.) Ms. Brennan was asked if she knew whether the [redacted] of the ad share revenue goes to some Fox entity, and she responded that she wasn't sure if that mattered because from her point of view, it doesn't matter – "It's Fox somewhere." (7/24/18 Tr. at 2829:18-24.)

While the testimony of Fox's witnesses establish that Fox was concerned with Fox at large, of which the Studio was a part, the fundamental problem is as stated by Ms. Zigler:

> I think Peter honestly may have made a very good decision, maybe even a brilliant decision for his parent company. I think he used the studio's content to build a brand new business and to raise the value of that business, but building it on the backs of the studio he did nothing to protect the Studio or the profit participants in terms of the revenue they should have received for that exploitation.

(7/25/18 Tr. at 2900:11-20.)

The Arbitrator finds that Respondents have established their claims for tortious interference and inducement to breach. The Parent and Network knew that the Studio had Agreements with Participants. They knew that essentially handing over the digital rights to their affiliate Hulu for an unprecedented ad revenue share would interfere with the Studio's obligations to its Participants. The ad revenue share to the Studio was less than $1 million, yet the Network made more than $70 million in revenues for the current season.

VII.

DAMAGES

Breach of Participants Agreements – Domestic Licensing

"Under general contract principles, when one party breaches a contract the other party ordinarily is entitled to damages sufficient to make that party 'whole,' that is, enough to place the non-breaching party in the same position as if the breach had not occurred." Postal Instant Press, Inc. v. Sealy, 43 Cal. App. 4th 1704, 1708-09 (1996) (citations omitted).

Before calculating damages, the Arbitrator addresses Fox's argument that Participants are not entitled to more than they would have received but-for the breach. Under this but-for scenario, it claims that FBC would not have continued to renew Bones because it would have lost tens of millions of dollars. Specifically, Fox asserts that in the but-for world of a full-cost license for Seasons 5-6 and in-season streaming going to TCFTV, FBC would have immediately cancelled Bones.

However, there is no evidence that FBC has ever cancelled a top 20 hit like Bones; rather, the evidence shows that Bones was driving $[redacted] million in profits to the Studio, outweighing the network's losses (Ex. 700; Fox Closing Slides, 111). It is simply too convenient for Fox to argue that not only did it not breach Paragraph 10(b), but if it did, there was no damage to Participants. This is consistent with Fox's constant refrain that it was doing Bones a favor by keeping it on air. Had Fox performed its contractual obligations, it would have looked to House as the comparable program (explained below), negotiated fairly, and paid the license fees accordingly. Moreover, as analyzed and established above, Fox had no intention of cancelling Bones, and its claim to the contrary is incredulous and found to be fraudulent.

Both parties agree that House is a "comparable" program to Bones. Indeed, both parties' experts agree that House is the only "comparable program" that existed at the times Bones was licensed for Seasons 5-8. FBC paid [redacted] for Seasons 5-6 of House, and had never paid anything less in connection with any one-hour scripted series licensed from any third-party distributor prior to the Seasons 5-6 license. As such, there was no basis under Paragraph 10(b) for TCFTV to have accepted lesser monetary terms from FBC for the same seasons of Bones. (7/26/18 Tr. at 3333:11-15, 3333:21-3334:12.)

The Arbitrator agrees with Respondents' position that it is not that FBC should have paid the exact same amounts for Bones as it paid for House, a higher-rated series, in order for TCFTV to have complied with Paragraph 10(b). Instead, TCFTV should have received comparable "monetary terms" – "[redacted] (Id. at 3335:12-21, 3336:23-3338:10, 3338:20-3339:17, 3422:5-3423:6.) As was shown at the Hearing, FBC's extended-term license structure already takes into account performance differences across series by [redacted] (See Ex. 21, ¶¶ 1(bb)-(hh).)

With respect to Season 7, FBC had paid [redacted] for Season 7 of House. As such, there was still no precedent for FBC paying anything other than [redacted], yet the Season 7 License for Bones had a license fee of [redacted], which was [redacted] of the expected production costs (see Ex. 816), and completely eliminated performance bonuses of any kind. (Compare Ex. 21, ¶ 1(hh) with Ex. 767.)

As for Season 8 of House, FBC and Universal agreed in May 2011, which was approximately a year before TCFTV licensed Season 8 of Bones to FBC, to a "[redacted] /episode license fee without bonuses. (Ex. 871.) While Fox argues that this "flat" $[redacted] million per episode fee did not amount to a [redacted] license fee, there was evidence to the contrary. Regardless, the $[redacted] million license fee that FBC paid for Bones is not comparable to the $5 million paid for House, and while FBC could reasonably pay less for Bones than House in Season 8, there is no justification for TCFTV to have received fees at [redacted]% of Universal's given the narrowing performance gap between the two series. (7/26/18 Tr. at 3425:18-3427:23; 7/18/18 Tr. at 2014:17-2015:14; Ex. 1228-0019, 0022.)

Respondents' industry expert, Laurie Younger, compared the license agreements for Seasons 5-8 of Bones to the agreements for the same seasons of House. Her analysis ties the [redacted] license fee to the production budget for each of Seasons 5-8 of Bones and assumes that all breakage actually paid by FBC would still have been paid under a [redacted] license fee, which provides for payment of [redacted] approved by the network. (Amended Younger Report Ex. 1270-0030, n. 10; Exs. 118, 107 ¶ 1(cc).)

Fox argues that Participants fail to calibrate for differences between House and Bones. The Arbitrator disagrees. As Ms. Younger explains, the monetary terms of FBC's extended-term license for House seasons 5-7 account for differences in performance by setting license fees at the [redacted] and by providing formulas [redacted] (See 7/26/18 Tr. at 3320:13-3321:9; 7/18/18 Tr. at 1808:7-18; 7/26/18 Tr. at 3275:21-3280:12; Ex. 448.)

For Season 8, Ms. Younger took the relative performance of House and Bones into account and capped the license fees that should have been paid to TCFTV at $[redacted] for that season. In total for Seasons 5-8, TCFTV could have complied with its contractual obligations to Respondents while still being paid $[redacted] million less than Universal received from FBC in connection with the same seasons of House. (See Exs. 1501, 1447-0009-13, 200-0010-15.)

According to Younger's analysis, if TCFTV had licensed Seasons 5-8 of Bones on monetary terms comparable to those Universal received for House, it would have been paid the following[9]:

Monetary Term	Season 5	Season 6	Season 7	Season 8
[redacted]				

[9] Sources: Ex. 1270, ¶¶ 59=67; Ex. 21, ¶¶ 1(o), (bb)-(hh); Ex. 1447-0009-13; Exs. 1448, 781; Ex. 200-0010-15; Exs. 600, 624, 687, 766, 816, 898, 904.

In total, an additional $113,831,519 would have been added to Gross Receipts for purposes of calculating Respondents' contingent compensation. (Ex. 1270, ¶ 67.) According to Respondents' participation expert, Michael Sippel, this addition to Gross Receipts would result in a total of $15,585,047 in payments to Respondents.[10] (Ex. 1268A-0003, Ex. B-1.)

Breach of Participants' Agreements – International Licensing

The United Kingdom

The evidence established that Bones was a massive hit for TCFTV in the United Kingdom. In just its second week on Sky, Bones was "[redacted]," and it more than doubled the total viewership of its Cold Case lead-in. (Ex. 152.) By September 2008, Bones was "Sky1's #1 series, outperforming the first-four weeks of Prison Break by +67%." (Ex. 367.) In 2010, Bones was Sky1's number two series. (Ex. 475.) Nonetheless, the license fees TCFTV received were nowhere near comparable to what Sky paid for other programming.

TCFTV licensed Bones Season 1 for £[redacted] per episode, and it never received more than £[redacted] over 12 seasons. By contrast, when Sky licensed House from NBC/Universal, an unaffiliated studio, Sky paid £[redacted] per episode, more than double that of the highest season. (Ex. 1260B-0015.) When Sky licensed Lost from Buena Vista Television, an unaffiliated studio, Sky paid more than £[redacted] per episode for Lost. (8/8/18 Tr. at 4242:2-19.)

Nonetheless, as Respondents point out, their expert, David Armstrong, took a conservative approach to damages and instead used the series Journeyman, a much less successful show that TCFTV licensed to Sky, as a proxy for what Sky should have been paid starting in Season 1 of Bones. TCFTV received £[redacted] per episode for Season 1 of Journeyman, £[redacted] more per episode than Season 1 of Bones. Mr. Armstrong calculated damages by adding the Season 1 differential, £[redacted] per episode, to all 12 seasons of Bones.

[10] Regarding FBC and 21CF/FEG's interference in the Agreements with TCFTV and FBC, Respondents seek to be placed "in a position substantially equivalent in a pecuniary way to that which [they] would have occupied had no tort been committed." (Restatement (Second) of Torts § 903, cmt. a (1979).) Therefore, FBC, 21CF, and FEG share TCFTV's liability for the $15,585,047 in actual damages suffered by Respondents due to its improper self-dealing in licensing Bones to FBC.

With the adjustment of Bones license fees to range from £[redacted] over the 12 seasons, TCFTV should have received an additional $59,811,000 in revenue. (Ex. 1260B-0016-17.)

Italy and Spain

With respect to Italy, TCFTV entered into several relicense agreements with FIC Italy for Bones which started at $[redacted] per episode. (Ex. 1260B-0038.) Because FIC Italy was not licensing first-run episodes from TCFTV, Mr. Armstrong evaluated relicense agreements for several series in order find apples-to-apples comparisons. (Ex. 1260B-0011.) He determined that the NCIS licenses were the most similar transactions to the Bones licenses because FIC Italy had three relicenses for each series over the first few seasons. (Ex. 1260B-0012.) Furthermore, NCIS was one of the few series that TCFTV considered a rival to Bones in the international marketplace based on the success of each series. The license fees that FIC Italy paid CBS for NICS averaged more than double the Bones license fees. (Id.) Mr. Armstrong determined that there should have been $4,662,508 in additional MAGR revenue over the first six seasons, which are the only seasons for which Armstrong had licensing information sufficient to calculate damages.

With respect to Spain, Mr. Armstrong determined that House was the most comparable program for the first eight seasons because the shows aired around the same time period, the number of runs in the license agreements were similar, the term of the agreements were similar, and Mr. Gregg had previously identified House as an appropriate comparable program. (Ex. 1260B-006-009.) The Bones license fees ranged from $[redacted] per episode to $[redacted] per episode during the first eight seasons. The House license fees, on the other hand, ranged from $[redacted] to $[redacted] making it higher in every season and more than double the Bones license fees in several seasons. (Ex. 1260B-0036.) Mr. Armstrong determined that TCFTV should have obtained approximately the same license fees for Bones from FIC Spain that FIC Spain paid to NBC/Universal for House, resulting in $1,112,099 added to MAGR.

For Seasons 9-11 in Spain, FIC Spain obtained the far more valuable first window for Bones, unlike in Seasons 1-8 in which La Sexta had the first window. Therefore, Mr. Armstrong determined that the most appropriate comparable license agreements were FIC Spain's license agreements with CBS for Blue Bloods and Hawaii Five-O, for which FIC Spain obtained the first licensing window. (Ex. 1260B-008.)

FIC Spain paid $[redacted] for Season 9 of Bones with [redacted]% escalators for seasons after that. (Ex. 1260B-0008.) During this same time period, FIC Spain paid license fees between $[redacted] and $[redacted] per episode for Blue Bloods and Hawaii Five-O, more than three times the Bones license fees. (Ex. 1260B-0034.) As a result, Mr. Armstrong determined that TCFTV should have received at least $1,852,404 more from Bones during Seasons 9-11, for a total addition to MAGR of $2,964,503.

Thus, TCFTV should have obtained $67,311,000 in additional license fees from its affiliates in international distribution which should have been included in TCFTV's Gross Receipts for purposes of properly accounting to Respondents for the MAGR. This addition to Gross Receipts would result in a total of $7,078,327 in payments to Respondents. (Ex. 2 (1/9/19 Revised Sippel Report Exhibits), Exs. B, B-3.)

Hulu Claims

As set forth above, all revenues from all current-season streaming of Bones were credited to FBC as though FBC possessed those rights. However, the Arbitrator has found that FBC claims to ownership to be unfounded. As such, had TCFTV properly asserted its right as the content owner of those streaming rights, TCFTV would have credited to Participants all Hulu revenues received from the exploitation of current season streaming of the Series. As of August 8, 2018, this totaled $70,690,961. (Ex. 3840.)

The Arbitrator agrees that disgorgement is not a proper remedy. However, Respondents are entitled to the *expectation damages* that will "put [them] in as good a position as [they] would have been in had the contract been performed." Restatement (Second) of Contracts § 347, cmt. a (1981). Here, the $70,690,961 represents the amount of damages that will put Participants in as good a position as they would have been in had TCFTV protected its rights.

With respect to Respondents' claim against FBC, FEG and 21CF for tortious interference, Respondents seek compensatory damages in the same amount. If FBC, FEG and 21CF had not interfered with Respondents' contracts with TCFTV and had not induced TCFTV's breach of those contracts, TCFTV would have received at least the $[redacted] wrongfully diverted to FBC for the current-season exploitation of Bones on Hulu, and

Participants, in turn, would have received their shares of those profits after appropriate reductions.

Respondents also seek damages for Fox's self-dealing in connection with the licensing of Bones to Hulu. Vivica Zigler, Respondents' Hulu expert witness, calculated that had TCFTV honored its contractual duty to the Bones participants, it would have contracted with Hulu to receive an estimated license fee of $685,000 per episode in connection with the full current-season stacking rights to Seasons 6-12 (140 episodes) of Bones.

Ms. Zigler examined license agreements for six CBS series and determined the most comparable benchmarks among them are Elementary, Blue Bloods and CSI. (Ex. 1273-0021.) She took the average of the comparable CBS deals for an approximate episodic license fee of $[redacted]. (Ex. 1275-0007.) The licenses for Elementary, Blue Bloods and CSI, however, relate to past-season episodes. (Ex. 1275-0005.) The record does not contain any information regarding what Hulu paid third parties for full current-season stacking rights because no third party was willing to license these "crown jewel" rights to Hulu. As such, Ms. Zigler applied a premium as was done with TCFTV's initial license agreement with Netflix for Bones and other series. Specifically with respect to the Netflix deal, a [redacted]% premium was applied to the license fee for any current-season episode delivered "[redacted]" which is the same recency with which episodes of Bones were made available to Hulu. (Ex. 652-0008; 7/25/18 Tr. at 2908:20-2909:24; Ex. 1164-0021.) Ms. Zigler therefore applied this [redacted]% premium to the average episodic license fee to account for the additional value of current-season episodes of Bones, arriving at an estimated current-season per-episode fee of $685,000. (Ex. 1275-0007.)

For the past-season episodes of Bones, Ms. Zigler applied an [redacted]% ad revenue split to these past-season episodes based on the fact that, prior to execution of the initial Hulu Classic license, third party [redacted] refused to license its programming to Hulu for anything less than that share on top of [redacted], the value of which Ms. Zigler decided not to include in her calculations. (Ex. 1275-0002 -0004; Ex. 225; 7/25/18 Tr. at 2912:19-2913:22.) Based on Fox's representation that the only past-season episodes ever exhibited on Hulu were the 22 episodes of Season 1, Ms. Zigler calculated damages of $203,452 for exhibition of past-season episodes on Hulu. (Ex. 1275-0003; Ex. 1231.)

In accord with the above, TCFTV should have included in the Gross Receipts a total of $96,103,452 for purposes of calculating Respondents' MAGR. As a result, Mr. Sippel calculated total damages of $10,106,099. (Ex. 1268A-0006.)

Hence, based on the determination that 21CF and FEG interfered with Respondents' agreements with TCFTV in connection with the licensing of both current- and past-season episodes of Bones to Hulu for an unreasonable and speculative ad revenue share, 21CF and FEG share TCFTV's liability for those damages. (See Restatement (Second) of Torts § 903, cmt. a.)

Prejudgment Interest

Pursuant to California Civil Code §§ 3287 and 3289(b), Respondents seek prejudgment interest on the full amount of their compensatory damages at the rate of 10% per annum.

The Arbitrator agrees with Fox that prejudgment interest is not appropriate under Section 3287(a), which provides in pertinent part: "A person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in the person upon a particular day, is entitled also to recover interest thereon from that day, except when the debtor is prevented by law, or by the act of the creditor from paying the debt." Under California law, prejudgment interest is not appropriate where damages are not "'certain' or 'capable of being made certain by calculation.'" Whisper Corp. v. California Commerce Bank, 49 Cal. App. 4th 948, 958 (1996). "Damages are deemed certain or capable of being made certain within the provisions of subdivision (a) of section 3287 where there is essentially no dispute between the parties concerning the basis of computation of damages if any are recoverable but where their dispute centers on the issue of liability giving rise to damage." Esgro Central, Inc. v. General Ins. Co., 20 Cal.App.3d 1054, 1060 (1971).

Here, the amount of damages is subject to a judicial determination and not capable of being a sum certain earlier in time. As set forth above, the amount of damages is subject to multiple methods of calculation that require a judicial determination. Experts have presented methodologies concerning the calculation of damages, requiring the Arbitrator to discern how damages should be calculated. Therefore, the Arbitrator declines to award pre-judgment interest under Section 3287(a). See St. Paul Mercury Ins. Co. v. Mountain West Farm Bureau Mutual Ins. Co., 210 Cal. App. 4th 645, 665-66 (2012) (Where "[t]he trial court [is] asked to choose the

method of allocation, i.e., the basis for computation, and to calculate" damages, prejudgment interest should not be awarded.)

However, the Arbitrator does award prejudgment interest under Section 3287(b), which provides: "Every person who is entitled under any judgment to receive damages based upon a cause of action in contract where the claim was unliquidated, may also recover interest thereon from a date prior to the entry of judgment as the court may, in its discretion, fix, but in no event earlier than the date the action was filed." The Arbitrator, in his discretion, awards prejudgment interest on the damages based upon the contract claims from the date this action was filed, January 11, 2016.

Applying the California legal rate of 10% interest (see Cal. Civ. Code § 3289(b)) to the total award amount of $32,769,474, the average daily rate of interest is $8,978.00. The number of days from January 11, 2016 to the date of this Award is 1,120 days. Thus, the total amount of prejudgment interest is $10,055,360.

Punitive Damages

In addition to actual damages, Respondents seek punitive damages for certain claims. As set forth above, contrary to Fox's arguments, Paragraph 10(b) does not bar an award of punitive damages for the intentional torts. Further, it is undisputed that the Arbitrator has the authority to award punitive damages. See Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 58 (1995) (finding that if contracting parties agree to include punitive damages claims within the issues to be arbitrated, the FAA ensures the agreement will be enforced according to its terms). As such, the Arbitrator examines Respondents' request for punitive damages.

Tortious Interference

Respondents seek punitive damages as a result of both the non-studio Claimants' acts of interference and TCFTV's and FBC's acts of fraud. Punitive damages are available for tortious interference with contract and inducement of breach. See Duff v. Engelberg, 237 Cal. App. 2d 505, 508 (1965) (inducement to breach contract supports damages for "'unforeseen expenses, as well as for mental suffering, damage to reputation, and punitive damages, by analogy to the cases of intentional injury to person or property'") (quoting Prosser, Torts (3d ed.) ch. 26, sec. 123, pp. 972-73); see also Asahi Kasei Pharma Corp. v. Actelion Ltd., 222 Cal. App. 4th 945, 962-64

(2014) (holding that parent company may be liable for tortuously interfering with the contract of its subsidiary and affirming $30 million in punitive damages against the parent company's individual managers).

Respondents contend that the same evidence establishing FBC's and 21 CF/FEG's tortious interference with, and inducement of breach of, Respondents' Agreements with TCFTV supports an award of punitive damages. (See, e.g., Webber v. Inland Empire Invs., 74 Cal. App. 4th 884, 911-12 (1999) (holding that same evidence establishing liability for tortious interference was sufficient to award punitive damages)). The Arbitrator concurs.

The Arbitrator finds that the evidence concerning the legal action plan and the Release establishes that FBC, 21CF and FEG undertook intentional acts designed to interfere with Respondents' contractual relationships with TCFTV. Additionally, such acts constitute malice and fraud and as such, warrant the imposition of punitive damages. See Cal. Civ. Code § 3294(c)(1) (defining "malice" to mean conduct which is intended by the defendant to cause injury to the plaintiff).

Fraud

Respondents seek punitive damages for TCFTV's and FBC's fraudulent, oppressive and malicious acts in inducing Josephson's and Reichs's signatures on the Release. They ask for punitive damages in an amount that the Arbitrator deems to be an "equitable and reasonable" deterrent to Fox's egregious behavior. Mahon v. Berg, 267 Cal. App. 2d 588, 590 (1968) ("[S]ome deterrent to fraud is equitable and reasonable. It is not afforded if the wrongdoer risks only the fruits of his fraud. The broad equity powers invoked in an action of rescission because of fraud should afford such a remedy."); Cal. Civ. Code § 1692 ("A claim for damage is not inconsistent with a claim for relief based upon rescission. The aggrieved party shall be awarded complete relief . . . .")

As Respondents acknowledge, the damages awarded in connection with TCFTV's breach of the ATP in connection with Seasons 5-6 License are already accounted for in the damages for the related tortious interference claim, and therefore, Respondents do not seek dual recovery against TCFTV and FBC for the fraud claim in the form of a multiple of those damages. Rather, they ask that TCFTV share FBC, 21CF, and FEG's liability for that portion of the punitive

damages award arising from their tortious interference in connection with the FBC licenses, and they correctly assert that the fraud is relevant to determining the overall reprehensibility of Fox's conduct.

Tortious interference related to Hulu licensing

Respondents seek punitive damages for 21CF's and FEG's tortious conduct related to the licensing of Bones episodes to Hulu. They point to the testimony of Peter Chernin, 21CF's President at the time of the Hulu launch, that he did not consider it 21CF's "job to protect [its] old business." (7/16/18 Tr. at 1425:24-1428:16.)

The Arbitrator determines that the same evidence establishing 21CF's and FEG's tortious interference with contractual relations and inducing breach of contract in connection with the Hulu/FEG agreements supports an award of punitive damages. As Mr. Chernin bluntly stated, 21CG and FEG sacrificed TCFTV's business for the sake of Hulu's success, and did so knowingly, thereby damaging Respondents by keeping $96,104,452 from MAGR. This constitutes a reckless disregard for Respondents' rights and as such warrants the imposition of punitive damages.

Amount of Punitive Damages Award

"An award of punitive damages hinges on three factors: the reprehensibility of the defendant's conduct; the reasonableness of the relationship between the award and the plaintiff's harm; and, in view of the defendant's financial condition, the amount necessary to punish him or her and discourage future wrongful conduct." Kelly v. Haag, 145 Cal. App. 4th 910, 914 (2006). Beyond consideration of the above factors, there is no legally prescribed formula to determine the amount of punitive damages, nor is there a bright-line ratio that a punitive damages award may not exceed. State Farm Mutual Auto Ins. Co. v. Campbell, 538 U.S. 408, 424-25 (2003). The finder of fact has "wide discretion to determine what punitive damage award is proper . . . . [T]here is a wide range of reasonableness for punitive damages reflective of the fact finder's human response to the evidence presented." McGee v. Tucoemas Fed. Credit Union, 153 Cal. App. 4th 1351, 1362 (2007).

Reprehensibility of Fox's Conduct

To determine the reprehensibility of the defendant's conduct, courts are to consider whether: "the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident." State Farm, 538 U.S. at 419.

The parties agree that the first two factors are not present here. With respect to the third factor – Respondents' financial vulnerability, Respondents contend that while they may not be financially vulnerable in the traditional sense, they depended upon Fox for their careers and livelihoods. As detailed herein, Fox held the position of relative financial power and used it in the course of negotiations by threatening to cancel the Show and put them out of work. Respondents' vulnerability in this regard cannot be ignored. See, e.g., Romo v. Ford Motor Co., 113 Cal. App. 4th 738, 755 (2003) (plaintiffs "were financially vulnerable relative to defendant's financial resources"); Shahinian v. Cedars-Sinai Med. Ctr., 194 Cal. App. 4th 987, 1005 (2011) ("plaintiff was financially vulnerable because he held surgical privileges only at Cedars-Sinai and summary suspension of privileges without opportunity for hearing would foreseeably inflict severe damages to his medical career") (internal quotation marks omitted). Furthermore, the Arbitrator agrees with Respondents that their decision to pursue this lawsuit risked their livelihoods, and it is unlikely that they will ever be hired by either Fox or Disney again.

The fourth factor – whether the conduct involved repeated actions or was an isolated incident – support a finding of reprehensibility. As detailed herein, Fox engaged in tortious conduct related to license fee negotiations for four seasons with the goal of maximizing profits and minimizing participant leakage. See Bardis v. Oates, 119 Cal. App. 4th 1, 22 (2004) ("The jury could find that the kickbacks, markups and concealed commissions" proven at trial "were part of a systematic pattern by Oates of bilking his partners out of funds legitimately belonging to the partnership."). The false promises began in 2005 and continued through 2008 and 2012 when Boreanaz and Deschanel negotiated new agreements, and all in accordance with the legal action plan. In 2009, Fox fraudulently induced Reichs and Josephson to execute the Release. At the same time, Fox entered into agreements with Mr. Ligouri (his First Look Agreement) and

Mr. Hanson (May 18, 2009 overall agreement) and attempted to keep these agreements secretive. In addition and as set forth herein, the non-studio Claimants intentionally interfered with Respondents' contracts in connection with the licensing of Bones to Hulu in self-dealing transactions over the last decade.

Also relevant to this factor is the cavalier attitude of Fox's witnesses. None of the witnesses took responsibility or expressed any remorse for their actions. See Bardis, 119 Cal. App. 4th at 22 (citing the fact that defendant was "unrepentant at trial, insisting that 'in [his] heart' [he] believed he did nothing wrong" as relevant to the analysis of reprehensibility). Indeed, as described herein, many of the witnesses, including Ms. Walden, Mr. Newman, Mr. Bramhall, Mr. Ligouri, Mr. Pearson and Mr. Rice, appear to have given false testimony in an attempt to conceal their wrongful acts.[11] The Fox witnesses' testimony at the hearing highlighted their pattern of deceit against Respondents.

Furthermore, Fox's cavalier attitude toward its wrongdoing is further reflected in its Punitive Damages Brief and Reply Punitive Damages Brief, which are devoid of any accountability, responsibility or remorse – and this is even after the detailed findings and analysis of evidence and testimony set forth in the Interim Award. Instead, Fox advances arguments that defy comprehension. It contends that since Respondents are receiving a large amount of compensatory damages "for purely economic harm," punitive damages are essentially not warranted. However, the amount of compensatory damages is large because it is the amount of money that Fox wrongfully withheld from Respondents for over 12 years, in violation of the parties' agreements. Similarly, Fox also points to the fact that Respondents, who are "sophisticated and wealthy participants with substantial financial means," received tens of millions of dollars over Bones's 12 seasons. Again, however, this ignores the amount of money that they should have earned absent Fox's unlawful conduct. To suggest that Respondents should somehow be grateful for what they did receive instead of focusing on what they were deceived and cheated out of is audacious and quite frankly astonishing. Fox also states that there is "no evidence of a long-term pattern of reprehensible or unethical behavior" and that "the tortious conduct was limited to the breaking of two promises." Does Fox really suggest that

[11] Merely describing the testimony as false is far too generous. The Arbitrator is convinced that perjury was committed by the Fox witnesses. Accordingly, if perjury is not reprehensible then reprehensibility has taken on a new meaning.

short-term reprehensible or unethical behavior and the breaking of just two promises is alright? By advancing these arguments, Fox seeks to divorce the detailed analysis and findings set forth herein of a pattern and practice of deceit and half-truths for its own financial gain from any punitive damage analysis, essentially asking the Arbitrator to ignore the reprehensibility of its conduct.[12]

Finally, with respect to the fifth reprehensibility factor, the Arbitrator found above in awarding punitive damages that Respondents' harm was the result of Fox's intentional acts of fraud and malice in connection with its fraudulent inducement of the Release and tortious interference with Respondents' agreements in the licensing of Bones to FBC and Hulu. See Bardis, 119 Cal. App. 4th at 22 (finding that "[t]he record []overwhelmingly supports a finding that the harm was caused as the result of intentional fraud, malice and deceit").

Thus, the Arbitrator finds that the third reprehensibility factor leans in favor of reprehensible conduct, and the fourth and fifth factors in the reprehensibility analysis are clearly met. Fox engaged in reprehensible conduct deserving of a punitive damages award at the higher end of the spectrum. Bardis, 119 Cal. App. 4th at 22, 26.

The reasonableness of the relationship between the award and Respondents' harm

The next factor examined is the relationship between the award and the harm to Respondents. Fox asserts that where compensatory damages are substantial, punitive damages can and should be lower than the compensatory damages award. To begin with, a contractual arbitration is "a private proceeding, arranged by contract, without legal compulsion . . . . Consequently, the arbitration and award themselves [are] not governed or constrained by due process, including its elements applicable to judicial proceedings to impose punitive damages." Rifkind & Sterling, Inc. v. Rifkind, 28 Cal. App. 4th 1282, 1291 (1994). California courts have

[12] Respondents ask the Arbitrator to consider Fox's pattern of tortious behavior that has harmed individuals other than Respondents. See Lopez v. Watchtower Bible & Tract Soc'y of New York, Inc., 246 Cal. App. 4th 566, 592 (2016) ("Although punitive damages may not be used to punish a defendant for injury inflicted on third parties, a jury may consider evidence of harm to others in determining the reprehensibility of a defendant's conduct toward the plaintiff."); Johnson v. Ford Motor Co., 35 Cal. 4th 1191, 1204 (2005) ("[D]ue process does not prohibit state courts, in awarding or reviewing punitive damages, from considering the defendant's illegal or wrongful conduct toward others that was similar to the tortious conduct that injured the plaintiff or plaintiffs." However, while there was some general testimony about similar contract provisions with participants on other shows and other legal actions against Fox, the evidence was not specific or sufficient enough to allow the Arbitrator to make any findings regarding other similar tortious behavior as set forth in the guiding cases.

disclaimed any ability to review an arbitrator's fixing of punitive damage awards. See Mave Enters., Inc. v. Travelers Indem. Co., 219 Cal. App. 4th 1408, 1440 (2013) ("[T]he 15-to-one ratio of punitive damages to compensatory damages does not constitute the type of legal error – assuming it was error – that warrants vacatur under the CAA."); Shahinian, 194 Cal. App. 4th at 1006-07 (any claimed excessiveness of arbitrator's punitive damages award "would be no different from other errors of law, which are generally not reviewable"). As such, Fox's assertion of federal due process standards as a limitation on punitive damages does not apply here to the Arbitrator's discretion in a private arbitration, which was sought by Fox itself.

Moreover, while Fox attempts to assert a bright-line rule requiring a 1:1 ratio between punitive damages and compensatory damages, no such authority prohibits an award exceeding a 1:1 ratio. "While punitive damages must bear a reasonable relation to actual damages, no fixed ratio exists to determine the proper proportion . . . . Rather, calculating punitive damages involves a fluid process of adding or subtracting depending on the circumstances." McGee, 153 Cal. App. 4th at 1361. "[T]here is a wide range of reasonableness for punitive damages reflective of the fact finder's human response to the evidence presented." Id. at 1362. Although there is no specific formula, courts have found that "[i]n cases where there are significant economic damages and punitive damages are warranted but behavior is not particularly egregious, a ratio of up to 4 to 1 serves as a good proxy for the limits of constitutionality." Planned Parenthood of Columbia/Willamette Inc. v. Am. Coal of Life Activists, 422 F.3d 949, 962 (9th Cir. 2005). On the other hand, "[i]n cases with significant economic damages and more egregious behavior, a single-digit ratio greater than 4 to 1 might be constitutional." Id.

In the Roby case relied on by Fox, the court found that a lower ratio of punitive damages to compensatory damages was warranted because plaintiff's recovery of emotional distress damages itself contained a "punitive element." See Roby v. McKesson Corp., 47 Cal. 4th 686, 718 (2009) (court noted that out of a $1,905,000 compensatory damages award, only $605,000 was for economic losses, resulting in the remaining $1.3 million awarded for plaintiff's physical and emotional distress and representing a punitive component). In other words, a high amount of non-economic damages may reflect a punitive aspect of the award. Importantly, "[i]n State Farm, the high court suggested that a ratio of one to one might be the federal constitutional maximum in a case involving, as [in Roby], relatively low reprehensibility and a substantial

award of *noneconomic* damages." Id. (Emphasis added.) This is not the case here, with a relatively high reprehensibility and no award of noneconomic damages.

Respondents argue that a punitive damages award of at least four times the amount of Respondents' actual damages and up to nine times the amount of Respondents' actual damages is warranted. The Arbitrator finds that a punitive damages award of five times the amount of Respondents' actual damages is appropriate.

In Bardis v. Oates, 119 Cal. App. 4th 1 (2004), a partner in a real estate partnership and his corporation, which had engaged in a pattern of self-dealing designed to line the defendants' pockets at the expense of the partnership, were found liable for intentional interference with economic advantage, intentional misrepresentation, fraudulent concealment, breach of fiduciary duty, and breach of the partnership agreement. Id. at 9. While the harm suffered by the plaintiffs was solely economic, the court found that the defendants' repeated and intentional self-dealing constituted "egregious misconduct" and held that a "high-end punitive damages award" of nine times compensatory damages was justified due to the presence of the fourth and fifth reprehensibility factors alone. Id. at 22-23. Similarly, here, Fox engaged in a pattern and practice of fraudulent self-dealing by which it enriched itself in violation of TCFTV's participation agreements with Respondents.

FBC, 21CF, and FEG's tortious interference in connection with the FBC licenses caused $15,585,047 in actual harm to Respondents, while 21CF, FEG and FBC's tortious interference in connection with the Hulu licenses caused an additional $10,106,099 in actual harm to Respondents.[13] Clearly, given the precedent in Bardis for awarding punitive damages at nine-to-one in economic damages cases involving a company-wide pattern and practice of fraudulent and malicious conduct, punitive damages of five times the amount of Respondents' actual damages is supported, for a total of $128,455,730 ($77,925,235 in punitive damages for tortious interference

[13] Respondents, relying on Bardis, seek to include prejudgment interest with the compensatory damages to form the basis for the punitive damages ratio. However, the Arbitrator is not persuaded that the Bardis court included prejudgment interest. See Bardis, 119 Cal. App. 4th at 17 & n. 7 (noting that the amount the jury awarded was the difference between the total damages figure, including interest, and "Expenses without Documentation" including accrued interest). Furthermore, the award of prejudgment interest under Section 3287(b) and its calculation were not determined until the Interim Award issued.

with contract and $50,530,495 in punitive damages for tortious interference with Hulu agreement).

The amount necessary to punish and deter future wrongful conduct

Finally, with respect to the last of the three factors for determining a punitive damages award, while "all three factors must be satisfied, the most important question is whether the amount of punitive damages award will have deterrent effect – without being excessive." McGee, 153 Cal. App. 4th at 1362; Coll. Hosp. Inc. v. Superior Court, 8 Cal. 4th 704, 712 (1994), as modified (Nov. 23, 1994) ("Punitive damages are to be assessed in an amount which, depending upon the defendant's financial worth and other factors, will deter him and others from committing similar misdeeds."). "The ultimately proper level of punitive damages is an amount not so low that defendant can absorb it with little or no discomfort . . . nor so high that it destroys, annihilates, or cripples the defendant." Soto v. BorgWarner Morse TEC Inc., 239 Cal. App. 4th 165, 192 (2015), as modified (Aug. 20, 2015).

Fox has stipulated that parent company 21CF's net worth is $21.924 billion, and that such evidence is sufficient for the Arbitrator to determine the appropriate amount of punitive damages as to Claimants. (See Jan. 14, 2019 Joint Stipulation Regarding Financial Condition.)[14] As Fox states, punitive damages must be based on the factors set forth and not solely on the defendant's wealth. State Farm, 538 U.S. at 427 (holding the wealth of a defendant "cannot make up for the failure of other factors, such as 'reprehensibility,' to constrain significantly an award that purports to punish a defendant's conduct" (quoting Gore, 517 U.S. at 585)). Here, there is no danger of the award being based solely on the defendant's wealth as the Arbitrator has found a higher level of reprehensibility as well as a reasonable relationship between the award and the harm.

Aside from the lack of any bright-line rule, Fox's assertion that a one to one ratio should be awarded completely ignores any deterrence factor. Indeed, even Fox's suggestion of such a ratio following the Interim Award reflects its lack of contrition. Moreover, an award of five times the amount of compensatory damages represents 0.6 percent of 21CF's stipulated net

[14] As set forth in the Interim Award, the Arbitrator must consider Claimants' financial condition, on which the plaintiff bears the burden of proof. Adams v. Murakami, 54 Cal. 3d 105, 119 (1991).

worth, which is well below the 10 percent cap recognized under California law. See, e.g., Sierra Club Found. v. Graham, 72 Cal. App. 4th 1135, 1163 (1999) ("Finally the award was more than 2 percent of Graham's net worth, far less than the 10 percent cap generally recognized by our courts."); Weeks v. Baker & McKenzie, 63 Cal. App. 4th 1128, 1166-67 (1998), as modified on denial of reh'g (June 2, 1998) ("It has been recognized that punitive damages awards generally are not permitted to exceed 10 percent of the defendant's net worth."). In fact, one could question whether a five to one ratio given Fox's financial condition and lack of contrition serves to deter the wrongful conduct at issue here, or whether it will be considered part of the cost of doing business.

Courts have approved punitive damages awards equaling far greater percentages of defendants' net worth. See Bigler-Engler v. Breg, Inc., 7 Cal. App. 5th 276, 309 (2017) (award of 5% of defendant's net worth); Weeks, 63 Cal. App. 4th at 1166-67 (award of 5% of defendant's net worth). Similarly, courts have approved ratios higher than the five to one ratio here. See Las Palmas Assocs. V. Las Palmas Ctr. Assocs., 235 Cal. App. 3d 1220, 1255 (1991) (court preserved a 7.9 to 1 ratio of punitive damages to compensatory damages); Simon v. San Paolo U.S. Holding Co., 35 Cal. 4th 1159, 1182-83 (2005) (court reduced a punitive damages award from 340:1 to 10:1); Planned Parenthood of the Columbia/Williamette Inc. v. American Coalition of Life Activists, 422 F. 3d 949, 963 (9th Cir. 2005) (court held that a 9:1 ratio did not offend its "constitutional sensibilities"). Fox relies on Mattel, Inc. v. MGA Entertainment, Inc., 801 F. Supp. 2d 950 (C.D. Cal. 2011) wherein the court awarded exemplary damages in "an amount equal to the remitted compensatory damage award." However, the compensatory damage award was $85 million, and the punitive damages award was "approximately 3.6% of Mattel's net worth." Mattel, 801 F. Supp. 2d at 956. The Mattel court also found that the need for deterrence was low "since other members of the close-knit toy industry have been alerted to Mattel's misconduct as a result of this litigation . . . ." Id. at 955. By contrast, the need for deterrence is greater here given the private nature of arbitration and the fact that other profit participants have not been alerted to Fox's misconduct.

As such, in light of Fox's financial condition, a punitive damages award in the amount of $128,455,730 is reasonable and necessary to punish Fox for its reprehensible conduct and deter it from future wrongful conduct.

VIII.

ATTORNEYS FEES AND COSTS &

ABITRATOR FEES AND ARBITRATION COSTS

The parties submitted a Stipulation Re: Memorandum of Costs wherein the parties stipulated that Respondents are the prevailing parties under the parties' respective Agreements. In accordance with the parties' Stipulation, the Arbitrator finds as follows: (1) Josephson is awarded attorneys' fees in the amount of $2,771,494.30 and costs in the amount of $787,114, for a total of $3,558,608.30; and (2) Reichs, Deschanel and Boreanaz are awarded attorneys' fees in the amount of $3,087,989.50 and costs in the amount of $754,953.44, for a total of $3,842,942.94.

With respect to the Arbitrator's fees and Arbitration costs, the Stipulation states that since Respondents are the prevailing parties, they are entitled to "all costs of arbitration." As such, Respondents are awarded the costs of arbitration in the amount of $264,707.29. This amount is representative of Respondents' share of Arbitration fees and costs.

IX.

AWARD

Final Comments

At the outset of Fox's closing arguments, counsel for Fox conveyed two observations directed at the Arbitrator. First, that the Arbitrator paid close attention to the examination of the witnesses and the evidence in general and thereon engaged in very rigorous examinations of Fox's witnesses at times. Second, that the Arbitrator seemed to be caught up and swayed by the rhetoric of counsel for Respondents and felt that the Arbitrator may have been inappropriately predisposed by the vitriolic spin, characterizations and strident presentations by counsel for Respondents. To make it very clear, this did not occur; however further discussion is warranted.

Unfortunately, the Arbitrator believes that these two observations must be addressed. As stated during the course of the hearing and repeated again, Respondents' case was presented and made (virtually entirely) through Evidence Code Section 776 witnesses. Or to put it another way,

Respondents' case was presented and supported through the testimony of the Fox witnesses themselves.

It is Fox and Fox alone that is responsible for the evidentiary findings made herein. If this had been a Jury trial, counsel for Fox would be decrying a runaway verdict comprised of passion and prejudice. However, to reiterate this ignores that it was Fox's own employees, executives and witnesses that provided the evidence for the Arbitrator to make the findings set forth above.

Since it is the purview of the Arbitrator to weigh the credibility of the witnesses and in accordance with the testimony detailed above, it can only be concluded that the Fox witnesses lacked credibility and at times appeared to intentionally deviate from the truth even in the face of clear and unequivocal controverting facts. A myriad of explanations by the Fox witnesses cannot account for their complete disregard for obvious and uncontroverted facts. There simply appeared to be a company-wide culture and an accepted climate that enveloped an aversion for the truth.

Yes, the Arbitrator did examine the Fox witnesses proffered. However, this became essential so as to undertake a thorough attempt to find the truth. Arbitrations and Trial Courts are designed and tasked to find the truth. The entire system of justice is designed to be a rigorous search for the truth. The job of any trier of fact be it a judge or an arbitrator is to find the truth by any means necessary.

This was done and done without any pre-disposition, passion or prejudice. The Arbitrator carried out his role in a dispassionate, neutral and surgical manner so as to accomplish what Shakespeare has called: ***"truth will out"*** (*originally found in Shakespeare's play the* ***"Merchant of Venice"***). Meaning that the truth will eventually be made public.

This Award reflects the evidence, the facts and the truth. Every finding made is supported by the documentary evidence presented and the transcript of the testimony of the witnesses themselves as well as the exhibits. The hearing transcript is extensively cited and quoted with respect to all of the Fox witnesses and leaves no room for any inflection of passion or prejudice.

Conclusion

Accordingly, Respondents have established their claims for breach of contract, fraud, and tortious interference with contract, and they are hereby awarded the following:

(1) For the breach of contract claim based on domestic licensing: $15,585,047 in actual damages;

(2) For the breach of contract claim based on international licensing: $7,078,327 in actual damages;

(3) For fraud: Rescission of the Release;

(4) For breach of contract based on Hulu agreements: $10,106,099 in actual damages;

(5) For Tortious Interference with Contract and Tortious Interference with Hulu agreements: $128,455,730 in punitive damages;

(6) Prejudgment interest on the breach of contract damages from the date this action was filed: $10,055,360;

(7) Attorneys' fees and costs: $3,558,608.30 total to Josephson; and $3,842,942.94 total to Reichs, Deschanel and Boreanaz; and

(8) Arbitrator fees and Arbitration costs representative of Respondents' share only: $13,664.66

The TOTAL AMOUNT of this Award is: **$178,695,778.90**.

Accordingly, Respondents are hereby awarded the sum of **$178,695,778.90** as and for those damages identified above. This award is in favor of Respondents and against the Claimants. Post-judgment interest shall accrue on the full amount of the final award from the date of issuance at the statutory rate.

Amended Final Award

This award resolves all claims between the parties submitted for decision in this proceeding and is the arbitrator's final award.

Dated: February 4, 2019

Hon. Peter D. Lichtman (Ret.)
Arbitrator

PROOF OF SERVICE BY E-Mail

Re: Twentieth Century Fox Film Corporation et al. vs. Wark Entertainment, Inc. fso Barry Josephson et al.
Reference No. 1220052735

I, Jasmine Lu, not a party to the within action, hereby declare that on February 20, 2019, I served the attached AMENDED FINAL AWARD on the parties in the within action by electronic mail at Los Angeles, CALIFORNIA, addressed as follows:

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I declare under penalty of perjury the foregoing to be true and correct. Executed at Los Angeles, CALIFORNIA on February 20, 2019.

Jasmine Lu
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