IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JACK HALEY, JR. PRODUCTIONS, INC., and KELLY BRANDT, as trustee of the Jack Haley, Jr. Trust and as executor of the Estate of Jack Haley, Jr.,	)	
Plaintiffs,	)	CIVIL ACTION
v.	)	CASE NO. _______________
WARNER HOME VIDEO, a division of WARNER BROS. HOME ENTERTAINMENT, INC., WARNER BROS. PICTURES, a division of WB STUDIO ENTERPRISES INC., and WARNER BROS. ENTERTAINMENT INC.,	)	
Defendants.	)	

COMPLAINT

COME NOW Plaintiffs Jack Haley, Jr. Productions, Inc. and Kelly Brandt, as trustee of the Jack Haley, Jr. Trust and as executor of the Estate of Jack Haley, Jr. (collectively, "Plaintiff"), and file this Complaint against Defendants Warner Home Video, a division of Warner Bros. Home Entertainment, Inc., Warner Bros. Pictures, a division of WB Studio Enterprises, Inc., and Warner Bros. Entertainment Inc. (collectively, "Defendant" or "Warner"), as follows.

PARTIES, JURISDICTION, AND VENUE

1.

Plaintiff Jack Haley, Jr. Productions, Inc. ("JHP") is an entity incorporated in and maintains its principal place of business in the State of California.

2.

Plaintiff Kelly Brandt is the trustee of the Jack Haley, Jr. Trust (the "Trust") and executor of the Estate of Jack Haley, Jr. Prior to his death, Jack Haley, Jr. assigned all his rights, title, and interest in his shares of JHP to the Trust. The Trust was formed under the laws of California and Ms. Brandt serves as the trustee. Jack Haley, Jr. also appointed Ms. Brandt as the executor of the Estate of Jack Haley, Jr. Ms. Brandt resides in Topanga, California.

3.

Defendant Warner Home Video is a division of Warner Bros. Home Entertainment, Inc., a Delaware corporation with its principal place of business in the State of California. Defendant may be served with a copy of the summons and complaint in this action at the office of its registered agent, CT Corporation System, at 1201 Peachtree Street, NE, Atlanta, Georgia 30361.

4.

Defendant Warner Bros. Pictures is a division of WB Studio Enterprises, Inc., a Delaware Corporation with its principal place of business in the State of New York. Defendant may be served with a copy of the summons and complaint in this action at the office of its registered agent, CT Corporation System, at 111 Eighth Avenue, New York, New York 10011.

5.

Defendant Warner Bros. Entertainment Inc. is a Delaware corporation with its principal place of business in the State of New York. Defendant may be served with a copy of the summons and complaint in this action at the office of its registered agent, CT Corporation System, at 111 Eighth Avenue, New York, New York 10011.[1]

6.

This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1331, 1338(a), and § 1338(b) as this action arises under the Copyright Act, 17 U.S.C §§ 101, et seq. Jurisdiction is also proper pursuant to the

[1] Plaintiff believes the proper parties to this suit are Jack Haley, Jr. Productions, Inc. and Warner Home Video, however, Plaintiff has received payments related to this project from Warner Bros. Pictures, a division of WB Studio Enterprises Inc. to Kelly Brandt, as trustee of the Jack Haley, Jr. Trust. A true and correct copy of the most recent payment is attached as Exhibit A. Plaintiff has also received distribution reports from Warner Bros. Entertainment Inc. A true and correct copy of the latest distribution report is attached as Exhibit B. Since Warner has so comingled its entities, Plaintiff has named all possible proper parties and will dismiss any improperly named parties once Warner makes clear which entities are in fact successor(s)-in-interest to the Agreement (as defined herein).

choice of law and venue provision found in paragraph 13 of the Agreement (as defined herein) entered March 28, 1989 (the "Venue Provision").[2] This Court has supplemental jurisdiction over Plaintiffs' state law and common law claims pursuant to 28 U.S.C. § 1367(a).

7.

Defendant is subject to personal jurisdiction in this Court pursuant to the Venue Provision, the provisions of Georgia's Long-Arm Statute, O.C.G.A. § 9-10-91(1)-(3), and because Defendant has established sufficient minimum contacts within the State of Georgia such that maintenance of the suit does not violate due process protections.

8.

Venue is proper pursuant to 28 U.S.C. §§ 1391(a)(2)-(3), 28 U.S.C. §§ 1391(b)(2)-(3), and the Venue Provision.

<u>FACTS</u>

9.

In 1989, Turner Entertainment Co. ("TEC") partnered with JHP (collectively "the partners" or " joint adventurers") to finance, produce, and distribute a special

[2] The Agreement's Venue Provision applies both to the contractual and non-contractual claims because it was the parties' intent to submit themselves to the exclusive jurisdiction of the Superior Court of the State of Georgia, Fulton County, or the Federal District Court of the Northern District of Georgia.

video program about the making of the classic motion picture “The Wizard of Oz” to be known as “The Wonderful Wizard of Oz: The Making of a Movie Classic” (hereinafter the “Project” or “Program”).

10.

The Project, which was written, produced and directed by Jack Haley Jr., son of Jack Haley, who played the Tin Man in the original “The Wizard of Oz” (hereinafter the “Movie”), includes interviews of the leading actors and actresses in the Movie and documentary footage relating to the creation of the Movie.

11.

The Project is the definitive documentary on the making of the classic Movie and has earned millions of dollars to date.

12.

TEC and JHP executed an agreement dated March 28, 1989, which was amended in 1994, with respect to the Project (“the Agreement”). A true and correct copy of the Agreement is attached hereto as Exhibit C.

13.

The Agreement provided that JHP and TEC would be joint authors of the Program pursuant to 17 U.S.C. § 201.

14.

As joint authors of the Program, JHP and TEC hold the copyright together as tenants in common and share the exclusive rights granted works under 17 U.S.C. §§ 103, 106.

15.

The Agreement provided that the joint adventurers "shall have and retain throughout the world in perpetuity the exclusive ownership of all rights in and to the Program, including, without limitation, all rights of copyright therein." (Agreement ¶ 5).

16.

The Agreement further provided that the joint adventurers "shall be the sole and exclusive owners of the copyright, all rights of copyright and copyright renewal throughout the world in and to the Program." (Agreement ¶ 6).

17.

JHP and TEC obtained a valid joint registration for the Program from the United States Copyright Office on September 19, 1994 as joint authors. A true and correct copy of the registration abstract is attached hereto as Exhibit D.

18.

The Agreement described the joint adventurers' respective roles in the creation of the Project and provides for a 50/50 split of profits after certain deductions and expenses. (Agreement ¶ 8(d)).

19.

Under the terms of the Agreement, Defendant had the "exclusive right, but not the obligation, ***subject to its obligations to [Plaintiff] hereunder*** . . . to distribute, transmit, display, project, exhibit, license, simulcast, cablecast, telecast, broadcast and otherwise exploit the Program, or any portion thereof, and to authorize others to do any and all of the foregoing, throughout the world in any and all languages, in perpetuity and in all media, whether now known or hereafter devised . . . ." (Agreement ¶ 7(a)) (emphasis added).

20.

Paragraph 7(a) of the Agreement explicitly subjects the exclusive distribution right to Defendant's other contractual obligations to Plaintiff, including the obligation to "negotiate in good faith" with Plaintiff regarding "the proposed acquisition by [Plaintiff] of such distribution rights in the Program." (Agreement ¶ 11, entitled "Future Negotiations").

21.

Warner Home Video, a subsidiary or division of Warner Bros. Home Entertainment, Inc., as successor-in-interest to Turner Entertainment Co. with respect to its share of the rights to the Project, distributed the Project as a special feature on the home video release of the Movie.

22.

The joint adventurers profited 50/50 from the distribution of the Project in connection with Defendant's sales of the Movie for decades.

23.

Jack Haley, Jr. assigned his ownership interest in JHP and its economic interest in the Program to Kelly Brandt, prior to his death. A true and accurate copy of the assignment is attached hereto as Exhibit E.

24.

Kelly Brandt, as executor of the estate of Jack Haley, Jr., trustee of the Jack Haley, Jr. Trust, and the successor in interest and owner of JHP, continues to operate JHP and receive JHP's profit participation from the Program.

25.

As of August 26, 2013, Defendant and its predecessors have paid Plaintiff its fifty percent share of the profits ("Adjusted Gross Proceeds" as defined in the Agreement) in the aggregate amount of $2,083,451.

26.

In late 2011, Defendant demanded that Plaintiff sell all of its right, title, and interest in the Project to Defendant for $150,000 or else Defendant would discontinue future distribution of the Project forever.

27.

When Defendant's demand was rejected, Defendant informed Plaintiff that future distribution of the Project with the Movie would be discontinued.

28.

In early 2012, Plaintiff attempted in good faith to negotiate obtaining distribution rights relating to the Project from Defendant since Defendant had effectively "mothballed" the Project permanently.

29.

Defendant rejected Plaintiff's negotiation efforts without counter and again reminded Plaintiff that Defendant "will discontinue distribution of the Project in any future manufactured homevideo devices of the Picture."

30.

Defendant's actions have violated the common sense admonition not to "cut off your nose to spite your face" as "The Wizard of Oz" has enjoyed renewed interest and popularity recently and a number of derivative works have recently enjoyed great success.

31.

The Program is likely to enjoy increased interest and profitability because of the remarkable success of numerous "Wizard of Oz" remakes, as well as the predominance of continued retellings of the story, some of which have recently been released. Of note, a Disney spin-off, "prequel" of the Movie, entitled "Oz: The Great and Powerful" (hereinafter "The Great and Powerful"), was much awaited and a huge box office hit. The Great and Powerful was released in 3D on March 8, 2013 and is comprised of a cast of A-list actors, such as Mila Kunis, James Franco, Rachel Weisz, and Michelle Williams.

32.

Additionally, approximately nine "Wizard of Oz" projects are in development, including two "Wizard of Oz" remakes by Defendant or their affiliates, another, rumored to be directed by Drew Barrymore, entitled "Surrender Dorothy," and a $60 million budgeted animated film, "Dorothy of Oz," voiced by A-list celebrities Patrick Stewart, Lea Michelle, Martin Short, Dan Aykroyd, and Jim Belushi, purported to be released in May of 2014.

33.

Moreover, "The Wizard of Oz" began as a revolution in cinematography and has become an American icon in the years since, encapsulating American culture as a take on the classic American tale. The foregoing represents only a sample of projects inspired by the Movie. An exhaustive list of such projects would fill pages upon pages and would include great successes.

34.

On December 25, 1950, "The Wizard of Oz" was dramatized and broadcast as a one-hour radio play on *Lux Radio Theater*. The radio play featured Judy Garland reprising her earlier role as Dorothy. In 1964, NBC created a one-hour, weekend afternoon animated cartoon, called "Return to Oz." The animated "Journey Back to Oz," an official sequel, was also produced in 1964 to commemorate the original film's 25th anniversary. "Journey Back to Oz" starred Liza Minnelli, Judy Garland's daughter, as Dorothy, and also featured Margaret Hamilton, who previously played the Wicked Witch, as Aunt Em. The film was released in the United States in 1974, and re-released in 1976 with additional live-action footage.

35.

In 1975, "The Wiz" musical, starring Stephanie Mills, Ted Ross, and Dee Dee Bridgewater, brought home seven Tony Awards for Best Musical, Best Supporting Actor in a Musical, Best Supporting Actress in a Musical, Best Choreographer, Best Director, Best Costume Designer, and Best Score. The movie version of “The Wiz,” which was inspired by the musical, starred Michael Jackson, Richard Prior, and Lena Horne, and received four Oscar nominations, including Best Cinematography and Best Music from the Academy of Motion Picture Arts and Sciences.

36.

Televisions projects based on the “Wizard of Oz” were quite popular as well. The September 30, 1977 episode of *Donny & Marie* featured Ray Bolger reprising his role as the Scarecrow in an episode adapting “The Wizard of Oz” as it was originally seen in 1939. To commemorate the 50th anniversary of the film “The Wizard of Oz,” DiC Enterprises created an animated TV series also called “The Wizard of Oz,” which first aired in 1990. The television series featured Dorothy returning to Oz to help her friends protect the Wizard from the resurrected Wicked Witch of the West.

37.

Consumer goods similarly incorporated “The Wizard of Oz” in their advertising campaigns. For example, *Crispy Wheats and Raisins* breakfast cereal exploited the “The Wizard of Oz” in a series of television commercials in the 1970s – 1980s.

38.

Gregory Maguire published the novel "Wicked: The Life and Times of the Wicked Witch of the West" in 1995, which describes Wicked Witch and other happenings in Oz prior to Dorothy's arrival. Maguire's novel was later adapted into the Broadway musical "Wicked." "Wicked" has recently reclaimed its place on Broadway by earning $2,947,172 over nine performances, setting a Broadway record for the highest single-week gross of any show in Broadway history. "Wicked," and its cast, have also won a number of Tony awards, including the 2004 Award for Best Actress in a Musical, the 2004 Award for Best Costume Design, and the 2004 Award for Best Scenic Design.

39.

For the film's 56th anniversary, a stage show also entitled "The Wizard of Oz," based upon the original film and book, which debuted in 1995 and continued to run through 2012, with the exception of 2004.

40.

The Jim Henson Company's 2005 television production "The Muppets' Wizard of Oz," starred Ashanti as Dorothy, Jeffrey Tambor as the Wizard, David Alan Grier as Uncle Henry, and Queen Latifah as Aunt Em. The production feature muppet favorites including Kermit the Frog as the Scarecrow, Gonzo as the

Tin Thing (Tin Man), Fozzie Bear as the Lion, and Miss Piggy as all the Witches of the West, East, North, and South.

41.

In 2007, Zooey Deschanel starred as DG, a Dorothy like character, in the *Syfy Network's* miniseries "Tin Man." It has been rumored that *Syfy Network* will team up with Timur Bekmambetov to create another adaptation of "The Wizard of Oz" entitled "Warriors of Oz." The new show was described by *Deadline* magazine, on July 22, 2013, as a re-imagining of the classic story of Dorothy and her lovable crew. "Warriors of Oz" will center on a warrior who is "transported to a post-apocalyptic future Oz where he must team up with three other warriors, Heartless, Brainless, and Coward, in order to defeat the evil Wizard who has enslaved the land." <http://www.deadline.com/2013/07/timur-bekmambetov-to-reimagine-wizard-of-oz-as-fantasy-action-miniseries-for-syfy/>.

42.

Andrew Lloyd Webber and Tim Rice wrote a musical entitled "The Wizard of Oz" based on the 1939 film, which features all of the songs from the film plus new songs written by Lloyd Webber and Rice. Lloyd Webber cast the role of Dorothy through a reality show competition entitled "Over the Rainbow." The musical opened in 2011 at the *London Palladium*. Another production of the musical opened in December 2012 at the *Ed Mirvish Theatre* in Toronto.

43.

"After the Wizard," an independent film by writer-director Hugh Gross produced in 2010, serves as a sequel relating events after those of the film.

44.

Warner Home Video released "Tom and Jerry and the Wizard of Oz", an animated film incorporating Tom and Jerry into the story as Dorothy's "protectors," in 2011.

45.

Warner has recently launched a multi-million dollar marketing campaign to celebrate the 75th anniversary of "The Wizard of Oz."[3] As part of this campaign, Warner has created a derivative work of the Project marketed as an "All-New Feature Length Documentary The Making of the Wonderful Wizard of Oz" (the "New Documentary") that is included in Warner's 75th anniversary collector's edition five-disc set, on sale for approximately $85.00.

46.

The New Documentary uses some of the same footage used in the Project.

[3] Warner began the Movie's 75th anniversary marketing campaign in October of this year, despite the fact that the film's milestone is not until August 2014.

47.

Upon information and belief, Warner's ultimatum, mothballing of the original Project, and creation of the New Documentary was merely a means to avoid the joint adventurers' Agreement and the corresponding 50/50 profit share.

48.

Given the success of the Movie, "The Wiz," both movie and musical, "Wicked," and the many other "Wizard of Oz" derivative works, including the New Documentary, it is evident that derivative works of the Movie and the Project, will continue to generate millions, if not billions, of dollars in the future. This is also true of the New Documentary as a derivative work of the Project and business opportunity of the joint venture.

49.

Increased marketing and monetization of derivative works necessarily increases interest and profitability of the Project which focuses on the making of the original classic Movie.

50.

Every day that passes leads to dollars lost by the joint adventurers due to Defendant's unilateral and unlawful decision to both mothball the Project and exclude Plaintiff from the competing derivative work and joint venture opportunity.

51.

Upon information and belief, Defendant failed to negotiate in good faith as required by the Agreement because the New Documentary was already conceived and in production.

52.

Defendant has effectively chosen to shoot the hostage rather than face the payment of what they believe to be a continued ransom. The only difference here is that the "ransom" was a reasonable 50/50 split of profits after certain deductions that had been honored for decades.

COUNT I: DECLARATORY JUDGMENT THAT THE AGREEMENT IS VOID FOR LACK OF MUTUALITY, INDEFINITENESS, AND VAGUENESS, AND THAT THE PARTIES ARE JOINT VENTURERS IN THE PROJECT

53.

Plaintiff realleges and restates the allegations contained in paragraphs 1 through 52 of this complaint against Defendant with the same force and effect as if they had been fully restated herein.

54.

Plaintiff and Defendant's predecessors in interest agreed to jointly finance, produce, and sell the Project and share the profits of the joint venture 50/50.

55.

Decades of profit participation statements and payments pursuant thereto reflected a 50/50 share of profits after certain deductions provided for in the Agreement.

56.

The joint adventurers traded an unenforceable future negotiation obligation for an unenforceable exclusive sales obligation.

57.

"Unless an agreement is reached as to all terms and conditions and nothing is left to future negotiations, a contract to enter into a contract in the future is of no effect." Estate of Ryan v. Shuman, 288 Ga. App. 868, 874 (2007) (internal citations and quotations omitted); see also Osta v. Moran, 208 Ga. App. 544, 545 (1993) ("An agreement to reach an agreement is a contradiction in terms and imposes no obligation on the parties thereto.").

58.

In order to be enforceable, a bilateral contract must have mutuality. Pepsi-Cola Co. v. Wright, 187 Ga. 723, 727 (1939). Today, mutuality is used to refer to the contractual requirement of mutual consideration. John K. Larkins, Jr., Georgia

Contracts: Law And Litigation, 122 (The Harrison Company, Publishers) (2002). It is axiomatic and a well-settled general rule that a contract must be supported by consideration, which may take the form of mutual promises. McCaw Manufacturing Company v. Felder & Rountree, 115 Ga. 408, 411 (1902); Cooley v. Moss, 123 Ga. 707, 710 (1905). A promise may be considered adequate consideration for a contract, but "the promise in each instance must be of such a character as to be capable of enforcement against the party making it, as otherwise neither party will be bound. It must be sufficiently definite both as to time and subject-matter." Pepsi-Cola, 187 Ga. at 727 (quoting McCaw, 115 Ga. at 411); see Morrow v. Southern Exp. Co., 101 Ga. 810, 812 (1897).

59.

A contract is unenforceable and deemed unilateral when "one party to it is bound and the other is not, or when one party gets something and the other nothing." Lowery Lock Co. v. Wright, 154 Ga. 867, 873 (1923). As stated even more clearly, "if one assumes under such an agreement to do a special act beneficial to another, and that other under the terms of the contract is under no obligation to perform any act of corresponding advantage to the former, the agreement is without such consideration as will support the promise of the part assuming to perform." Cooley, 123 Ga. at 710. The principle has long been settled that "neither party to an ostensible executory contract is bound unless both parties are bound. 'That the promise by one with nothing in return is void is axiomatic.'" Martin v. Cox, 13 Ga. App. 236, 237 (1913) (quoting Bishop on Contracts 35 (2d ed.)).

60.

Defendant contends it has the sole and absolute right to discontinue distribution and sale of the Program. (Agreement ¶ 7(a)). This unilateral right voids the Agreement on the grounds of lack of mutuality, indefiniteness, and vagueness.

61.

The only possible consideration in the Agreement for Defendant's unilateral exclusive distribution rights is its obligation to negotiate in good faith with Plaintiff to acquire those distribution rights for unspecified terms to be determined in the future. This unenforceable consideration voids the Agreement on the grounds of lack of mutuality, indefiniteness, and vagueness.

62.

There is no severability clause in the Agreement.

63.

If the Agreement is found to be void on the grounds of lack of mutuality, indefiniteness, and vagueness, then the Project must be deemed a joint venture between joint copyright owners who have combined their property and labor, in a joint undertaking for profit, with rights of mutual control. See Kissun v. Humana, Inc., 267 Ga. 419, 420 (1997) (citing Boatman v. George Hyman Constr. Co., 157 Ga. App. 120, 123 (276 S.E.2d 272) (1981)).

64.

If the Agreement is found to be void on the grounds of lack of mutuality, indefiniteness, and vagueness due to the unenforceable exchange of an unenforceable future negotiation obligation for an unenforceable exclusive sales obligation, then the remainder of the unenforceable Agreement might still be looked to as parol evidence of the joint venture.

65.

Plaintiff contends that it has equal rights to distribute and sell the Program, subject to a 50/50 profit split with certain deductions as described in the Agreement.

66.

Plaintiff is insecure with respect to its rights as a 50/50 owner of the Project.

67.

Plaintiff requests this Court's determination of the dispute regarding the ownership of the Project to guide and protect Plaintiff from uncertainty and insecurity with regard to the operation and control of the Project.

68.

The question of the relative rights in the Project is an actual justiciable controversy and Plaintiff has no adequate remedy at law or in equity.

69.

Defendant has acted in bad faith, has been stubbornly litigious, and has caused Plaintiff unnecessary trouble and expense so as to allow Plaintiff to recover its reasonable expenses and attorney's fees pursuant to O.C.G.A. § 13-6-11.

WHEREFORE, Plaintiff requests a judgment declaring that it is the 50% owner of the Project and that Plaintiff has all of the rights and powers of a fifty percent (50%) owner based on joint venture precedents, and to award Plaintiff its reasonable expenses and attorneys' fees pursuant to O.C.G.A. § 13-6-11, and for such other and further relief as the Court deems just and proper.

COUNT II: DECLARATORY JUDGMENT THAT THE PARTIES ARE JOINT AUTHORS OF THE PROJECT AND SHARE EXCLUSIVE RIGHTS IN THE PROJECT AS TENANTS IN COMMON

70.

Plaintiff realleges and restates the allegations contained in paragraphs 1 through 69 of this complaint against Defendant with the same force and effect as if they had been fully restated herein.

71.

Plaintiff and Defendant's predecessors in interest agreed to jointly finance, produce, and sell the Program and share the profits of the joint venture 50/50.

72.

The Agreement contemplated that the Program was to be a co-production of TEC and JHP.

73.

Under the terms of the agreement, JHP and TEC had joint control over the production, jointly owned the work, and agreed to make individualized contributions to the Program, making them joint authors.

74.

The Agreement specifically stated: "JHP and TEC shall have mutual creative control and approval of the Program, including, without limitation, the final shooting script and all key above-the-line personnel, which approval shall not be unreasonably withheld."

75.

A valid copyright registration evidencing the parties' position as joint authors was filed with the United States Copyright Office on September 19, 1994.

76.

As joint authors, JHP and TEC share the exclusive rights granted works under 17 U.S.C. §§ 103, 106.

77.

As a joint author, JHP has rights including, but not limited to, the right to reproduce, prepare derivative works, distribute, perform, and display the Program; the right to participate in negotiations of exclusive licenses for the publication of the Program; and the right to receive royalties and profits from the exploitation of the Program.

78.

Plaintiff and Defendant have not entered into a valid agreement to grant any of the exclusive rights to either of the parties, exclusively.

79.

All exclusive rights are retained by both Plaintiff and Defendant as tenants in common pursuant to 17 U.S.C. § 201.

80.

Plaintiff is entitled to a declaratory judgment that JHP is a joint author of the Program entitled to share all exclusive rights in the Program as a tenant in common with its co-author, TEC.

81.

Defendant has acted in bad faith, has been stubbornly litigious, and has caused Plaintiff unnecessary trouble and expense so as to allow Plaintiff to recover its reasonable attorney's fees and expenses incurred in bringing this action pursuant to O.C.G.A. § 13-6-11.

WHEREFORE, Plaintiff requests this Court issue a judgment declaring that Plaintiff is a joint author of the Program and that it is free to reproduce, prepare derivative works, distribute, perform, and display the Program; requiring Defendant to pay Plaintiff's attorneys' fees, costs, and expenses of litigation; and affording all further relief the Court deems just and appropriate.

COUNT III: INJUNCTIVE RELIEF PROHIBITING DEFENDANT FROM INTERFERING WITH PLAINTIFF'S OWNERSHIP AND CONTROL OF THE PROGRAM

82.

Plaintiff realleges and restates the allegations contained in paragraphs 1 through 81 of this complaint against Defendant with the same force and effect as if they had been fully restated herein.

83.

Plaintiff and Defendant entered a joint venture when they combined their labor and property in a joint undertaking for profit with rights of mutual control, namely through creation of the Project. Kissun, 267 Ga. at 420 (citing Boatman v. George Hyman Constr. Co., 157 Ga. App. 120, 123, 276 S.E.2d 272 (1981)).

84.

Under Georgia law, a joint venture is governed by the same rules as a partnership. Therefore, Plaintiff is owed the same duties as if Plaintiff and Defendant had entered a common law partnership. Vitner, 182 Ga. App. at 42 (applying partnership rules of formation to a joint enterprise); see Murphey, 223 Ga. at 102-103 (applying partnership agency principles to a joint venture).

85.

Since approximately early 2012, Defendant has wrongfully excluded Plaintiff from its rights as a joint adventurer by unilaterally terminating distribution of the Program and has wrongfully excluded Plaintiff from the joint venture opportunity of the New Documentary.

86.

The unenforceable Agreement, to the extent that it serves as written evidence of a joint venture agreement, provided that the joint adventurers would each jointly own the intellectual property and copyrights relating to the Program. (Agreement ¶ 5).

87.

"[O]ne joint author may properly license the copyright in a joint work to a third party. In Community for Creative Non-Violence v. Reid, 846 F.2d 1485, 270 U.S. App. D.C. 26 (D.C. Cir. 1988) (opinion by Judge Ruth Bader Ginsburg), aff'd, 490 U.S. 730, 109 S. Ct. 2166, 104 L. Ed. 2d 811 (1989), the Court held that 'Joint authors co-owning copyright in a work "are deemed to be tenants in common," with each having an independent right to use or license the copyright, subject only to a duty to account to the other co-owner for any profits earned thereby.' 846 F.2d at 1498 (quoting William Patry, Latman's The Copyright Law 122 (6th ed. 1986))." Cambridge Univ. Press v. Becker, 863 F. Supp. 2d 1190 (N.D. Ga. 2012).

88.

Defendant's actions violated the duty of good faith and fair dealing implied in the joint venture agreement and constituted wrongful dissolution of the joint venture.

89.

By virtue of the foregoing, Plaintiff is entitled to a preliminary and permanent injunction enjoining and restraining Defendant, its agents, employers, servants, attorneys, representatives and all other persons acting in concert with it (i) from interfering in any way with Plaintiff's joint ownership and control of the

Project; (ii) from transferring any business assets or funds to any third party; (iii) from interfering with the partnership's distribution and exploitation of the Program; (iv) and that an order be entered requiring Defendant to provide access to, turn over, or allow copying of all master recordings of the Program by Plaintiff.

90.

Immediate and irreparable injury and damage will result to Plaintiff's property rights in the Program unless the Defendant is temporarily restrained. Unless enjoined Defendant will continue to commit the acts sought to be restrained causing irreparable injury and harm to the Plaintiff for which it has no adequate remedy at law.

91.

Defendant has acted in bad faith, has been stubbornly litigious, and has caused Plaintiff unnecessary trouble and expense so as to allow Plaintiff to recover its reasonable expenses and attorney's fees pursuant to O.C.G.A. § 13-6-11.

WHEREFORE, Plaintiff requests this Court to enter a preliminary and permanent injunction restraining and enjoining Defendant, its agents, employers, servants, attorneys, representatives and all other persons acting in concert with it (i) from interfering in any way with Plaintiff's joint ownership and control of the Project; (ii) from transferring any business assets or funds to any third party; (iii) from interfering with the partnership's distribution and exploitation of the Program; (iv) and that an order be entered requiring Defendant to provide access to, turn over, or allow copying of all master recordings of the Program by Plaintiff, together with its reasonable attorneys' fees and costs of this action pursuant to O.C.G.A. § 13-6-11, and such other and further relief as this Court deems just and proper.

COUNT IV: APPOINTMENT OF A RECEIVER

92.

Plaintiff realleges and restates the allegations contained in paragraphs 1 through 91 of this complaint against Defendant with the same force and effect as if they had been fully restated herein.

93.

Based upon the foregoing, Plaintiff is entitled to the appointment of a receiver to marshal and preserve the assets of the joint venture, including the distribution of the Program and the distribution of the New Documentary, pending final relief from the Court.

94.

By spitefully mothballing the Program, Defendant is wasting valuable joint venture opportunities to capitalize on the renewed interest in the Movie, including but not limited to the joint venture's distribution of the New Documentary.

95.

As the Program was the only definitive "making of" documentary about the Movie, the Program's unavailability invites others to create a competing product.

96.

Defendant has usurped a joint venture opportunity by mothballing the Project, creating the New Documentary, and excluding Plaintiffs from a corporate opportunity for the partnership, namely participation in creating the New Documentary.

97.

Plaintiff has no adequate remedy at law because these lost sales during a period of peak interest in the Movie cannot be recaptured and the value of the wasted opportunities is difficult, if not impossible, to measure.

98.

There is no less drastic equitable remedy available to Plaintiff other than the appointment of a receiver due to Defendant's desire to make no profit at all from the Project rather than continue to share profits with Plaintiff.

99.

The New Documentary is a joint venture opportunity and should be an asset jointly owned by the Plaintiff and Defendant.

100.

The Court should use its equitable powers to appoint a qualified receiver to operate the joint venture business during these proceedings, and to pay all profits, after accounting for all expenses including the expenses of the receivership, into the registry of the Court pending ultimate disposition by the Court.

101.

In balancing the equities, there is no conceivable harm to Defendant in the appointment of a receiver because the Program is currently earning no revenue.

102.

"To justify appointment of a receiver, the pleadings and the evidence must show that the Defendant's rights are in immediate peril and that he will be prejudiced if a receiver is not appointed." Sires v. Luke, 544 F. Supp. 1155, 1161 (S.D. Ga. 1982).

103.

Based on Defendant's conduct with Plaintiff, Defendant is likely to discontinue distribution of the New Documentary just to ensure that the profits earned thereby are not shared with Plaintiff.

104.

Although there is no precise formula for determining when a receiver may be appointed, factors typically warranting appointment include: "the danger that the collateral will be dissipated or squandered, the inadequacy of available legal remedies, the probability that any hardship to Defendant would be outweighed by the potential hardship to Plaintiff if appointment were denied, and the potential irreparable harm." Bookout v. Atlas Financial Corp., 395 F. Supp. 1338, 1341 (N.D. Ga. 1974); see also O.C.G.A. § 9-8-2 ("Equity may appoint receivers to take possession of and protect trust or joint property and funds whenever the danger of destruction and loss shall require such interference.")

105.

Plaintiff is entitled to an order appointing a receiver *pendente lite* pursuant to Fed. R. Civ. P. 66. "[It] is the purpose of a receivership to prevent injury to the thing in controversy and to preserve it, *pendente lite* . . . for the security of all parties in interest, to be finally disposed of as the court may direct. In brief, the purpose of a receivership is the preservation and proper disposition of the subject of litigation. The appointment of a receiver certainly is not made for the purpose of destroying the rights of persons, but rather, that their rights may be made more secure." Bookout, 395 F. Supp. at 1342. (Citation omitted); see also

O.C.G.A. § 9-8-3. This Court's authority to appoint a receiver in this case is provided by statute:

> These rules govern an action in which the appointment of a receiver is sought or a receiver sues or is sued. But the practice in administering an estate by a receiver or a similar court-appointed officer must accord with the historical practice in federal courts or with a local rule. An action in which a receiver has been appointed may be dismissed only by court order.

Fed. R. Civ. P. 66.

106.

The Court should appoint a receiver with the power to: (1) obtain an accurate accounting of any unpaid profits from the Program and the New Documentary; (2) obtain an accurate accounting of any unpaid profits from the New Documentary; (3) actively manage and operate the joint venture business of marketing and exploiting the Program; (4) account for all revenue and expenses to the Court; (5) collect all profits for the benefit of the parties, and (6) marshal and preserve all assets, income, and profits of the partnership until receiving further direction from the Court.

WHEREFORE, Plaintiff demands judgment on Count IV of its complaint against the Defendant for the appointment of a receiver to operate the joint venture's business and to marshal and preserve the assets of the joint venture pending final judgment, together with all costs, Plaintiff's reasonable attorney's fees incurred in bringing this action, and such other and further relief as the Court deems just and proper.

COUNT V: DEMAND FOR AN ACCOUNTING

107.

Plaintiff realleges and restates the allegations contained in paragraphs 1 through 106 of this complaint against Defendant with the same force and effect as if they had been fully restated herein.

108.

Plaintiff and Defendant entered a joint venture when they combined their labor and property in a joint undertaking for profit with rights of mutual control, namely through creation of the Project. Kissun, 267 Ga. at 420 (citing Boatman v. George Hyman Constr. Co., 157 Ga. App. 120, 123 (276 S.E.2d 272) (1981)).

109.

Under Georgia law, a joint venture is governed by the same rules as a partnership. Therefore, Plaintiff is owed the same duties as if Plaintiff and Defendant had entered a common law partnership. Vitner v. Funk, 182 Ga. App. 39, 42 (1987) (applying partnership rules of formation to a joint enterprise); see Murphey, Taylor & Ellis v. Williams, 223 Ga. 99, 102-103 (1967) (applying partnership agency principles to a joint venture).

110.

As such, Plaintiff has been wrongfully excluded from the joint venture business by Defendant, its joint adventurer, within the meaning of O.C.G.A. § 14-8-22(1); see Vinter, 182 Ga. App. at 42 (stating that the distinction between a joint venture and partnership is not crucial and the same general rules apply).

111.

Plaintiff is entitled to a formal accounting as to joint venture affairs pursuant to O.C.G.A. § 14-8-22 and the Copyright Act.

112.

Defendant has acted in bad faith, has been stubbornly litigious, and has caused Plaintiff unnecessary trouble and expense so as to allow Plaintiff to recover its reasonable expenses and attorney's fees pursuant to O.C.G.A. § 13-6-11.

WHEREFORE, Plaintiff requests the Court order a formal accounting as to partnership affairs pursuant to O.C.G.A. § 14-8-22 and the Copyright Act and award Plaintiff its reasonable expenses and attorney's fees pursuant to O.C.G.A. § 13-6-11, and for such other and further relief as the Court deems just and proper.

COUNT VI: DEPOSIT OF FUNDS IN COURT

113.

Plaintiff incorporates herein by reference Paragraphs 1 through 112 of this

Complaint with the full force and effect as if they were restated herein.

114.

Defendant should be required to deposit all profits and royalties collected and held by it from distribution of the Project and the New Documentary into the registry of this Court.

115.

Defendant has received certain funds from the exploitation of the Project (the "Disputed Funds").

116.

Plaintiff disputes Defendant's right to the Disputed Funds as detailed herein.

117.

According to the Agreement, and as a joint adventurer and joint author, JHP is entitled to a fifty percent (50%) share of the Disputed Funds.

118.

Defendant may, with leave of court and pursuant to Fed. R. Civ. P. 67, deposit the Disputed Funds with the court and such funds will be held by the clerk of court until further order.

119.

Deposit of the Disputed Funds with the court will preserve tangible assets whose ownership is disputed in this matter.

WHEREFORE, Plaintiff demands that this Court order Defendant to deposit the Disputed Funds with the Court pursuant to Fed. R. Civ. P. 67, and such other and further relief as this Court deems just and proper.

COUNT VII: DEMAND FOR DAMAGES FOR BREACH OF FIDUCIARY DUTIES

120.

Plaintiff realleges and restates the allegations contained in paragraphs 1 through 119 of this complaint against Defendant with the same force and effect as if they had been fully restated herein.

121.

Plaintiff and Defendant entered a joint venture when they combined their labor and property in a joint undertaking for profit with rights of mutual control, namely through creation of the Project. Kissun, 267 Ga. at 420 (citing Boatman v. George Hyman Constr. Co., 157 Ga. App. 120, 123 (276 S.E.2d 272) (1981)).

122.

Under Georgia law, a joint venture is governed by the same rules as a partnership. Therefore, Plaintiff is owed the same duties as if Plaintiff and

Defendant had entered a common law partnership. Vitner, 182 Ga. App. at 42 (applying partnership rules of formation to a joint enterprise); see Murphey, 223 Ga. at 102-103 (applying partnership agency principles to a joint venture).

123.

Therefore, Defendant owes the highest fiduciary duty of loyalty to Plaintiff. These fiduciary duties forbid joint adventurers from (i) wasting business assets, (ii) engaging in self-dealing of any kind to the detriment of the joint venture or any joint adventurer, (iii) usurping joint venture opportunities for one's own benefit; or (iv) appropriating the assets and property of the business to the exclusion of the other joint adventurers. See Vinter, 182 Ga. App. at 42 (stating that the distinction between a joint venture and partnership is not crucial and the same general rules apply).

124.

Defendant breached its fiduciary duties to Plaintiff by, inter alia, (i) demanding that Plaintiff fire sale its interest in the joint venture for $150,000; (ii) threatening to and then actually terminating the distribution of the Program expressly because Defendant decided Plaintiff's half share was too much; (iii) upon information and belief, failing to properly account for profits since this dispute arose; (iv) depriving Plaintiffs of a corporate opportunity for the joint venture, namely participation in the creation of the New Documentary; (v) upon information and belief, demanding the fire sale and terminating the distribution of the Program in order to avoid paying Plaintiffs the 50/50 profit share they are entitled to under the Agreement.

125.

By virtue of Defendant's breach of fiduciary duties, Plaintiff is entitled to damages in an amount to be proven with certainty at trial.

126.

Defendant has acted in bad faith, has been stubbornly litigious, and has caused Plaintiff unnecessary trouble and expense so as to allow Plaintiff to recover its reasonable expenses and attorney's fees pursuant to O.C.G.A. § 13-6-11.

127.

Defendant's violations of its fiduciary duties to Plaintiff constituted willful misconduct, malice, fraud, wantonness, oppression, or that entire want of care which would raise a presumption of conscious indifference to consequences so as to authorize an award of punitive damages in order to deter such willful misconduct.

WHEREFORE, Plaintiff demands judgment against Defendant in an amount to be proven with certainty at trial, reasonable expenses and attorneys' fees pursuant to O.C.G.A. § 13-6-11, punitive damages in an amount to be determined by the enlightened conscience of an impartial jury, interest as provided by law and such other and further relief as this Court deems just and proper.

COUNT VIII: BREACH OF THE COVENANT OF GOOD FAITH AND FAIR DEALING

128.

Plaintiff realleges and restates the allegations contained in paragraphs 1 through 127 of this complaint against Defendant with the same force and effect as if they had been fully restated herein.

129.

In addition to the express written requirement of good faith in the Agreement, Georgia law implies a covenant of good faith and fair dealing in every contract.

130.

Defendant has breached the Agreement and the covenant of good faith and fair dealing.

131.

Defendant's breach of the Agreement is not the result of an honest mistake, bad judgment or negligence, but rather a conscious, selfish, and deliberate act, which unfairly frustrates the agreed common purpose and disappoints the reasonable expectations of Plaintiff, thereby depriving Plaintiff of the benefits of the Agreement.

132.

Defendant has acted in bad faith, has been stubbornly litigious, and has caused Plaintiff unnecessary trouble and expense so as to allow Plaintiff to recover its reasonable attorney's fees and expenses incurred in bringing this action pursuant to O.C.G.A. § 13-6-11.

WHEREFORE, Plaintiff demands judgment against Defendant in an amount to be proven at trial, post-judgment interest as allowed by law, its reasonable expenses and attorney's fees incurred in bringing this action, together with all costs, pursuant to O.C.G.A. § 13-6-11 and pursuant the express language of the Agreement, and such other and further relief as this Court deems just and proper.

COUNT IX: ALTERNATIVE COUNT FOR BREACH OF CONTRACT

133.

Plaintiff realleges and restates the allegations contained in paragraphs 1 through 132 of this complaint against Defendant with the same force and effect as if they had been fully restated herein.

134.

Although Plaintiff contends that the Agreement is void on the grounds of lack of mutuality, indefiniteness, and vagueness, and that the Project must be deemed a joint venture between joint copyright owners as detailed in Counts I and II herein, Plaintiff alternatively brings this claim for breach of the Agreement in the event that it is found to be enforceable.

135.

Paragraph 7(a) of the Agreement explicitly subjects the exclusive distribution right to Defendant's other obligations to Plaintiff, including the obligation to "negotiate in good faith" with Plaintiff regarding "the proposed acquisition by [Plaintiff] of such distribution rights in the Program." (Agreement ¶ 11, entitled "Future Negotiations").

136.

In late 2011, Defendant demanded that Plaintiff sell all of its right, title, and interest in the Project to Plaintiff for $150,000 or else it would discontinue future distribution of the Project forever.

137.

When Defendant's demand was rejected, Defendant informed Plaintiff that future distribution of the Project with the Movie would be discontinued.

138.

In early 2012, Plaintiff attempted to negotiate obtaining distribution rights relating to the Project from Defendant since Defendant had effectively "mothballed" the Project permanently.

139.

Defendant rejected Plaintiff's negotiation efforts without counter and again reminded Plaintiff that Defendant "will discontinue distribution of the Project in any future manufactured homevideo devices of the Picture."

140.

Defendant materially breached the Agreement through its unilateral, improper termination of the Agreement and mothballing of the Program.

141.

Defendant materially breached the Agreement because it failed to negotiate in good faith regarding "the proposed acquisition by [Plaintiff] of such distribution rights in the Program." (Agreement ¶ 11, entitled "Future Negotiations").

142.

Upon information and belief, Defendant has failed to pay Plaintiff all sums due under the Agreement.

143.

If Defendant had not materially breached the Agreement, Plaintiff would continue to earn profits pursuant to the Agreement.

144.

As a result of Defendant's material breaches, Plaintiff has been damaged in an amount to be determined at trial and in an amount to put Plaintiff in the same place it would have been if the Agreement had been performed. Plaintiff's damages are measured by the losses caused and gains prevented by Defendant's breach.

145.

Defendant has acted in bad faith, has been stubbornly litigious, and has caused Plaintiff unnecessary trouble and expense so as to allow Plaintiff to recover its reasonable attorney's fees and expenses incurred in bringing this action pursuant to O.C.G.A. § 13-6-11.

WHEREFORE, Plaintiff demands judgment against Defendant in an amount to be proven at trial, post-judgment interest as allowed by law, its reasonable expenses and attorney's fees incurred in bringing this action, together with all costs, pursuant to O.C.G.A. § 13-6-11 and pursuant the express language of the Agreement, and such other and further relief as this Court deems just and proper.

COUNT X: ALTERNATIVE COUNT FOR DECLARATORY JUDGMENT

146.

Plaintiff realleges and restates the allegations contained in paragraphs 1 through 145 of this complaint against Defendant with the same force and effect as if they had been fully restated herein.

147.

There is an actual controversy and uncertainty with respect to the rights and legal obligations of the parties to the Agreement.

148.

Because of Defendant's prior breaches, Plaintiff believes that it is excused from performing under the Agreement, especially and including the purportedly exclusive right to distribute the Program or not distribute the Program at all. On information and belief, Defendant contends Plaintiff must continue to honor this exclusivity.

149.

Plaintiff is entitled to a declaratory judgment that Defendant's prior breaches excuse its performance and that it is free to distribute the Program.

150.

"If the nonperformance of a party to a contract is caused by the conduct of the opposite party, such conduct shall excuse the other party from performance." O.C.G.A. § 13-4-23.

151.

Defendant has acted in bad faith, has been stubbornly litigious, and has caused Plaintiff unnecessary trouble and expense so as to allow Plaintiff to recover its reasonable attorney's fees and expenses incurred in bringing this action pursuant to O.C.G.A. § 13-6-11.

WHEREFORE, Plaintiff requests this Court issue a judgment: declaring Defendant's prior breaches excuse it from performance under the Agreement and that it is free to distribute the Program; requiring Defendant to pay Plaintiff's attorneys' fees, costs, and expenses of litigation; and affording all further relief the Court deems just and appropriate.

This the 30th day of October, 2013.

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