SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. RICHARD B. LOWE, III Lowe Justice

PART 56m

NBC Universal, Inc. et al

INDEX NO. 601011/08

MOTION DATE 7/17/08

- v -

MOTION SEQ. NO. 001

The Weinstein Company, Llc et al

MOTION CAL. NO. ____

The following papers, numbered 1 to ____ were read on this motion to/for ____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED
SEP 26 2008
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 9/25/08

HON. RICHARD B. LOWE, III J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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NBC UNIVERSAL, INC. and BRAVO MEDIA LLC,

Plaintiffs,

Index No. 601011/08

v

THE WEINSTEIN COMPANY, LLC

Defendant.

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Hon. Richard B. Lowe, III:

Plaintiffs NBC Universal, Inc. ("NBCU") and Bravo Media, LLC ("Bravo Media") move for an order preliminarily enjoining the Defendant The Weinstein Company, LLC ("TWC") from taking any steps to perform under its agreement with Lifetime Television Networks ("Lifetime") regarding the television show "Project Runway", and any spin off television show related to Project Runway. NBCU also seeks to enjoin TWC from promoting or marketing Project Runway on Lifetime.[1] TWC moves to dismiss the action pursuant to CPLR §§ 3211(a)(1) and (7).

On June 17, 2008 this court held a hearing on the application for a preliminary

[1]The instant order to show cause was signed by the court on April 28, 2008 and a hearing was set for July 17, 2008. A so ordered stipulation dated April 23, 2008 was entered giving the parties time to do limited expedited discovery, to brief the issues, and to prepare for an evidentiary hearing. On July 14, 2008, three days before the hearing date, Lifetime filed an order to show cause requesting leave to intervene and to be heard on this motion. Lifetime failed to provide a reasonable excuse for not seeking leave to intervene until the "eleventh hour", having been on notice of this motion for over 45 days. Therefore, this court determined that Lifetime waived its right to put in opposition to the motion as it was prejudicial to the plaintiffs. Subsequently, the parties stipulated to allow Lifetime to intervene, however Lifetime remained precluded from filing papers in opposition to this instant application as it was under submission.

injunction. Testimony was heard on issues such as whether there was an enforceable licensing agreement between the parties and whether the defendant agreed to give the plaintiff a right of first refusal to Project Runway upon expiration of the licensing agreement.

Testifying on behalf of NBCU were its CEO, Jeff Zucker ("Zucker"); Marc Graboff ("Graboff"), the Co-Chairman of NBC Entertainment and Universal Media Studios for NBCU; and Jeff Gaspin, the Chief Operating Officer and President of NBC Universal Television Group. On behalf of the defendant, the court heard testimony from Arthur Bell ("Bell"), testifying as an expert in the computation and estimation of television ratings; Eric Roth ("Roth"), the Executive Vice President of Business Affairs of TWC; and Harvey Weinstein ("Weinstein"), the Co-Chairman of TWC.

After the taking of testimony and review of the papers submitted in support of the parties respective motions, the plaintiffs' motion for a preliminary injunction is granted and the defendant's motion to dismiss is denied.

BACKGROUND

NBCU is a leading media and entertainment company in the development, production, and marketing of entertainment, news, and information (Graboff Aff ¶ 3). NBCU has traditionally taken ideas and concepts presented to it and turned them into highly rated television programs. It has a close family of networks which include its broadcast network, NBC, and other cable networks including the Bravo Network ("Bravo") and USA Network.

Bravo Media is NBCU's wholly owned subsidiary (through intermediate entities). Bravo Media operates the successful cable network of the same name, Bravo, which reaches more than 80 million homes (Berwick Aff ¶ 1). It has aired and presently airs a wide range of competition

shows and "reality" based programming as well as acquired movies, series, and specials. Its top programs include "Queer Eye for the Straight Guy", "Top Chef", "The Real Housewives of Orange County, and "Inside the Actors Studio" (Id).

TWC was founded in 2005 by Weinstein and his brother Bob Weinstein (collectively the "Weinsteins") (Weinstein Aff ¶ 1). Prior to forming TWC, the Weinsteins were co-chairmen of Mirimax Pictures ("Mirimax")(Id). In those capacities, they have produced numerous motion pictures and television programs (Id). The Weinsteins have a reputation for producing quality work. Over the course of the years their companies have won more Oscars than any other, and have won numerous national and international awards including three Pulitzer prizes and twenty five Tony Awards for Best Broadway Show (Tr 7/17/08 227:3-12).

In the Fall of 2003, Weinstein pitched the idea of a program called "Project Runway" to NBCU's CEO, Zucker (Weinstein Aff ¶ 4). The parties agreed to go forward with production of the program and decided it was to be aired on Bravo (Id). In November of 2003, a licensing agreement was drafted by the parties (the "2003 License Agreement"), however it was never signed. The 2003 License Agreement contained terms calling for Bravo to develop and oversee the production of Project Runway and to obtain exclusive rights to exhibit the program in the United States, in exchange for license fees to TWC. The show launched in December 2004 and has aired on Bravo ever since.

Project Runway is "an unscripted program concerning competition among aspiring fashion designers in a series of 'challenges', which are at the centerpiece of each weekly episode" (Weinstein Aff ¶ 2). Four seasons, also known as cycles, of Project Runway have been

broadcast on Bravo (Id). Season five of the program began airing in July of this year (Id).[2]

Project Runway has become a critical and commercial hit (Id ¶ 7)[3]. It recently became the first reality television program to win a Peabody Award.[4] (Graboff Aff ¶ 32). It has also been nominated for an Emmy Award, three times in 2005, 2006, and 2007, for Outstanding Competition Reality Program (Id).[5] It has developed a "fervent fan base" and has become "appointment television", meaning television that people will go out of their way to watch (Karpoff Aff., Exs 1,2; Bell Aff. ¶ 35; Graboff Aff ¶ 32).

Because it is a reality program, Project Runway can provide unique and valuable marketing opportunities. Product integration is an entertainment industry term to describe a form of advertising in which products and services are featured within a television program. (Bell Aff ¶ 20; Roth Aff¶ 7). Unlike traditional on-air commercial advertising, where advertisers present their products in "commercials" which are aired distinctly from the program, product integration involves the featuring of an advertiser's product in the context of the program itself (Roth Aff ¶ 7). Advertising is considered most effective when both integration and traditional

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[2] Project Runway went into initial production in 2004. Since that date, Bravo has aired four complete cycles of Project Runway as follows: Cycle One - December 1, 2004 through February 23, 2005; Cycle Two - December 7, 2005 through March 8, 2006; Cycle Three - July 5, 2006 through October 18, 2006; and Cycle Four - November 14, 2007 through March 5, 2008 (Berwick Aff. ¶ 6). As of the time of the filing of this motion, Cycle Five of Project Runway was in its "pre-production stage and scheduled to begin airing in July 2008" (Id).

[3]Project Runways viewership has grown 1500% between December 2004 and March 2008 (Berwick Aff ¶ 7).

[4] The Peabody award denotes excellence in news and entertainment broadcasting (Graboff Aff ¶ 32).

[5]Project Runway is the only cable television show nominated in this category (Berwick Aff ¶ 8).

interstitial advertising is used, therefore advertisers who purchase product integration generally also purchase significant interstitial air time on Bravo (Bell Aff ¶ 8; Karpoff Aff, Ex 39).[6] Product integration is critical to financing a program like Project Runway because while a licensing fee is paid for each episode of the show, it often times does not cover the amount necessary to produce the show (Roth Aff ¶ 8).

For three seasons the parties performed under the unsigned 2003 License Agreement (Tr. 7/17/08; 208:21-22; Graboff Aff ¶8). Paragraph 2 of the agreement gave Bravo rights to cycle one of Project Runway and four consecutive options for additional cycles (with a specified increase in the licensing fee for each cycle)(Graboff Aff Ex A). Paragraph 7(b) refers to a right of first negotiation and first refusal to any "Spin-off"[7] of the show. Such a provision allows a licensee, like the plaintiffs, to maximize the value of a licensed program by having the right to obtain for itself the right to exploit new shows that are "spun-off" of the original and that trade off the value and fame of the licensed program (Graboff Aff ¶ 9).

Importantly, Paragraph 7(a) contains a "Holdback Period" barring TWC from exploiting or marketing new episodes of the show for twelve months after Bravo aired all of its new episodes. During the holdback period, TWC is not permitted to and cannot permit others to "market, promote, and exhibit other [i.e. non-Bravo] episodes of the Series" (Graboff Aff Ex A). A Holdback Period allows a licensee, such as the plaintiffs, to maximize the value of a licensed

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[6] For example, Tresemme, a producer of hair care products, pays significant money to have its products featured on Project Runway as the hair care products used by the models on the show (Roth Aff ¶ 9). In addition, Tresemme also purchases traditional commercial air time (Id).

[7] A spin-off is a television series that has one or more common elements with the underlying series it is spun from (Tr. 7/17/08 21:24-26).

program by precluding anyone else from entering the market and competing for a period of time after the licensee has finished exploiting new episodes of the program (Graboff Aff ¶ 9).

From time to time, the parties amended the 2003 License Agreement (Id ¶ 10). For example, in March 2005, the parties agreed to increase the per-episode license fee paid by Bravo to TWC set forth in the 2003 License Agreement (Id Ex B). On November 22, 2004, the parties executed a written indemnity agreement "pursuant to [the] license agreement dated as of November 11, 2003"(Id, p 1).[8] They also re-worked how they would sell and apportion revenue from sponsorship opportunities related to the show which was memorialized in an unsigned writing (Graboff Aff ¶ 10).

In mid-2006, after airing three cycles of Project Runway, the relationship between Bravo and TWC began to sour (Roth Aff ¶ 21). Weinstein had a particular dislike for Lauren Zalaznick ("Zalaznick"), the head of Bravo, whom he claimed made day-to-day production of Project Runway difficult (Weinstein Aff ¶ 9; Karpoff Aff ¶ 5; Tr. 7/17/08 28:3-6). He further asserts that Zalaznick interfered with TWC's efforts to secure product integration advertisers –an important source of TWC's profits from the program (Weinstein ¶ 7). On August 15, 2006, Plaintiffs notified TWC that Bravo intended to exercise its option to cycle four (Graboff Aff Ex F). TWC did not honor the option (Graboff Aff Ex G). Plaintiffs assert that TWC used the opportunity to escalate its demands for additional licensing fees for providing the cycles (Graboff Aff ¶ 13).

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[8]Another indemnity agreement was executed in March 2006 following the formation of TWC (as a separate entity from Mirimax. It was executed "pursuant to a license agreement . . .dated as of November 11, 2003 as amended . . .and any and all other agreements that [TWC] and Bravo have entered into or will enter into regarding Project Runway and any and all amendments thereto (Graboff Aff. Ex C).

When negotiating for cycles four and five, TWC and plaintiffs began to dispute whether the 2003 License Agreement was enforceable and whether it contained a holdback provision (Weinstein Aff ¶ 18; Graboff Aff ¶14). If unenforceable, TWC would be able to take Project Runway elsewhere and allow a third party to exhibit future cycles of the show in direct competition with Bravo's cycles. TWC made it clear that it intended to take the show elsewhere no later than Fall 208. Plaintiffs maintained a position that under the 2003 License Agreement, Bravo was entitled to exercise its right to cycles four and five. Further, they asserted there was no requirement as to when Bravo had to air cycle five and, pursuant to the holdback provision, TWC was barred from marketing, promoting or allowing the exhibition of future cycles of Project Runway for at least twelve months after Bravo exhibited the last episode of cycle five. Under the terms of the 2003 License Agreement, according to plaintiffs, Bravo was not even required to exercise its option for cycle five until six months after TWC delivered all of cycle four to Bravo. Therefore, if NBCU elected to do so, TWC would not be able to take the show elsewhere until much longer than it desired.

To attempt to resolve the issues, the parties' top executives, Zucker and Weinstein agreed to meet on January 15, 2007 in a private suite at the Four Seasons hotel. Graboff, the current Co-Chairman of NBC Entertainment and Universal Media Studios, was also in attendance.

Plaintiffs' position is that at the meeting the parties conceded to the following in order to meet Weinstein's desire to exploit Project Runway by the Fall of 2008: (a) NBCU would exercise Bravo's options to both cycles four and five immediately, even though their position was that under the 2003 License Agreement, the right to cycle five did not need to be exercised until six months after cycle four was complete; (b) plaintiffs would exhibit cycles four and five

sooner than they desired, and on an accelerated timetable sought by TWC; and (c) they would reduce the expiration date of the holdback period from twelve months to six months after Bravo aired the last new episode of cycle five (Graboff Aff ¶ 17). These concessions would mean that the holdback period would expire earlier and Weinstein could have the show back sooner as he desired.

In exchange for these concessions, plaintiffs argue it was agreed to by the parties that NBCU would have a right of first refusal to license future cycles of Project Runway, beyond cycle five, for exhibition on any NBCU non-Bravo network should TWC sell or license any new cycles to another television network (Id ¶ 18). Alternatively, Project Runway could come back to air on Bravo if the parties agreed on a package deal whereby NBCU would invest in TWC's movie library (Id ¶ 19). According to plaintiff, this right of first refusal was consideration given because their concessions standing alone to accelerate the date on which Bravo would lose its exclusive rights to Project Runway were of no benefit to NBCU (Id). The right of first refusal would protect Plaintiffs against an early loss of the show and would allow them to protect their investment in Project Runway (Id).

A few days after the meeting, an assistant for Jim Wiatt ("Wiatt"), Chief Executive Officer of the William Morris Agency ("WMA"), TWC's agent, sent an email to Graboff requesting a confirmation of the terms of the January Amendment (Pl Ex 5; Graboff Aff ¶22). On January 19, 2007, Graboff sent the following email ("Graboff email") to Wiatt:

> As you have requested, I have outlined below Jeff Zucker's and my understanding of the points we agreed to in our meeting this past Monday with Harvey Weinstein regarding Project Runway:
>
> 1. TWC will immediately start pre-production of cycle 4 and, upon conclusion of production of cycle 4, will begin pre-production on cycle 5,

all pursuant to the terms of the existing license agreement.

2. Bravo will have a six month holdback from the date of the last original telecast of the last episode of cycle 5, during which TWC (or a third party) cannot produce, promote or telecast any further episodes of Runway. Harvey's desire is for cycle 5 to finish it's initial run in the Fall of 2008.

However, on this point, after discussing the timing of production and Bravo's scheduling and sales requirements, we'd like to clarify this point and propose the following: Bravo will air cycle 4 starting in the 4th Quarter, 2007, and ending in March 2008. The series would "rest" for a few months (which is good for all concerned), and Cycle 5 would begin to air in Summer 2008 and finish by the end of 2008, likely early in the 4th Quarter. TWC can have the series back not later than 1/1/09 - basically the same timing as Harvey proposed, but on a better air schedule for Bravo's (and the show's) needs; in effect, we have reduced the holdback to a few months at most, and have helped protect the continuing viability of the series.

3. Harvey gave Jeff his word that, should he or TWC sell or license Runway to another network (other than a network which Harvey or TWC owns or controls), NBC Universal will have a first refusal right to acquire the series for NBC, USA or another non-Bravo platform.

4. Harvey is prepared to continue licensing the series to Bravo beyond cycle 5 if (i) NBCU and TWC can reach an agreement on a multi-year, multi-picture output deal in which NBCU acquires television rights to TWC films, and TWC purchases at least an equivalent amount in ad time on NBCU platforms during each year of the deal; or (ii) NBCU and TWC partner in some form on the "Chiller" cable network.

We proposed, but Harvey rejected, that cycle 4 air on Bravo (with a premiere of the first episode on NBC), and cycle 5 and beyond (additional cycles to be negotiated) to air on NBC. We would appreciate it if you could ask Harvey to reconsider this proposal, since it (i) gets the series away from Bravo, per Harvey's wishes, and (ii) gets the show a higher license fee and revenue for TWC.

Please discuss item 2 with Harvey - we all think our proposed air schedule for cycles 4 and 5 are in the best interests of the series, and Harvey will get the series back within virtually the same time period as he, Jeff and I discussed.
Also, please confirm the remaining points with Harvey and let me know if there are any issues/clarifications that we need to address.

Thanks for your help.

(Graboff Aff Ex I).

It was not until February 22, 2007 that Mark Itkin ("Itkin"), current Executive Vice President and Co-head of Television at WMA, sent Graboff a response which was copied to Wiatt. It stated, in pertinent part, "Harvey intends to live by the terms of the letter you sent to Jim Wiatt on 1/19/07."(Graboff Aff Ex J).

Thereafter, an agreement was signed by the parties on July 13, 2007 which adjusted the holdback provision contained in the Graboff email (Graboff Aff Ex E). The parties, in this agreement, agreed that Bravo could exhibit cycle five of Project Runway at a date later than that contained in the Graboff email and that, in exchange, the holdback period would be shortened accordingly to one day. Under this adjustment, the holdback period was scheduled to expire in Fall 2008 (Graboff Aff Ex E).[9]

Later in 2007, the parties resumed negotiations regarding Project Runway (Graboff Aff ¶ 26). Part of the discussions involved TWC's desire to a package deal including Project Runway with unrelated second-tier films owned by TWC (Id).

On February 22, 2008, Zucker sent an email to Mark Gaspin, who oversees Bravo for NBCU, which indicated that he had received a phone call from Weinstein that night. According

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[9] The letter agreement confirms: "NBC/Bravo's agreement that notwithstanding anything to the contrary in the (unsigned) November 11, 2003 "Project Runway" license agreement (as amended), the holdback on future cycles of "Project Runway" (i.e., cycles 6 and beyond), expires one day after the initial airing of the finale episode of the fifth cycle (i.e. the episode featuring the finalist competition fashion show at September 2008 Fashion Week in New York) (the "08 Finale) provided such airing shall be deemed no later than the earlier of (a) five weeks after the taping of the '08 Finale if the tape date is on the Friday of fashion week in September '08 or (b) six weeks after the taping of the '08 Finale if the tape date is not on the Friday of fashion week in September '08" (Graboff Ex E).

to the email, Weinstein told Zucker that TWC received an offer which was so "huge and stupid" that it was "not worth countering" (Pl Ex 15). According to the email, Weinstein would show it to Zucker when it was completed (Id).

Zucker received the phone call on February 22, 2008. However, it is undisputed that TWC had already signed a deal on February 7, 2008 giving Project Runway to Lifetime Television Network ("Lifetime"), a competing network. Weinsten had also received and cashed a twenty million dollar advance (Graboff Aff ¶ 28; Tr 7/17/08 254:19-20). NBCU found out about the deal in a letter dated April 7, 2008 sent by Lifetime (Graboff Aff ¶ 28). A joint press release issued by TWC and Lifetime on April 7, 2008 announced the deal and stated that Project Runway would move to Lifetime, with the premiere of cycle six to be exhibited on Lifetime in November 2008, immediately following Plaintiffs' exhibition of cycle five on Bravo (Id Ex K). They also announced that Lifetime will be licensing a spin-off of Project Runway (Id Ex L).

On April 7, 2008, plaintiffs commenced this action, alleging three causes of action: Breach of Contract; Declaratory Relief; and Specific Performance. Plaintiffs now move this court for a preliminary injunction. Specifically, plaintiffs ask this court to (1) preliminarily enjoin TWC from taking steps to effectuate, implement or perform under any agreement with Lifetime regarding Project Runway and/or any spin off television show related to Project Runway, including the February 7, 2008 agreement between TWC and Lifetime; and (2) preliminarily enjoining promotion or marketing of Project Runway on Lifetime (or authorizing Lifetime to do the same).

DISCUSSION

PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

Standard for a Preliminary Injunction

"The party seeking a preliminary injunction must demonstrate a likelihood of success on the merits, danger of irreparable injury in the absence of an injunction and a balance of equities in its favor" (*Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839, 840 [2005]).

Likelihood of Success on the Merits

To establish this element, a party seeking a preliminary injunction need not establish a certainty of success (*Props for Today, Inc. v Kaplan*, 163 AD2d 177 [1st Dept 1990]), but rather a prima facie showing of a right to relief is required at this stage (*Bingham v Struve*, 184 AD2d 85, 88 [1st Dept 1992]). The existence of an issue of fact on a motion for a preliminary injunction is not a basis for denying a preliminary injunction (*See* CPLR 6312(c)). "It is well-settled that likelihood of success on the merits may be sufficiently established even where the facts are in dispute and the evidence is inconclusive" (*Four Times Square Assocs., LLC v Cigma Investment, Inc.*, 306 AD2d 4 [1st Dept 2003]). Even where the opposing party demonstrates that the facts are in "sharp dispute", this alone will not defeat a motion for a preliminary injunction (*Business Networks of New York, Inc. v Complete Network Solutions, Inc.* 1999 WL 126088 [NY Sup Ramos, J.).

Under New York law, to succeed on a claim for breach of contract, a plaintiff must establish the existence of a contract; a breach of that contract, performance by the plaintiff; and damages resulting from the breach (*Furia v Furia*, 116 AD2d 694, 695 [2nd Dept 1986]).

Plaintiffs assert they have made a sufficient showing that TWC breached the agreements between the parties on three different occasions: (1) by giving Lifetime the right to a spin-off show in violation of the 2003 License Agreement; (2) by marketing Project Runway on Lifetime

in violation of the parties holdback provision; and (3) by not honoring the right of first refusal to acquire future rights to Project Runway allegedly promised to NBCU.

The defendants argue that the 2003 License Agreement is not enforceable and a right of first refusal was never given to plaintiffs.

The 2003 Licence Agreement

TWC argues that the 2003 License Agreement is unenforceable because it was never signed by the parties. Furthermore, they argue that at no time did they ever intend to be bound by its terms.

A plaintiff's actions in reliance on a promise will create an enforceable contract (*Global Icons, LLC v Sillerman*, 45 AD3d 457 [1st Dept 2007]). To enforce an unsigned agreement, " it must be shown that the other party's conduct evinced an intent to be bound by the agreement" (*Rudolph & Beer, LLP v Roberts*, 260 AD2d 274 [1st Dept 1999]).

At the hearing, the testimony established that the television industry is one which seems to have a disregard for legal formality and is indeed reckless by failing to execute long form license agreements for the sake of the exigencies of time in getting television shows produced and broadcasted. It is customary in the television industry for unexecuted agreements to be adhered to by the parties. Graboff testified that it is custom and practice for parties to regard unsigned agreements as binding and enforceable despite being unexecuted (Tr. 7/17/08 16:16-24). This was further confirmed by Itkin, TWC's agent, at his deposition, where he testified that it is not uncommon in the television industry for the owner or licensor in television production to proceed with a production based on unsigned agreements (Snyder Affirmation Ex E 15:7). Itkin also testified that the terms of the parties' agreements can be codified in unsigned writings

between the parties or otherwise are sometimes set forth in a series of writings which could include term sheets and follow up emails, all of which constitute the understanding between the parties (Id 15:19-16:6). Furthermore, TWC's witness, Roth, testified that a vast majority of license agreements in the television industry are performed based on unsigned agreements (Tr 7/17/08 208:17-21). Despite the admonition of legal staffs, television executives fail to sign agreements because of this long standing custom and practice (Id 18:2-4). TWC's attorney, Roth agreed that it is not "fortuitous for parties to reach agreements in the television industry and perform under those agreements on the basis of unsigned documents" (Tr. 7/17/08 208:10-14), rather it "happens a lot" (Id 208:15-16). Therefore, it is not unusual that the parties in this matter proceeded under an unexecuted agreement as amended by emails and other correspondence. It is reasonable for the plaintiffs to have acted in reliance upon the 2003 License Agreement.

The parties performed under the 2003 License Agreement. There is no dispute that TWC produced and Bravo paid for four cycles of Project Runway. This was done pursuant to the provisions of the 2003 License Agreement, the unexecuted long form, as well as subsequent amendments (Tr 7/17/08 20: 25-26, 21:1-2).

Prior to this litigation, it is clear TWC considered the 2003 License Agreement binding and enforceable. On July 28, 2006 and August 26, 2006, TWC's attorney, David Boies wrote NBCU wherein he stated that in connection with the 2003 License Agreement, he sought to protect TWC's rights as they pertain to the Project Runway venture (Pl Ex 43 and 44).[10] When

[10] The July 28, 2006 letter states: "My firm represents The Weinstein Company ("TWC"). I write in connection with the Project Runway License Agreement dated as of November 11, 2003 (the "License Agreement"). Specifically, I write to protect TWC's rights as they pertain to two "Project Runway" related Bravo ventures that have come to our attention. (Letter from Boies to NBCU dated July 28, 2006).

asked about the Boies letters, Roth testified that the repeated positions taken by TWC asserting plaintiffs were in violation of the 2003 License Agreement was only done based upon the plaintiffs' own rendering of what plaintiffs believed was agreed upon between the parties (Tr. 7/17/07 212:16-18). Therefore, according to Roth, they sought only to remind plaintiff that they were going against what they, the plaintiffs, believed was an agreement between the parties, not what TWC believed to be the agreement (Tr. 7/17/06 206:20-24). This court finds this testimony to be self serving and not credible. TWC's attempts to argue the contract is not enforceable are not credible in light of their prior conduct which showed an intent to be bound by the agreement. It is evident that TWC's action caused plaintiff to reasonably rely upon the agreement and it would be "unconscionable to deny [its] enforcement" at this stage (*Global Icons LLC* 45 AD3d at 457).

Therefore, the 2003 License Agreement is enforceable.

Right of First Refusal

Having found that the 2003 License Agreement is an enforceable agreement, the court must now turn to whether there was an amendment through which TWC gave plaintiff a right of first refusal for future cycles of Project Runway.

Signed and unsigned writings "may be pieced together out of separate writings, connected with one another either expressly or by the internal evidence of subject-matter and occasion" *(Crabtree v Elizabeth Arden Sales Corp.*, 305 NY 48, 54 [1953]). "[S]o long as one

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The August 26, 2006 letter states: "As you are aware, the Project Runway License Agreement dated as of November 11, 2003 (the "License Agreement") distinguishes between On-Line users that are intended to be a separate revenue source and On-Line users that are intended to advertise, publicize and promote the Series." (Letter from Boies to NBCU dated August 11, 2006).

writing, signed by the party to be charged, establishes the contractual relationship between the parties, the remaining terms of the agreement may be expressed in other writings, either signed or unsigned, which must connect with the signed writing and one another, either expressly or by the internal evidence of subject matter and occasion, and refer to the same transaction" (Id). "The writings, however, must clearly refer to the same transaction, include all items of the contract, and at least one of the writings must bear the signature of the party to be charged" (*Strain v Strain*, 228 AD2d 491 [2nd Dept 1996]).

There is no dispute that on January 15, 2007, a meeting was held at the Four Seasons hotel in Los Angeles between Weinstein and Zucker, with Graboff in attendance. NBCU asserts it was at this meeting Weinstein committed to give a right of first refusal whereby if Project Runway was sold or licenced to another network, NBCU would have a first refusal right to acquire the series for NBC or another non-Bravo platform. It is NBCU's position that in exchange for the right of first refusal, it would shorten the holdback period contained in the 2003 License Agreement. TWC asserts that at no time was a right of first refusal given at the meeting. Rather, according to TWC, the parties only agreed to scheduling of cycle four and cycle five of the program as well as to the shortening of the holdback period.

At the January 15th meeting, Graboff took contemporaneous notes of what was agreed upon by the parties (Graboff Aff. Ex H). Subsequent to the meeting, an email was sent by WMA requesting that Graboff send a confirmation indicating where the parties stood (Pl Ex 5; Graboff Aff ¶ 22). On January 19, 2007, the Graboff email was sent to Wiatt of WMA outlining the agreed upon points. Graboff confirmed that "should [Weinstein] or TWC sell or license Project Runway to another network (other than a network which [Weinstein] or TWC owns or controls),

NBC Universal will have a *first refusal right* to acquire the series for NBC, USA or another non-Bravo platform" (Graboff Ex I)(emphasis added). Itkin confirmed on February 22, 2007 that "[Weinstein] intends to live by the terms of the letter you sent to Jim Wiatt on 1/19/07" (Graboff Ex J). In an email dated February 21, 2007 to Itkin, Roth recognized that Graboff's email was "an outline of *agreed* points" and directed Itkin to "pass this [email] along as TWC's official response" (Snyder Aff Ex I)(emphasis added). He also rejected the requests in the email to amend the agreed to points regarding scheduling.

As has been customary among the parties, the amendment to the 2003 License Agreement, as contained in the Graboff email and accepted by the February 22, 2007 Itkin email, was not put into a further writing. Rather, according to plaintiffs, it was their understanding that Graboff's email, in addition to the confirmatory email sent by the defendants, was binding.

Subsequently, there was a letter agreement signed by the parties on July 13, 2007 which amends the Graboff email with respect to scheduling (Graboff Aff Ex E). This letter agreement amended the holdback period a second time whereby it was shortened to one day after the initial airing of the finale episode of Project Runway. It also further adjusted the airing schedule so that the finale would be shown in the Fall of 2008. Thereafter, TWC would be able to immediately begin marketing and advertising the show elsewhere.

Throughout the parties relationship there is a series of writings, both signed and unsigned, which refer back to the 2003 License Agreement which is dated as of "November 11, 2003" (Graboff Aff Ex A). Most recently, the signed July 13 2007 letter agreement which adjusts the holdback period also refers to the "November 11, 2003 'Project Runway' license

agreement (as amended)" (Id Ex E). The parties also entered into a March 28, 2006 Indemnity Agreement "pursuant to [the] license agreement . . . dated November 11, 2003" (Id Ex C). There was also a November 22, 2004 Indemnity Agreement entered into "pursuant to the November 11, 2003 [License Agreement]" (Id Ex B).

The two writings: (1) the January 19, 2007 email from Graboff to Wiatt and (2) the confirmatory email response by Itkin stating that "Harvey [Weinstein] intends to live by the terms of the [January 19, 2007] letter, connect with one another and with the other related signed and unsigned writings between the parties, all of which refer to and collectively set forth the parties' rights and obligations to Project Runway as memorialized in the 2003 License Agreement. The two emails connect both "expressly [and] by the internal evidence of subject matter and occasion" to form a valid agreement" (*Crabtree*, 305 NY at 54).

Furthermore, the writings evidence that the parties reached an agreement by which they intended to be bound. The Graboff email expressly sets forth "Jeff Zucker's and [Graboff's] understanding of the *points we agreed to in our meeting* this past Monday with Harvey Weinstein regarding Project Runway"(Graboff Aff, Ex I)(emphasis added). Itkin indicated this was a deal that "Harvey [Weinstein] intended to live with". TWC's own documents are in accord with and confirm the January Amendment. Roth acknowledged in his February 21, 2007 email that Graboff's email was "an outline of agreed points", and TWC's "official position" regarding the email was that it bound plaintiffs and could not be varied (Snyder Aff Ex I).

Lastly, in addition to the writings, Weinstein's deposition testimony confirms that an agreement was reached at the January meeting.[11] In addition, TWC puts forth no evidence that it

[11] Weinstein Dep. At 71:16-72:6

ever refuted the Graboff email despite it having been reviewed by both Roth and Weinstein. Weinsten conceded that he had seen the email at least by the following month (Weinstein Dep at 83:7-19; 102:18-25). All parties acknowledged that the industry is one which reaches agreements through email correspondence. Therefore, if the Graboff email was inaccurate, then Weinstein or his representative would have refuted it immediately. Rather, a response was sent that "Harvey intends to live by the terms" of the Graboff email. The defendants assertion that Weinstein "flat out refused [a right of first refusal] request" is not credible in light of this evidence (Weinstein Aff ¶ 19).

The defendants argue that the Itkin email meant only to agree to the scheduling terms contained in the Graboff email. Furthermore, Weinstein maintains that an agreement was reached only with respect to the scheduling of future cycles of Project Runway. However, without the right of first refusal, there was no consideration given for plaintiffs' concession to turn Project Runway back over to Weinstein by the Fall of 2008. NBCU had waived its holdback period through the amendments to the 2003 License Agreement. Therefore, beginning in November 2008, without the injunction, Lifetime will run its episodes of Project Runway at the same time Bravo is running its episodes. Plaintiffs have lost their right to maximize their license by precluding anyone else from entering the market before they have exploited their new episodes. Defendant maintains the consideration given is that the 2003 License Agreement was unenforceable yet plaintiffs were given the rights to cycles four and five. The court has already found that the defendant's assertion that it viewed the 2003 License Agreement unenforceable is not credible.

Defendants argue that plaintiffs position is irrational in light of the fact that 2003 License

Agreement contains a provision that requires all amendments to be in a writing signed by both parties. However while these clauses are generally enforceable, the oral or unsigned modification will still be enforceable if the party seeking the enforcement can demonstrate partial performance of the modification so long as the performance clearly refers to the modification (*Fairchild Warehouse Associates v United Bank of Kuwait*, 285 AD2d 444 [2nd Dept 2001]). Here plaintiffs have demonstrated partial performance in that they have sped up the production and airing of cycles four and five of Project Runway in reliance on the modification.

TWC also makes much of the fact that there is no right of first refusal mentioned in the later July 13, 2007 letter agreement. TWC argues that it is this letter agreement which constitutes the entire agreement of the parties and the only valid modification to the 2003 License Agreement. However, the letter agreement was an amendment to the "2003 license agreement (as amended)" (Graboff Aff Ex E). After the January 15, 2007 meeting and after the Graboff email was sent and an acceptance was made through Itkin, the parties continued to negotiate with respect to scheduling issues which led to another amendment on July 13, 2007.[12]

Weinstein testified that he'd "rather cut off [his] arm that give [Zucker] a right of first refusal"(Tr. 7/17/08 234:16-17) and that he "certainly was not going to stay at Bravo, there was no way [he] was going to do that"(Tr. 7/17/08 234:21-22). There is no dispute among the parties that Weinstein had a fractious relationship with Bravo and its head, Zalaznick, such that he did

[12] On March 28, 2007 a call between Zucker and Weinstein was held whereby they agreed that in exchange for TWC allowing Bravo its desired schedule, Bravo would reduce the holdback period from six months to one day. An email from Roth to Weinstein confirms this arrangement. (See Arato Aff Ex G).

not want to continue producing Project Runway for the network (Tr 7/17/08 28:3-6; 245:13-18). Specifically, Weinstein testified he was frustrated with Bravo's failure to compensate TWC for the success of Project Runway or to share in its production costs.(Tr. 7/17/03 229:22-25). He also resented Bravo's alleged theft of and carbon copying of Weinstein's original concept for Project Runway through production of different shows with the same format, but the difference being the skills utilized by the contestants (Tr. 7/17/08 245:16-18).[13]

The terms of the right of first refusal did not compel TWC to continue producing for Bravo if the right was exercised by NBCU for Project Runway only. Rather, if NBCU acquired the series pursuant to the first refusal right, it would do so only to have the show produced for either the NBC, USA or any other "*non- Bravo* platform" (Graboff Aff Ex I). This is consistent in that Weinstein did not have a dislike for Zucker and NBC and indeed he testified that he considered Zucker a friend for whom he has tremendous respect (Tr. 7/17/08 235:7-10). Therefore, the terms provided that Weinstein could continue his relationship with Zucker and NBCU. The parties bargained, however, that Weinstein would only be compelled to return the show to Bravo if the right was exercised whereby NBCU agreed to a much more lucrative multi-year, multi-picture output deal in which NBCU acquired television rights to TWC films. Therefore, the written agreements evidence a deal that "Harvey [Weinstein] intend[ed] to live [with]."(Graboff Aff. Ex J).

Lastly, the defendants argue that Section 204(a) of the Copyright Act requires that the

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[13] Weinstein testified about Bravo's production of shows called "Top Chef" about cooking and "Shear Genius" about twelve hair cutters who live in a house and compete cutting hair, all of which follow the identical formula of Project Runway whereby various individuals selected for their proficiency in a particular field live in a home and compete against one another by performing various assigned tasks (Tr. 7/17/08 232:4-7; 17-21).

January Amendment be in writing. It states:

> A transfer of copyright ownership, other than by operation of law, is not valid unless an instrument of conveyance, or a note or memorandum of the transfer, is in writing and signed by the owner of the rights conveyed or such owner's duly authorized agent.

(17 U.S.C.A. § 204(a)).

The plaintiffs argue that this statute applies only to the transfer of copyrighted ownership and not to a contractual right of first refusal. Courts have held that the grant of a right of first refusal does not implicate the Copyright Act or its signed writing requirement. In *Cavallo, Ruffalo & Fargnoli v Torres*, the court held if a right of first refusal was not a contractual right separate from the Copyright Act, would be to grant rights and remedies to holders of unexercised rights and to any person with a right, "no matter how remote," to potentially obtain a copyright in the future (1988 WL 161313). Because one holds a right of first refusal, "does not mean [they] acquired any copyrights or other rights in any designs . . ."(*Spectrum Creations, LP v Carolyn Kinder Int'l, LLC*, 2007 WL 1217917, at *11 [W.D. Tex. April 17, 2007]).

The defendants also cite to *A.Brod, Inc. v SK* 7 I Co., LLC, 998 FSupp 314 [SDNY 1998] for the proposition that this statute applies to rights of first refusal. However, that case holds only that "Section 204 applies not only to purported oral transfers of copyright ownership, but also to oral agreements to (re)transfer copyright ownership in the future" (998 FSupp at 323-324). The matter at bar applies to rights to transfer copyright ownership, not to contractual rights of first refusal. It is clear that "a contractual right of first refusal is . . . a right granted under a contract; it is not a right granted under the Copyright Act" (William E. Patry, 5 Patry on Copyrights § 21.18 (2008). Therefore, plaintiffs have established a likelihood of success on the merits whereby TWC breached the right of first refusal given to the plaintiffs when it signed the