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

VIJAY SINGH,	:	Index No.: 651659/2013
Plaintiff,	:	Hon. Eileen Bransten, Justice.
v.	:	
	:	**NOTICE OF APPEAL**
PGA TOUR, INC.,	:	
Defendant.	:	

PLEASE TAKE NOTICE that Defendant PGA TOUR, Inc. (the "TOUR") hereby appeals to the Appellate Division of the Supreme Court of the State of New York, in and for the First Judicial Department, from those parts of the Decision and Order of the Supreme Court of the State of New York, County of New York, denying the TOUR's Motion for Summary Judgment (Motion Sequence Number 010), which was signed by the Honorable Justice Eileen Bransten on May 12, 2017 and entered in the Office of the New York County Clerk on May 15, 2017.

Dated: May 26, 2017
New York, New York

Respectfully submitted,

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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

VIJAY SINGH,	:	Index No.: 651659/2013
Plaintiff-Respondent.	:	Supreme Court, New York County
v.	:	
	:	**PRE-ARGUMENT STATEMENT**
PGA TOUR, INC.,	:	
Defendant-Appellant.	:	

Defendant-Appellant PGA TOUR, Inc. (the "TOUR"), by its undersigned attorneys, respectfully submits the following Pre-Argument Statement pursuant to Section 600.17 of the Rules of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department.

1. Title of Action: The title of the proceeding is set forth in the caption above.

2. Full Names of Original Parties and Any Change in the Parties: The full names of the original parties are those identified in the caption above. There has been no change in the parties during the pendency of this action.

3. Name, Address and Telephone Number of Counsel for Defendant-Appellant:

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5. Court and County from which the Appeal is Taken: This appeal is taken from the Decision and Order, dated May 12, 2017, of the Supreme Court of the State of New York, New York County (Honorable Eileen Bransten), which was filed with the Office of the Clerk of the County of New York on May 15, 2017. A copy of the Decision and Order is attached hereto as Exhibit A.

6. Nature and Object of the Cause of Action: The TOUR administers an Anti-Doping Program (the "TOUR Program") applicable to members of, and players competing on, certain golf tours it operates, including the PGA TOUR. In a January 29, 2013 Sports Illustrated article, Plaintiff Vijay Singh ("Singh"), a long-standing PGA TOUR member subject to the TOUR Program, admitted to using a deer antler spray product known as the "Ultimate Spray," which was advertised as containing IGF-1—a growth hormone that is a prohibited substance under the TOUR Program. The TOUR spoke with Singh, who confirmed his use of the Ultimate Spray and agreed to provide the TOUR with a bottle of the product. The TOUR sent that bottle for analysis to the UCLA Olympic Analytical Laboratory, which reported that the bottle contained IGF-1. Based on Singh's admitted use of a product found to contain a prohibited substance under the TOUR Program, the TOUR notified Singh that he had committed an anti-doping violation. Although the TOUR Program authorized the TOUR to suspend Singh for up to one year and fine him up to $500,000 for the violation, the TOUR only sought to impose a suspension of three months and no fine. The TOUR did not publicly announce the sanction while Singh exercised his right under the TOUR Program to appeal to an arbitration panel.

Singh was permitted to continue playing in TOUR events during the pendency of his appeal.

While Singh's appeal was pending, the TOUR was informed that the World Anti-Doping Agency ("WADA") would not consider the use of deer antler spray containing IGF-1 to violate the WADA Code, unless it resulted in a positive drug test. WADA's Code and the TOUR Program are similar but separate and distinct anti-doping programs. Therefore, WADA's interpretation of the WADA Code is not binding on the TOUR's administration of the TOUR Program. However, the TOUR decided to accept WADA's view in this instance and, as a result, rescinded its sanction of Singh. Accordingly, Singh did not serve a single day of his suspension.

After his suspension was withdrawn, Singh sued the TOUR, asserting seven causes of action, including three counts of negligence, breach of the implied covenant of good faith and fair dealing, breach of fiduciary duty, intentional infliction of emotional distress and conversion.

7. Result Reached in the Court Below: On February 13, 2014, the court dismissed five of the seven claims in Singh's complaint. On June 2, 2016, the TOUR moved for summary judgment on the two remaining claims for (1) breach of the implied covenant of good faith and fair dealing and (2) conversion. Singh cross-moved for partial summary judgment on the liability portion of his implied covenant claim.

On May 12, 2017, the court granted in part the TOUR's motion for summary judgment, dismissing Singh's conversion claim and two of Singh's implied covenant theories. Specifically, the court dismissed the portions of Singh's implied covenant claim based on allegations that the TOUR (1) treated Singh differently than other golfers who had used deer antler spray and (2) failed "to test a bottle [of deer antler spray] used by Plaintiff" or failed "to further test the compound IGF-1 to determine whether it was 'active.'" (Ex. A, Decision and Order at 20.) The court denied the TOUR's summary judgment motion with regard to Singh's two remaining

implied covenant theories, which claim that the TOUR breached implied obligations by (1) "failing to consult WADA and/or appreciate the information advanced by WADA concerning deer antler spray prior to issuing its suspension of Plaintiff" and (2) allegedly making improper public statements concerning Singh's use of deer antler spray. (Id. at 16-18, 20.) The court denied Singh's motion for partial summary judgment in its entirety.

8. Grounds for Seeking Reversal: For the reasons stated below, the TOUR seeks reversal of those portions of the Decision and Order denying the TOUR's motion for summary judgment on Singh's claim alleging that the TOUR breached the implied covenant of good faith and fair dealing:

(a) The court erroneously held that there is a material fact dispute as to whether the TOUR breached the implied covenant of good faith and fair dealing by failing to conduct an "appropriate investigation" as that term is used in the TOUR Program when it did not "consult WADA and/or appreciate the information advanced by WADA concerning deer antler spray prior to issuing its suspension of Plaintiff." (Id. at 12, 20.) No such implied obligation can exist as a matter of law and, in any event, Singh cannot establish that the TOUR acted arbitrarily, irrationally or in bad faith.

(b) The court erroneously held that there is a material fact dispute as to whether the TOUR breached the implied covenant of good faith and fair dealing by "improperly" making public statements regarding Singh's use of deer antler spray (id. at 16-18) because the TOUR's statements do not implicate any implied obligation arising from the parties' contractual relationship and, in any event, Singh cannot establish that the TOUR's statements were made arbitrarily, irrationally or in bad faith.

(c) Singh has no admissible evidence regarding an essential element of his claim: that the TOUR's alleged breach of an implied obligation caused him cognizable damage. This deficiency alone requires dismissal of Singh's implied covenant claim.

9. Related Actions or Proceedings Now Pending in Any Court and Additional Appeals: None.

Dated: May 26, 2017
New York, New York

Respectfully submitted,

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EXHIBIT A

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

PRESENT: BRANSTEN, EILEEN **PART** 3

Justice

SINGH, VIJAY

INDEX NO. 651659/2013

MOTION DATE 10/6/2016

- V -

PGA TOUR, INC.

MOTION SEQ. NO. 010

The following papers, numbered 1 to 3, were read on this application to/for Summary Judgment

Notice of Motion/ Petition/ OSC - Affidavits - Exhibits	No(s)	1
Answering Affidavits - Exhibits	No(s)	2
Replying	No(s)	3

Upon the foregoing papers, it is

is decided in accordance with the Decision and Order signed under motion sequence number 010;

DATE : 5/ 12 /2017

BRANSTEN, EILEEN , JSC

1. CHECK ONE	:	☐ CASE DISPOSED		☒ NON-FINAL DISPOSITION			
2. APPLICATION	:	☐ GRANTED	☐ DENIED	☒ GRANTED IN PART		☐ OTHER	
3. CHECK IF APPROPRIATE	:	☐ SETTLE ORDER		☐ SUBMIT ORDER			
		☐ DO NOT POST		☐ FIDUCIARY APPOINTMENT		☐ REFERENCE	

651659/2013 SINGH, VIJAY VS. PGA TOUR, INC.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART THREE

----------X

VIJAY SINGH,

Index No.: 651659/2013
Motion Date: 10/6/2016
Motion Sequence No.: 009, 010

Plaintiff,

-against-

PGA TOUR, INC.,

Defendant,

----------X

BRANSTEN, J.

This matter comes before the Court on Plaintiff Vijay Singh and Defendant PGA Tour, Inc.'s respective motions for partial summary judgment pursuant to Section 3212 of the New York Civil Practice Law and Rules ("CPLR"). Plaintiff seeks an award of Summary Judgment on liability for its Third Cause of Action and Defendant seeks an award of Summary Judgment dismissing Plaintiff's Third and Seventh Causes of Action. Both motions are respectively opposed. (Motion Sequences 009 and 010). For the following reasons Plaintiff's Motion for Summary Judgment is Denied and Defendant's Motion for Summary Judgment is Granted in Part and Denied in Part.

BACKGROUND[1]

Plaintiff, Vijay Singh, is a professional golfer and a lifetime member of the PGA Tour. (Plaintiff's 19-a Statement ("Pl 19-a." ¶1). Defendant, PGA Tour ("The Tour") is

[1] Except where otherwise indicated, all facts detailed in this section are drawn from the Plaintiff's 19-a Statement of Material Facts.

the organizer of the main men's professional golf tours and events in North America. (Id. ¶5). In 2008, Defendant enacted an anti-doping program (the "Program"), which prohibits the use of certain substances by Defendant's members. (Id. ¶6). The terms of the Program are set forth in the Anti-Doping Program Manual (the "Manual"). (Ex "P" to Def. Aff. in Support). The list of prohibited substances contained in the manual is adopted from a list of prohibited substances maintained by the World Anti-Doping Agency ("WADA"). (Pl. 19-a, ¶11). As a condition of membership in Defendant's organization, golfers, including Plaintiff, consent to be bound by the terms of the Program, as set forth in the Manual. (Id. ¶19).

In 2012, on the advice of his caddie, Plaintiff began using a product called "deer antler spray" to address Plaintiff's knee and back problems. (Id. ¶21). Plaintiff used the spray during his off-season, over a period of approximately one month. (Id. ¶30). Plaintiff ingested the spray orally by spraying it into his mouth. (Id).

On January 29, 2013, an article was posted on Sports Illustrated's website, www.SI.com, http://www.SI.com, discussing an athletic supplement company that made the deer antler spray used by Plaintiff. (Id. ¶33). The article referenced Plaintiff's use of the deer antler spray, suggesting that by using the spray, Plaintiff had, in fact, used a banned substance. (Id).

Immediately after the article's release, Plaintiff contacted Defendant to address the allegation that Plaintiff had used a banned substance. (Id. ¶38). A bottle of the deer antler spray was provided to Defendant by a representative of Plaintiff for testing. (Id). Also, in the prior week, Plaintiff submitted a urine sample which tested negative for any banned substance.

Defendant sent the bottle of spray to the UCLA Olympic Analytical Laboratory for testing. In a report dated February 14, 2013, that laboratory determined the contents of the bottle tested "negative for anabolic androgenic steroids." (Id. ¶ 50). However, the report identified "IGF-1", or Insulin-like Growth Factor-1, as one of the substances contained in the bottle's contents. Id. IGF-1 is also listed as a prohibited substance in the Manual. (Pl.'s Ex. P at 20).

Following the issuance of the laboratory's report, Defendant determined that Plaintiff had a committed an anti-doping violation by using the spray. Subsequent to Plaintiff's submission of a written explanation, Defendant informed Plaintiff he had committed an anti-doping violation, and, as a result, Plaintiff would be suspended from activities related to Defendant's organization for a period of 90 days. (Pl 19-a, ¶¶51-53). In addition, Plaintiff's earnings from competition in Defendant's tournaments would be held in escrow. (Id. ¶5).

On February 25, 2013, pursuant to the procedure set forth in the Manual, Plaintiff timely appealed Defendant's determination that Plaintiff had committed an anti-doping violation, and commenced an arbitration proceeding before the American Arbitration Association. (Id. ¶61). Defendant informed Plaintiff that he would be allowed to play in Defendant's tournaments during the pendency of his appeal, but that any prize money would continue to be held in escrow and that Plaintiff risked forfeiture of those winnings if he did not prevail on his appeal.

On April 30, 2013, approximately one week before the first scheduled arbitration hearing, Defendant ceased its disciplinary action against Plaintiff, and the arbitration was discontinued. (Id. ¶135). Several days earlier, WADA issued a letter announcing deer antler spray is not considered prohibited. (Id. ¶¶129-134).

On May 8, 2013, Plaintiff commenced this action against Defendant, alleging, among other things, that Defendant recklessly administered its anti-doping program, exposing Plaintiff to ridicule and humiliation; that Defendant placed Plaintiff's prize money in escrow without legal authority; and that Defendant inconsistently disciplined golfers who had admitted using deer antler spray, and in some cases, imposed no discipline at all. Plaintiff asserted causes of action for negligence, breach of the implied covenant of good faith and fair dealing, breach of fiduciary duty, intentional infliction of emotional distress, and conversion. (Pl's Ex. "A")

Plaintiff's Motion for Partial Summary Judgment

Plaintiff moves for partial summary judgment on his claim for Defendant's Breach of Good Faith and Fair Dealing (Motion Sequence 009). Arguing three main points, Plaintiff seeks summary judgment because, he alleges: 1) Defendant failed to adequately investigate the allegations against him and arrived at a conclusion in an arbitrary fashion; 2) failed to test the actual bottles he used in reaching such a conclusion; and 3) treated and punished him differently from his colleagues who allegedly also used and endorsed the same deer antler spray product.

Defendant's Motion for Partial Summary Judgement

Defendant, in turn, moves for partial summary judgement over two of plaintiff's claims: 1) Breach of Implied Covenant of Good Faith and Fair Dealing and 2) Conversion (Motion Sequence 010). Defendant argues it acted reasonably in its actions in suspending Plaintiff from the PGA Tour ("the Tour") and did not treat him differently than other golfers similarly situated. Defendant further argues the theory of "implied covenant" is precluded insomuch as Defendant's challenged conduct is expressly covered in a contract and Plaintiff cannot demonstrate any cognizable damages sufficient to maintain these claims. Finally, Defendant argues Plaintiff's claim for Conversion cannot be maintained as he never had a possessory interest in his earnings and Defendant complied with the terms of the Program.

At this juncture the issue before the Court, as it pertains to summary judgment, is **not** whether Plaintiff violated the Anti-Doping Program, as the WADA has unequivocally declared use of the spray is not a violation (absent a positive drug test); but rather, was Defendant acting in bad faith, arbitrarily and unreasonably when it declared Plaintiff had violated the Program.

ANALYSIS

I. Summary Judgment Standard

It is well-understood that summary judgment is a drastic remedy and should only be granted if the moving party has sufficiently established the absence of any material issues of fact, requiring judgment as a matter of law. *Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499, 503 (2012) (citing *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986)). Once this showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980).

When deciding a motion for summary judgment, the Court must view the evidence in the light most favorable to the non-movant. *Branham v. Loews Orpheum Cinemas, Inc.*, 8 N.Y.3d 931, 932 (2007). However, mere conclusions, unsubstantiated allegations or expressions of hope are insufficient to defeat a summary judgment motion.

Zuckerman, 49 N.Y.2d at 562; *see also Ellen v. Lauer*, 210 A.D.2d 87, 90 (1st Dep't 1994) ("[it] is not enough that the party opposing summary judgment insinuate that there might be some question with respect to a material fact in the case. Rather, it is imperative that the party demonstrate, by evidence in admissible form, that an issue of fact exists ...") (citations omitted).

II. The Third Cause of Action — Breach of Implied Covenant of Good Faith and Fair Dealing

According to the Court of Appeals, "implicit in all contracts is a covenant of good faith and fair dealing in the course of contract performance." *Dalton v Educ. Testing Serv.*, 87 N.Y.2d 384, 389 (1995); S*ee, Van Valkenburgh, Nooger & Neville v. Hayden Publ. Co.,* 30 N.Y.2d 34, 45, *cert denied* 409 U.S. 875, 93 S.Ct. 125).

"Under New York law, the elements of a claim for breach of the duty of good faith and fair dealing are: (1) defendant must owe plaintiff a duty to act in good faith and conduct fair dealing; (2) defendant must breach that duty ...; and (3) the breach of duty must proximately cause plaintiff's damages." *In re Tremont Sec. Law, State Law, & Ins. Litig.*, 2013 WL 5393885, at *8 (S.D.N.Y. Sept. 26, 2013).

The Court of Appeals has found encompassed within the implied obligation of each promisor to exercise good faith are "any promises which a reasonable person in the position of the promisee would be justified in understanding were included." *Dalton*, 87

NY2d at 389; *Rowe v. Great Atl. & Pac. Tea Co.,* 46 N.Y.2d 62, 69 (1978). This embraces a pledge that "neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." *Dalton*, 87 N.Y.2d at 389; *Kirke La Shelle Co. v. Armstrong Co.,* 263 N.Y. 79, 87 (1933). Where the contract contemplates the exercise of discretion, this pledge includes a promise not to act arbitrarily or irrationally in exercising that discretion. *Dalton*, 87 N.Y.2d at 389; S*ee, Tedeschi v. Wagner Coll.,* 49 N.Y.2d 652, 659 (1980). The duty of good faith and fair dealing, however, is not without limits, and no obligation can be implied that "would be inconsistent with other terms of the contractual relationship." *Dalton*, 87 N.Y.2d at 389; *Murphy v. American Home Prods. Corp.,* 58 N.Y.2d 293, 304 (1983).

Section 2H(5) of the Players Manual ("Manual") provides that following the determination that a player may have committed an anti-doping rule violation, "[t]he Commissioner, in consultation with the Program Administrator, shall consider any information submitted by the player and shall then decide whether to go forward with an anti-doping rule violation against the player." (Pl. Ex. P at 12.) In addition, Section 2K of the Manual provides a list of possible sanctions, and also provides that "the Commissioner may depart from the sanction guidance in the International Anti-Doping Standards as he deems appropriate in a particular case." (Pl. Ex. P at 14.)

Plaintiff argues Defendant owed him an implied duty of good faith and fair dealing and, from January 2013 to April 2013, breached this duty. Specifically, Plaintiff alleges Defendant failed to properly investigate whether Plaintiff, in fact, violated the Program prior to publicly suspending him thereby causing damage to Plaintiff's reputation and reportedly causing him to lose out on various sponsorships. (Pl Memo in Supp., p. 20, 25-30).

Failure to Consult with WADA

Plaintiff alleges Defendant, following Plaintiff's admission to Sports Illustrated concerning his use of deer antler spray, acted in an arbitrary, unfair and unreasonable manner in summarily sanctioning him. Plaintiff argues Defendant was aware, or should have been aware, that the WADA (the agency which has the "lead role in interpreting the prohibited (substance) list" and who Defendant defers to for interpretations of the Prohibited List) did not consider use of deer antler spray to be in violation of the Program **absent** a positive drug test before issuing its suspension. (Pl's Memo in Supp. at 2, 7). Plaintiff's assert the WADA has been unchanged on its position concerning deer antler spray since 2007 or 2008. (Id. at 7). Plaintiff takes issue that, despite the fact that the WADA is considered the "authority" on banned substances, Defendant disregarded its opinion and relied solely on allegedly incomplete laboratory results provided by UCLA.

To the contrary, Defendant is of the position it was not obligated to consult with WADA before determining the spray was banned and issuing its decision to suspend Plaintiff. (Def. Memo in Opp. at 14-15). Defendant relies on the agreement entered into between the two parties insomuch as the agreement assigns Defendant a duty, albeit discretionary, to conduct an "appropriate investigation" into the potential Program violation. (Pl's Ex. P). It does concern this Court that the word "appropriate" is not otherwise defined in the Agreement. Therefore, it is left to the interpretation of a "reasonable person".

As held in *Dalton*, where a contract contemplates the exercise of discretion, this pledge includes a promise not to act arbitrarily or irrationally in exercising that discretion. *Dalton*, 87 NY2d at 389. It does not stretch reasonableness or rationality that a major sports agency, such as Defendant, would seek counsel of the agency whom it otherwise relies heavily on concerning anti-doping violations and prohibited substances, prior to publically punishing a player, such as Plaintiff. This is true, particularly in light of Defendant's ultimate express consultation and reliance on WADA's opinion concerning the use of deer antler spray prior to attending the arbitration in this matter. Defendant ultimately relied on the WADA's opinion in arriving at its decision to revoke the suspension previously issued to Plaintiff. (Pl. Memo in Supp. at 19-20).

To that end, it does not stretch reasonableness for Defendant to have reviewed *pre-existing* material on this subject to determine whether WADA had already decided this issue before issuing the suspension, as opposed to affirmatively presenting it to them for consideration only months after rendering its decision. It is undisputed Defendant did not consult with WADA prior to suspending Plaintiff.

Defendant argues the complained of behavior, the subject investigation, is covered by contract and therefore Plaintiff's claim for breach of implied covenant must fail. (Def. Memo. in Opp. at 15-16). This Court disagrees. Defendant is still, nevertheless, tasked with ensuring its investigation is not carried out in an arbitrary manner. Such an analysis must first be conducted before the claim can be completely foreclosed.

Defendant also argues a determination that it should have consulted with WADA would be unfairly imposing an obligation on it which was not contemplated or included in the governing agreement. (Def. Memo in Supp. at 18). This Court again disagrees. While it is not proper to impose obligations which would be *inconsistent* with those contractual obligations already entered into between the parties, indicating it may be reasonable for Defendant to consult the agency which it proclaims to be the "experts" in this field merely suggests one way the investigation could have been "appropriately" performed and is not "inconsistent" with the obligations imposed on Defendant. Particularly since Defendant ultimately did consult and base its revocation solely on

WADA's position. As it stands now, there are no requirements the Defendant agency must comply with in order to deem the investigation performed to be "appropriate". Therefore, the Court finds it is up to a jury to determine whether Defendant's decision to not consult the WADA and/or ignore WADA studies and findings issued prior to Plaintiff's suspension concerning deer antler spray constitute an "appropriate" investigation.

UCLA Laboratory Results/Testing of Sample Bottle

Following the Sports Illustrated publication, Defendant requested Plaintiff provide a bottle of the deer antler spray for the purposes of investigation. (Def. 19-a Stmt., ¶53). Plaintiff provided a sample bottle which was sent to the UCLA laboratory for testing on January 31, 2013. (Id. ¶56). The resulting report stated "the material in the bottle is negative for anabolic androgenic steroids. The material in the bottle contains IGF-1". (Exhibit "Y" to Pl. Aff. in Support). Plaintiff takes issue with Defendant's decision not to request UCLA further test whether the detected IGF-1 rose to the level of being "functional or biologically active". (Pl. Memo in Supp., p. 8). Further, Plaintiff contends the substance found was **not** the "IGF-1" banned by the Program but, rather, was a substance with a different structure which did not and could not have had any anabolic effect on the human body. (Id at 9). Both Plaintiff and Defendant's experts agree the substance identified by UCLA as "IGF-1" did not have the same three-dimensional

chemical structure as IGF-1 and, without that structure, could not have presented a potential to enhance performance. (Id at 9). Plaintiff argues in order to comply with its "good faith obligation", Defendant should have delved further into UCLA's findings and sought a determination as to whether the substance it identified as IGF-1 was active or functional, integrated, whole, or the same structure as the banned substance. (Id at 16).

In opposition, and in support of its own motion for partial summary judgment, Defendant argues it was incumbent upon it to "appropriately investigate" whether Plaintiff violated the Program. (Def. Memo in Sup. at 11-12). From Defendant's perspective, Plaintiff admitted to using a product which is advertised to contain the banned substance IGF-1. (Def's 19-a Stmt., ¶¶39-45, 54-55). A bottle, selected on behalf of Plaintiff, was provided to Defendant for testing. The bottle was tested by UCLA and was found to have IGF-1. (Id at ¶¶53, 56-59). Based on these facts, Defendant argues it had ample good faith reason to suspend Plaintiff and to proceed as though he violated the Program. (Def. Memo in Sup. at 14). Defendant argues, what Plaintiff proposes Defendant *should have* done, that is, have UCLA retest the substance and/or product, would impose obligations that are not contained within the express terms of the parties' contractual agreement. (Def. Memo in Opp. p. 17).

In the same vein, Defendant argues it was not its obligation, implied or otherwise, to affirmatively establish that Plaintiff's use of the spray "could have had a performance-

enhancing effect". (Def. Memo in Opp., p. 19). The Program states "the success or failure of the use of a Prohibited Substance … is not relevant. It is sufficient that the Prohibited Substance…was Used or Attempted to be Used for an anti-doping rule violation to be committed". (Def. 19-a Stmt., ¶19). Accordingly, Defendant argues, Plaintiff seeks to impose a duty on Defendant which would nullify other express terms of a contract.

The Court agrees with Defendant in this regard. That is, the agreement lays out specific terms by which it can determine a violation to have occurred. Defendant is required to show the product used by Plaintiff contained IGF-1. The agreement does not require Defendant to obtain a breakdown of the composite of the substance (IGF-1) as contained in the product (although, perhaps it should to be effective) before it determines a violation has occurred. Reliance on UCLA's advisement that banned substance IGF-1 was present in the product does not exhibit irrationality or bad faith on the part of Defendant. The Court finds that requiring Defendant to analyze the composite make-up of the IGF-1 found in the product would impose an inconsistent obligation on Defendant than is contemplated within the agreement. That is, the agreement and Program prohibits players from using products with IGF-1 without regard to its "composite make up" or "active" nature, or lack thereof. As stated in the agreement, the success or failure of the

use of a *Prohibited Substance* has no bearing on the decision to find a player in violation of the Program. (Def. Memo in Sup. at 16).

The task Plaintiff is charging Defendant with is inconsistent with this provision insomuch as the agreement does not take into consideration the "effectiveness" of the Prohibited Substance but rather its mere presence. Requiring Defendant to test the chemical make-up of the Prohibited Substance before issuing its decision would be overstepping the limits imposed on the covenant of good faith and fair dealing. As such, this Court forecloses the argument that Defendant breached the implied covenant of good faith and fair dealing by not requesting UCLA further test the chemical composite of IGF-1 to determine whether it was active.

Finally, Plaintiff's argument as it pertains to Defendant's testing of a bottle that Plaintiff, in fact, did not use but rather tested sample bottles is not persuasive to this Court. Plaintiff was asked for a bottle with the purpose of testing its ingredients and the choice was made to provide Defendant with bottles not used by Plaintiff. That was Plaintiff and/or his agent's decision and Defendant cannot be faulted for that. While, to Plaintiff's point, it may be true each bottle has the capacity to yield different testing results, it is noteworthy that when Plaintiff's own counsel sent four additional bottles of the spray to two different laboratories, they each reported finding IGF-1. (Def's 19-a Stmt., ¶104-108; Def. Memo in Opp., p. 15). The Court does not find Defendant

breached any duties of good faith and fair dealing by testing the very bottle provided on Plaintiff's behalf to it for the purpose of testing. This argument, too, is foreclosed.

Defendant's Public Discussion of Plaintiff's Alleged Violation

Next, Plaintiff argues Defendant breached the implied covenant of good faith by improperly speaking out about Plaintiff at press conferences. Plaintiff contends Defendant's then Executive Vice President – Ty Votaw, in response to an interview question posed shortly after the Sports Illustrated article ran, answered "Yes", to the question "Is this deer antler spray on the (Tour's) list of banned substances?" (Pl. Memo in Supp., at 5). In explaining his response at a deposition, Mr. Votaw claimed he answered "yes" because he understood the deer antler spray advertised that it contained IGF-1, which is on the Tour's Prohibited List. (Def.'s 19-a Resp. ¶37). The Court questions whether this response given to the reporter was made in good faith insomuch as, while Mr. Votaw ultimately couched his "yes" answer during his subsequent deposition, Plaintiff correctly contends the damage had already been done. A plain reading of the question and answer as asked and given on January 30, 2013 between the reporter and Mr. Votaw leaves a question of fact as to whether Mr. Votaw arbitrarily advised that deer spray was on the Prohibited List. Products are not on the list, rather substances are. Nevertheless, the same qualification provided by Mr. Votaw during his later deposition was not provided to the reporter. It also bears mentioning a review of the

deer antler spray label provided to this Court does **not** indicate it has IGF-1 as contented by Mr. Votaw. (See, Pl. Ex. "S").

Another statement made by Defendant and called into question by Plaintiff is that he was spared by change in position by the WADA. (Pl. Memo in Sup. at 25). Plaintiff highlights this as a problem because, as he argues, the WADA's position on deer antler spray did not change in 2013 insomuch as deer antler spray was never listed as a prohibited substance or product. (Id). Plaintiff adduced evidence that supports this argument. Memos and statements were issued by the WADA leading up to Plaintiff's suspension confirming its position that deer antler spray was not on its Prohibited List. If Defendant, nevertheless, arbitrarily and unreasonably revoked Plaintiff's suspension due to a non-existent change, which was also publicly announced, it is possible a jury may find this statement was not made in good faith and did, in fact, have the effect of destroying or injuring Plaintiff's rights to receive the fruits of the contract. *Dalton*, 87 N.Y.2d at 389; *Kirke La Shelle Co. v. Armstrong Co.*, 263 N.Y. 79, 87.

As for actual damages suffered as a result of this "public speaking", Plaintiff contends "approximately 7,000 articles were written labeling Singh a cheater", all of which served to diminish and destroy Plaintiff's reputation. (Pl. Memo in Sup. at 26). Defendant argues several articles were published prior to Defendant's issuance of any public statements indicating Plaintiff used a spray that was banned, which led to

headlines "Vijay Singh cheated". (Def. Memo in Opp. at 28). Defendant argues if plaintiff's reputation was tarnished through the use of deer spray it was through his own admission of its use and not by way of any statements made by Defendant.

Plaintiff has offered affidavits and statements from various professionals in the financial and golfing arenas, including the former CEO of a golfing company who previously sponsored Plaintiff, who claim Plaintiff lost out on sponsorship opportunities as a result of Defendant's stance on Plaintiff's ability to use deer antler spray. In light of the presented contradictory evidence, the extent of damages, if any, should be assessed and decided at trial and not summarily dismissed. Also the issue of whether Defendant breached the implied covenant of good faith and fair dealing by publicly speaking through Mr. Vatow remains viable.

Treatment of Other Golfers

Plaintiff's final argument is he was treated differently than other PGA golfers who used deer antler spray. Plaintiff alleges there were several other players who used the spray with Defendant's knowledge and were not penalized. Defendant argues these players were members of the Champions Tour (for golfers age 50 or over) when they admitted to using deer antler spray. (Def Memo in Opp. at 23). Defendant claims its long standing position is that it does not impose the Program rules on Champions Tour players except when they are playing PGA Tour events. (Id at 23). Plaintiff contends several of

the golfers were members of both Tours, the PGA and the Champions, and played in PGA tour events while using the spray and without penalty. (Pl. Memo in Opp. at 15). It seems clear there is no requirement for the Champions Tour to abide by the Program when they are not playing PGA Tour events. The question before the Court, however, is are there examples of Champion Tour golfers who used the spray while playing PGA Tour events and did not suffer any penalty. The testimony of the three golfers who plaintiff alleges used deer antler spray while playing on the PGA tour all denied this at their depositions. While they concede they did use deer antler spray, even in the same years they played in the PGA tour events, they did not use deer antler spray *while* they were playing in a PGA Tour event – which is a significant point. (Pl. 19-a Stmt. ¶162, 165-169). Plaintiff does not offer any evidence that the referenced golfers used deer antler spray while playing in a PGA tournament.

Rather, Plaintiff argues Defendant should not permit those golfers on a different tour to use the spray without penalty. This argument, however, has been foreclosed by this Court's decision on Defendant's initial Motion to Dismiss. See, *Singh v. PGA*, 2014 N.Y. Slip Op. 50915 (U) * 5 (2014). This Court held an argument that the Program should be structured or administrated differently cannot support Plaintiff's claim. (Id). As such, the Court does not find there to be an issue of fact raised concerning Plaintiff's alleged mistreatment in comparison to Champion Tour players as there has been no

evidence presented those Champion Tour players used deer antler spray *while playing in PGA Tour events.*

In sum, this Court partially grants Defendant's motion for Summary Judgment on the Fourth Cause of Action, and denies Plaintiff's motion, insomuch as Plaintiff's theory of mistreatment of Plaintiff as it compares to other golfers; Defendant's alleged failure to test a bottle used by Plaintiff and Defendant's alleged failure to further test the compound IGF-1 to determine whether it was "active" are all dismissed as it pertains to Defendant's alleged breach of implied covenant of good faith. A question of fact does still remain, however, as to whether Defendant breached the implied covenant of good faith by failing to consult WADA and/or appreciate the information advanced by WADA concerning deer antler spray prior to issuing its suspension of Plaintiff. Also, an issue of fact left for trial is what, if any, damages did Plaintiff suffer as a result of Defendant's public discussion of the deer antler spray and its alleged prohibition and whether such discussion breached the implied covenant of good faith.

III. The Seventh Cause of Action — Conversion

Defendant also seeks dismissal of Plaintiff's Seventh Cause of action for Conversion. Under New York law, "[a] conversion occurs when a party, 'intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession.'" *Lynch v. City of New*

York, 108 A.D.3d 94, 101 (1st Dep't 2013) (quoting *Colavito v. New York Organ Donor Network, Inc.*, 8 N.Y.3d 43, 49-50 (2006)). "'Two key elements of conversion are (1) the plaintiff's possessory right or interest in the property and (2) the defendant's dominion over the property or interference with it, in derogation of plaintiff's rights.'" *Lynch*, 108 A.D.3d at 101 (quoting *Colavito*, 8 N.Y.3d at 49-50). Of particular relevance in this case, the First Department has held that "a plaintiff cannot maintain a conversion claim absent proof of a possessory interest" (or the right to possess the escrowed funds at issue). *McDougal v. Apple Bank for Sav.*, 200 A.D.2d 418, 419 (1st Dept 1994).

Plaintiff seeks damages "for the loss of use of the property taken, with interest," alleging that he had a possessory interest in the earnings that were held in escrow and that Defendant "took possession of [Plaintiff's] earnings and refused to release those funds to Plaintiff or interest on those funds." (Compl. ¶¶ 116-18.) Plaintiff also alleges that Defendant held the prize money in escrow "without authority or legal support." (Compl. ¶ 42.). This Court has already held that the Defendant was entitled to escrow prize money Plaintiff earned after February 14, 2013, the date Defendant gave Plaintiff notice of his potential anti-doping violation. *Singh v. PGA Tour, Inc.*, 43 Misc. 3d 1225 (A). As discussed at the oral argument of this motion on September 27, 2016, the parties do not dispute all prize money held in escrow was returned to Plaintiff following the cessation of the disciplinary action. (September 27, 2016 Transcript, 31: 23-32:5). As such, it

appears the amount currently at issue is limited to the interest that may have accrued on the prize money allegedly wrongly held in escrow. (Id). Therefore, the question now before this Court is whether Defendant improperly held Plaintiff's prize money in escrow prior to February 14, 2014, which totaled $15,184, as earned from the February 10, 2013 AT&T Pebble Beach National Pro-Am.

Defendant argues that it was legally authorized to place Plaintiff's prize money in escrow pursuant to Section 2L of the Manual. (Def.'s Mem. Opp. at 24-25). Section 2L provides that "[i]f a player is not Provisionally Suspended after Notice provided in section H(5) and the player chooses to continue participating in any tournaments pending the resolution of the case, then any prize money won by the player may be held in escrow pending the outcome of the case." (Id).

Section 2H(5) provides, among other things, that "[a]t such time as the Program Administrator determines that a player may have committed an anti-doping rule violation, the player shall be Notified of the potential violation. The player shall have seven (7) calendar days from such Notice to provide a written explanation, including any mitigating or extenuating circumstances." (Id. at 12).

Defendant argues Plaintiff must demonstrate he had a right to possess the money at issue and, in making that point, Defendant relies on section 2K(1) of the Program, which states sanctions for an anti-doping violation may include "Disqualification" of

"prize money from the date the anti-doping violation was found to occur forward". (Def Memo in Sup. at 26) (emphasis added). Defendant notified Plaintiff, by letter dated February 14, 2013, that Plaintiff had committed an anti-doping rule violation and that Plaintiff had seven days to submit a written explanation. (Def. 19-a Stmt., ¶69). Defendant identifies the February 14 letter as the Notice provided for by Section 2H(5) Def.'s Mem. in Sup. at 30; however, considered January 29, 2013 as the date the anti-doping rule violation occurred – the date which Plaintiff admitted use of the spray. (Def. 19-a Stmt., ¶91). The reference to the "date the anti-doping violation occurred" serves as ample basis for Defendant to *retroactively* apply its sanctions to prizes won prior to the date Notice was provided.

Additionally, the Court is not persuaded by Plaintiff's argument that "no anti-doping violation ever occurred". (Pl. Memo in Opp. at 24). That is directly contrary to what this Court previously held in ruling Defendant was permitted to escrow Plaintiff's earnings (after February 14, 2013) because the Program expressly allows Defendant to escrow a player's earnings after it determines "that a player **may have committed** an anti-doping rule violation'" and notices the player of "'**the potential violation**'". *Singh v. PGA Tour, Inc.* 42 Misc. 3d 1225(A) (emphasis added). It is clear Defendant declared Plaintiff **may have committed an anti-doping rule violation** and noticed him of same.

As such, the Court does not find the fact that Defendant ultimately decided Plaintiff did not violate the anti-doping rule to be persuasive to the issue at hand.

Therefore, Defendant has shown compliance with the Program and its entitlement to escrow all Plaintiff's funds from January 29, 2013 – the date of the potential violation – to either the end of Plaintiff's suspension or its revocation. Plaintiff is unable to show a possessory interest to the $15,184 and, therefore, Plaintiff's Seventh Cause of Action for Conversion is dismissed.

CONCLUSION

ACCORDINGLY, it is hereby

ORDERED, that Plaintiff's motion for Partial Summary Judgment is DENIED; and it is further

ORDERED, that Defendant PGA Tour, Inc.'s motion for Partial Summary Judgement is Granted in Part and Denied as part as stated herein.

This constitutes the decision and order of the Court.

Dated: New York, New York
May 12, 2017

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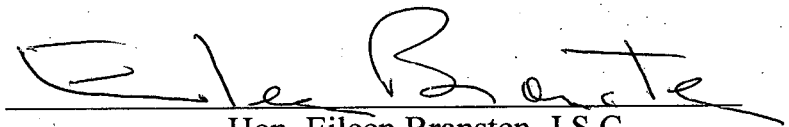

Hon. Eileen Bransten, J.S.C.

HON. EILEEN BRANSTEN
J.S.C.