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Clerk of the Superior Court

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By: Y. Terronez, Clerk

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN DIEGO

Hubert Hansen Intellectual Property Trust, <i>etc.</i> ,)	Case No. 2016-21046
<i>et al.</i> ,)	
)	
Plaintiffs,)	Department C-72
)	
vs.)	Tentative Decision Following Bench
)	Trial on Phase One
The Coca-Cola Company, <i>et al.</i> ,)	
)	Trial: Nov. 18-25, 2019
)	
Defendants.)	

1. Overview and Procedural Posture.

This is an action by the grandchildren of Hubert Hansen, who died in 1951. The plaintiffs are: The Hubert Hanson Intellectual Property Trust; and Jeanne Hansen, Timothy Hansen, and Maureen Hansen Todd (all in their roles as trustees). They seek a share of the profits from defendants' beverage sales using the "Hubert's" brand under the California Celebrities Rights

Act, Civil Code section 3344.1. The central focus of the dispute is reflected in Appendix A, at the end of this decision.

The complaint was filed June 22, 2016. ROA 1. The operative pleading is the second amended complaint ("SAC"). ROA 50. Defendants allowed their answers to the FAC (ROA 20, 27) to stand for the SAC.

The court incorporates its ruling from Friday, February 15, 2019 (ROA 401), for a more complete recitation of the procedural posture and history of the case. On that day, the court denied defendants' motion for summary judgment on the SAC.

The court found the case exceptional, and appointed a discovery referee whose work began in earnest in November, 2018. He was kept very busy, having issued numerous lengthy and careful reports/recommendations pursuant to Code of Civil Procedure section 643(c). The vast majority of the ROA entries between 137 and 851 are discovery related. Many monetary sanctions orders were requested, and an unusual number were made. On October 8, 2019, the court received the referee's resignation. The court regretted the resignation, and accepted it reluctantly. ROA 824. Discovery in this case was a charnel house, and this fact gives credence to the observation that (in a case with an explicit statutory fee-shifting provision) "[a]ll too often attorney fees become the tail that wags the dog in litigation." *Deane Gardenhome Assn. v. Denktas* (1993) 13 Cal.App.4th 1394, 1399. The lawyers in this case were so polarized they could not even agree on the simple joint statement of the case required by the Local Rules and the Advance Trial Review Order.

The parties answered ready at the TRC. ROA 846-848. Counsel estimated a 20 day jury trial.

Plaintiffs filed 18 motions *in limine* (MIL), and defendants filed 13. ROA 852-885. Many were supported by lengthy lodgments, including thick submissions under seal (as has been the norm in this case). Extensive opposition papers were also filed. ROA 886-921. The court reviewed the papers, and when the parties answered ready at the November 15 trial call, the court provided detailed tentative rulings. ROA 945.

Both sides included bifurcation requests within their MIL. The court granted plaintiffs', which gave rise to a phase one bench trial on count 2 of the SAC. That cause of action* seeks the court's declaration as to which of the parties' competing 2015 "Successor-in-Interest Registrations" under Civil Code section 3344.1 is valid. This question is, in turn, bound up in the question whether the 1989 Bankruptcy Court sale and the 1992 "Asset Purchase Agreement" (and a series of subsequent agreements) transferred Hubert Hansen's publicity rights to defendants (as they contend).

Both sides filed trial briefs. ROA 923-925. The court read those over the weekend between the trial call and the commencement of phase one of the trial.

Phase one began on November 18, 2019. The court heard lengthy arguments on the MIL, followed by opening statements. ROA 950. Evidence began on November 19. ROA 957. Ultimately, the court heard from more than 20 witnesses, and was exposed to dozens of exhibits. Phase one evidence concluded just before noon on November 25, and the parties proposed a briefing schedule culminating in the submission of simultaneous briefs on December 6. The

court gave specific and detailed guidance regarding the content of the briefs. ROA 968. The court took the phase one issues under submission upon receipt of those briefs. [Defendants' brief was not filed until 6:31 p.m. on December 6 (ROA 969). Plaintiffs' brief was filed at 5:48 p.m. (ROA 970), but did not come to hand until the morning of December 9.]

This is the court's tentative decision in accordance with CCP section 632 and CRC 3.1590. It will become the Statement of Decision (SOD) unless the steps required under CRC 3.1590(d) are taken by either side within the timeframe set forth therein. Should this occur, the court designates plaintiffs' counsel to prepare the proposed SOD, which must incorporate this tentative decision in *haec verba* and which must be supplied to the court in editable electronic format, scanned for viruses.

2. Applicable Standards.

A. Civil Code section 1635 provides that "[a]ll contracts, whether public or private, are to be interpreted by the same rules, except as otherwise provided by this Code." These rules provide that a "contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful." (Civ. Code, § 1636.) "When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible . . ." (Civ. Code, § 1639; see *id.*, § 1638 ["The language of a contract is to govern its interpretation, if the language is clear and explicit"].) Although "words of a contract are to be understood in their ordinary and popular sense," where specific words are "used by the parties in a technical sense," the "special meaning [that] is given to them by usage... must be followed." (Civ. Code, § 1644.) "If the terms of a promise are in any respect ambiguous or uncertain, it must be interpreted in the sense in which the promisor believed, at the time of making it, that the promisee understood it." (Civ. Code, § 1649.)

Language in a contract is ambiguous if it is reasonably susceptible to more than one interpretation. (*Brown v. Goldstein* (2019) 34 Cal.App.5th 418, 433 (*Brown*)). Because a "contract may be explained by reference to the circumstances under which it was made, and the matter to which it relates" (Civ. Code, § 1647), an ambiguity can be patent, arising from the face of the writing, or latent, based on extrinsic evidence (*Rancho Pauma Mutual Water Co. v. Yuima Municipal Water Dist.* (2015) 239 Cal.App.4th 109, 117; see *Pacific Gas & E. Co. v. G.W. Thomas Drayage etc. Co.* (1968) 69 Cal.2d 33, 37-39).

"In cases involving integrated contracts, the use of parol evidence is always subject to the limitation that parol evidence may not be used to vary or contradict the words the parties agreed upon, since an integrated writing must be taken as the best and final expression of their intent. ([Code Civ. Proc.]§ 1856, subd. (a); Cal. U. Com. Code, § 2202.)" (*Thompson v. Asimos* (2016) 6 Cal.App.5th 970, 987 (*Thompson*)). If [a court] determines there is no ambiguity—i.e., the language is reasonably susceptible to only one interpretation—then the judicial inquiry into meaning is concluded, and the clear and explicit meaning governs. (*Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1264.) If, however, [a court] determines there is an ambiguity, then the judicial inquiry continues by focusing on whether the parties have presented extrinsic evidence relevant to the meaning of the ambiguous language. If there is no extrinsic evidence (or *if there is no conflict in the extrinsic evidence*), then the interpretation of the ambiguity is a question of law; but "where the trial court's interpretation rests on its resolution of conflicting

evidence, 'any reasonable construction will be upheld [on appeal] as long as it is supported by substantial evidence.' " (*Thompson*, at p. 987.)

" 'When there is no material conflict in the extrinsic evidence, the trial court interprets the contract as a matter of law. [Citations.] This is true even when conflicting inferences may be drawn from the undisputed extrinsic evidence [citations] or that extrinsic evidence renders the contract terms susceptible to more than one reasonable interpretation.' " (*Brown, supra*, 34 Cal.App.5th at p. 433, quoting *Wolf v. Walt Disney Pictures & Television* (2008) 162 Cal. App.4th 1107, 1126-1127 (*Wolf*).

The goal of contract interpretation is to ascertain the parties' mutual intent at the time of contracting, which is determined by objective manifestations of the parties' intent including the surrounding circumstances under which the parties entered into the contract, the object, nature and subject matter of the contract, and the subsequent conduct of the parties. *Morey v. Vannucci* (1998) 64 Cal.App.4th 904, 912 (*Morey*).

As already noted, the parol evidence rule bars the admission of extrinsic evidence, whether oral or written, to vary, alter, or add to the terms of an integrated agreement. The rule is codified in Code of Civil Procedure section 1856, which provides, in relevant part:

- “(a) Terms set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporary oral agreement.
- (b) The terms set forth in a writing described in subdivision (a) may be explained or supplemented by evidence of consistent additional terms unless the writing is intended also as a complete and exclusive statement of the terms of the agreement. ***
- (g) This section does not exclude other evidence of the circumstances under which the agreement was made ... or to explain an extrinsic ambiguity or otherwise interpret the terms of the agreement ...”

As the Court of Appeal noted in *Hayter Trucking, Inc. v. Shell W. E&P, Inc.*, 18 Cal.App.4th 1, 15 (1993):

“The parol evidence rule is not merely a rule of evidence concerned with the method of proving an agreement. Rather, it is a principle of substantive law. The rule derives from the concept of an integrated contract. When the parties to an agreement incorporate the complete and final terms of the agreement in a writing, such an integration in fact becomes the complete and final contract between the parties. Such a contract may not be contradicted by evidence of purportedly collateral agreements. As a matter of law, the writing is the agreement. Extrinsic evidence is excluded because it cannot serve to prove what the agreement was, this being determined as a matter of law to be the writing itself.”

The degree to which language is stable and susceptible to judicial exposition without, or with, extrinsic evidence of what the parties actually meant is an intellectually rich and historically

controversial area of California contract law. *Cf. Pacific Gas & E. Co. v. G.W. Thomas Drayage etc. Co.* (1968) 69 Cal.2d 33 [requiring parol evidence]; *Trident Center v. Connecticut General Life Ins.* (9th Cir. 1988) 847 F.2d 564, 569 [criticizing *Drayage* as always requiring parol evidence]; *ACL Technologies, Inc. v. Northbrook Property & Casualty Ins. Co.* (1993) 17 Cal.App.4th 1773 [defending *Drayage*, if properly understood, as not always requiring parol evidence, or as being linguistically "nihilistic"]; *Nedlloyd Lines B.V. v. Superior Court* (1992) 3 Cal.4th 459, 470 [arguably overruling *Drayage* to the extent it does not allow for the possibility of objectively unambiguous texts]; see also Martin-Davidson, *Yes, Judge Kozinski, There is a Parol Evidence Rule in California -- The Lessons of a Pyrrhic Victory* (1995) 25 Sw. U. L. Rev. 1; Comment, *Say What You Mean and Mean What You Say* (1997) 30 U.C. Davis L. Rev. 569.

When parties to a contract dispute the meaning of contract terms, "[t]he decision whether to admit parol evidence involves a three-step process. First, the court provisionally receives (without actually admitting) all credible evidence concerning the parties' intentions to determine 'ambiguity,' *i.e.*, whether the language is 'reasonably susceptible' to the interpretation urged by a party. If in light of the extrinsic evidence the court decides the language is 'reasonably susceptible' to the interpretation urged, the extrinsic evidence is then admitted to aid in the second step - interpreting the contract." *Winet v. Price* (1992) 4 Cal.App.4th 1159, 1165. "[I]t is reversible error for a trial court to refuse to consider such extrinsic evidence on the basis of the trial court's own conclusion that the language of the contract appears to be clear and unambiguous on its face. Even if a contract appears unambiguous on its face, a latent ambiguity may be exposed by extrinsic evidence which reveals more than one possible meaning to which the language of the contract is yet reasonably susceptible. [Citations.]" *Morey, supra*, 64 Cal.App.4th at 912. The third step involves the determination of whether there is a conflict in the properly admitted extrinsic evidence:

When there is no material conflict in the extrinsic evidence, the trial court interprets the contract as a matter of law. *City of Hope Nat. Medical Center v. Genentech, Inc.*, 43 Cal.4th 375, 395 (2008) [interpretation of written instrument solely a judicial function "when it is based on the words of the instrument alone, when there is no conflict in the extrinsic evidence, or a determination was made based on incompetent evidence"]; *Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 865-866. This is true even when conflicting inferences may be drawn from the undisputed extrinsic evidence, *Garcia v. Truck Ins. Exchange* (1984) 36 Cal.3d 426, 439; *Parsons*, [62 Cal. 2d] at p. 866, fn. 2, or that extrinsic evidence renders the contract terms susceptible to more than one reasonable interpretation. *Parsons*, [62 Cal. 2d] at p. 865; *New Haven Unified School Dist. v. Taco Bell Corp.* (1994) 24 Cal.App.4th 1473, 1483. If, however, there is a conflict in the extrinsic evidence, the factual conflict is to be resolved by the jury. (*City of Hope Nat. Medical Center, supra*, 43 Cal. 4th at p. 395 ["when, as here, ascertaining the intent of the parties at the time the contract was executed depends on the credibility of extrinsic evidence, that credibility determination and the interpretation of the contract are questions of fact that may properly be resolved by the jury"]; *Warner Constr. Corp. v. City of Los Angeles* (1970) 2 Cal.3d 285, 291 [it is a "judicial function to interpret a written instrument unless the interpretation turns upon the credibility of extrinsic evidence"]; *Pacific Gas & Electric*, [69 Cal. 2d] at pp. 39-40 [same].

Wolf v. Walt Disney Pictures & Television, 162 Cal. App. 4th 1107, 1126-27 (2008)(some internal citations omitted). In *Wolf*, after admitting extrinsic evidence in accordance with the foregoing principles, the trial court found no conflict in the extrinsic evidence, interpreted the contract as a matter of law, and granted a nonsuit. The Court of Appeal affirmed. In situations in which interpretation turns upon the credibility of extrinsic evidence, the jury would be asked to address these issues via CACI 314 and question 1 of VF-303. This would occur, for example,

in situations in which two signers of a written contract had differing recollections of their discussions at or before the time of signing as to the import or meaning of a particular term of the contract. For example, assume a written contract to purchase and sell 1000 widgets. Assume further the writing does not specify the color. Buyer contends the parties' oral understanding at the time the contract was signed was that the widgets would be blue, whereas seller insists the agreement was that they would be red. This would be a jury question.

B. Civil Code section 3344.1, first enacted by the Legislature as Civil Code section 990 in 1984, presently provides:

(a)(1) Any person who uses a deceased personality's name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods, or services, without prior consent from the person or persons specified in subdivision (c), shall be liable for any damages sustained by the person or persons injured as a result thereof. In addition, in any action brought under this section, the person who violated the section shall be liable to the injured party or parties in an amount equal to the greater of seven hundred fifty dollars (\$750) or the actual damages suffered by the injured party or parties, as a result of the unauthorized use, and any profits from the unauthorized use that are attributable to the use and are not taken into account in computing the actual damages. In establishing these profits, the injured party or parties shall be required to present proof only of the gross revenue attributable to the use, and the person who violated the section is required to prove his or her deductible expenses. Punitive damages may also be awarded to the injured party or parties. The prevailing party or parties in any action under this section shall also be entitled to attorney's fees and costs.

(2) For purposes of this subdivision, a play, book, magazine, newspaper, musical composition, audiovisual work, radio or television program, single and original work of art, work of political or newsworthy value, or an advertisement or commercial announcement for any of these works, shall not be considered a product, article of merchandise, good, or service if it is fictional or nonfictional entertainment, or a dramatic, literary, or musical work.

(3) If a work that is protected under paragraph (2) includes within it a use in connection with a product, article of merchandise, good, or service, this use shall not be exempt under this subdivision, notwithstanding the unprotected use's inclusion in a work otherwise exempt under this subdivision, if the claimant proves that this use is so directly connected with a product, article of merchandise, good, or service as to constitute an act of advertising, selling, or soliciting purchases of that product, article of merchandise, good, or service by the deceased personality without prior consent from the person or persons specified in subdivision (c).

(b) The rights recognized under this section are property rights, freely transferable or descendible, in whole or in part, by contract or by means of any trust or any other testamentary instrument, executed before or after January 1, 1985. The rights recognized under this section shall be deemed to have existed at the time of death of any deceased personality who died prior to January 1, 1985, and, except as provided in subdivision (o), shall vest in the persons entitled to these property rights under the testamentary instrument of the deceased personality effective as of the date of his or her death. In the absence of an express transfer in a testamentary instrument of the deceased personality's rights in his or her name, voice, signature, photograph, or likeness, a provision in the testamentary instrument that provides for the disposition of the residue of the deceased personality's assets shall be effective to transfer the rights recognized under this section in accordance with the terms of that provision. The rights established by this section shall also be freely transferable or descendible by contract, trust, or any other testamentary instrument by any subsequent owner of the deceased personality's rights as recognized by this section. Nothing in this section shall be construed to render invalid or unenforceable any contract entered into by a deceased personality during his or her lifetime by which the deceased personality assigned the rights, in whole or in part, to use his or her name, voice, signature, photograph, or likeness, regardless of whether the contract was entered into before or after January 1, 1985.

(c) The consent required by this section shall be exercisable by the person or persons to whom the right of consent, or portion thereof, has been transferred in accordance with subdivision (b), or if no transfer has occurred, then by the person or persons to whom the right of consent, or portion thereof, has passed in accordance with subdivision (d).

(d) Subject to subdivisions (b) and (c), after the death of any person, the rights under this section shall belong to the following person or persons and may be exercised, on behalf of and for the benefit of all of those persons, by those persons who, in the aggregate, are entitled to more than a one-half interest in the rights:

(1) The entire interest in those rights belongs to the surviving spouse of the deceased personality unless there are any surviving children or grandchildren of the deceased personality, in which case one-half of the entire interest in those rights belongs to the surviving spouse.

(2) The entire interest in those rights belongs to the surviving children of the deceased personality and to the surviving children of any dead child of the deceased personality unless the deceased personality has a surviving spouse, in which case the ownership of a one-half interest in rights is divided among the surviving children and grandchildren.

(3) If there is no surviving spouse, and no surviving children or grandchildren, then the entire interest in those rights belongs to the surviving parent or parents of the deceased personality.

(4) The rights of the deceased personality's children and grandchildren are in all cases divided among them and exercisable in the manner provided in Section 240 of the Probate Code according to the number of the deceased personality's children represented. The share of the children of a dead child of a deceased personality can be exercised only by the action of a majority of them.

(e) If any deceased personality does not transfer his or her rights under this section by contract, or by means of a trust or testamentary instrument, and there are no surviving persons as described in subdivision (d), then the rights set forth in subdivision (a) shall terminate.

(f)(1) A successor in interest to the rights of a deceased personality under this section or a licensee thereof shall not recover damages for a use prohibited by this section that occurs before the successor in interest or licensee registers a claim of the rights under paragraph (2).

(2) Any person claiming to be a successor in interest to the rights of a deceased personality under this section or a licensee thereof may register that claim with the Secretary of State on a form prescribed by the Secretary of State and upon payment of a fee as set forth in subdivision (d) of Section 12195 of the Government Code. The form shall be verified and shall include the name and date of death of the deceased personality, the name and address of the claimant, the basis of the claim, and the rights claimed.

(3) Upon receipt and after filing of any document under this section, the Secretary of State shall post the document along with the entire registry of persons claiming to be a successor in interest to the rights of a deceased personality or a registered licensee under this section upon the Secretary of State's Internet Web site. The Secretary of State may microfilm or reproduce by other techniques any of the filings or documents and destroy the original filing or document. The microfilm or other reproduction of any document under this section shall be admissible in any court of law. The microfilm or other reproduction of any document may be destroyed by the Secretary of State 70 years after the death of the personality named therein.

(4) Claims registered under this subdivision shall be public records.

(g) An action shall not be brought under this section by reason of any use of a deceased personality's name, voice, signature, photograph, or likeness occurring after the expiration of 70 years after the death of the deceased personality.

(h) As used in this section, "deceased personality" means any natural person whose name, voice, signature, photograph, or likeness has commercial value at the time of his or her death, or because of his or her death, whether or not during the lifetime of that natural person the person used his or her name, voice, signature, photograph, or likeness on or in products, merchandise, or goods, or for purposes of advertising or selling, or solicitation of purchase of, products, merchandise, goods, or services. A "deceased personality" shall include, without limitation, any such natural person who has died within 70 years prior to January 1, 1985.

(i) As used in this section, "photograph" means any photograph or photographic reproduction, still or moving, or any videotape or live television transmission, of any person, such that the deceased personality is readily identifiable. A deceased personality shall be deemed to be readily identifiable from a photograph if one who views the photograph with the naked eye can reasonably determine who the person depicted in the photograph is.

(j) For purposes of this section, the use of a name, voice, signature, photograph, or likeness in connection with any news, public affairs, or sports broadcast or account, or any political campaign, shall not constitute a use for which consent is required under subdivision (a).

(k) The use of a name, voice, signature, photograph, or likeness in a commercial medium shall not constitute a use for which consent is required under subdivision (a) solely because the material containing the use is commercially sponsored or contains paid advertising. Rather, it shall be a question of fact whether or not the use of the deceased personality's name, voice, signature, photograph, or likeness was so directly connected with the commercial sponsorship or with the paid advertising as to constitute a use for which consent is required under subdivision (a).

(l) Nothing in this section shall apply to the owners or employees of any medium used for advertising, including, but not limited to, newspapers, magazines, radio and television networks and stations, cable television systems, billboards, and transit advertisements, by whom any advertisement or solicitation in violation of this section is

published or disseminated, unless it is established that the owners or employees had knowledge of the unauthorized use of the deceased personality's name, voice, signature, photograph, or likeness as prohibited by this section.

(m) The remedies provided for in this section are cumulative and shall be in addition to any others provided for by law.

(n) This section shall apply to the adjudication of liability and the imposition of any damages or other remedies in cases in which the liability, damages, and other remedies arise from acts occurring directly in this state. For purposes of this section, acts giving rise to liability shall be limited to the use, on or in products, merchandise, goods, or services, or the advertising or selling, or soliciting purchases of, products, merchandise, goods, or services prohibited by this section.

(o) Notwithstanding any provision of this section to the contrary, if an action was taken prior to May 1, 2007, to exercise rights recognized under this section relating to a deceased personality who died prior to January 1, 1985, by a person described in subdivision (d), other than a person who was disinherited by the deceased personality in a testamentary instrument, and the exercise of those rights was not challenged successfully in a court action by a person described in subdivision (b), that exercise shall not be affected by subdivision (b). In that case, the rights that would otherwise vest in one or more persons described in subdivision (b) shall vest solely in the person or persons described in subdivision (d), other than a person disinherited by the deceased personality in a testamentary instrument, for all future purposes.

(p) The rights recognized by this section are expressly made retroactive, including to those deceased personalities who died before January 1, 1985.

C. Section 3344.1 (formerly section 990) has been amended several times (1988, 1999, 2007, 2009, 2010 and 2011) since its 1985 effective date; it has received trial and appellate explication in the District Courts, the 9th Circuit, the California Supreme Court, and the California Courts of Appeal. *See, e.g. Timed Out, LLC v. Youabian, Inc.*, 229 Cal. App. 4th 1001, 1008 (2014)(section 3344.1 changed the law and is notable because it acknowledges, as the Supreme Court did in *Lugosi*, that the right of publicity can be assigned by the owner during his or her lifetime); *Cairns v. Franklin Mint Co.*, 292 F.3d 1139, 1148 (9th Cir. 2002)(not a choice of law provision); *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 25 Cal. 4th 387, 400 (2001)(Legislature had a rational basis for permitting celebrities and their heirs to control the commercial exploitation of the celebrity's likeness); *Milton H. Greene Archives, Inc. v. CMG Worldwide, Inc.*, 568 F. Supp. 2d 1152, 1156 (C.D. Cal. 2008), *aff'd sub nom. Milton H. Greene Archives, Inc. v. Marilyn Monroe LLC*, 692 F.3d 983 (9th Cir. 2012)(addressing 2007 change to the statute, SB 771).

D. A threshold requirement for declaratory relief (SAC, count two) is the existence of a justiciable dispute. The declaratory judgment statute expressly provides that declaratory relief is available to parties to contracts or written instruments "in cases of actual controversy relating to the legal rights and duties of the respective parties." Code of Civil Procedure § 1060. Because Code of Civil Procedure section 1060 "makes the presence of an 'actual controversy' a jurisdictional requirement to the grant of declaratory relief" (*Environmental Defense Project of Sierra County v. County of Sierra* (2008) 158 Cal.App.4th 877, 885), a "court is only empowered to declare and determine the rights and duties of the parties 'in cases of actual controversy' " *Pittenger v. Home Savings & Loan Assn.* (1958) 166 Cal.App.2d 32, 36. For this reason, the existence of an " 'actual, present controversy' " is " 'fundamental' " to an action for declaratory relief. *City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 79; *In re Claudia E.* (2008) 163 Cal.App.4th 627, 638.

E. Under 11 USC §541(a)(1), "[t]he commencement of a case [under the Bankruptcy Code] creates an estate . . . comprised of all legal or equitable interests of the debtor in property as of

the commencement of the case.” “Property of the estate” includes all legal or equitable interests of the debtor as of the commencement of the case. *In re Goldstein*, 526 BR 13 (9th Cir. BAP 2015).

An unscheduled asset, whether by accident or intent, is property of the estate, and remains so even after the bankruptcy case is closed, unless explicitly abandoned by the trustee. *Cusano v. Klein*, 264 F.3d 936, 946 (9th Cir. 2001). An abandonment requires an affirmative act of the trustee, or some other clear evidence of the trustee’s intent to abandon the property. *Pace v. Battley (In re Pace)*, 146 B.R. 562, 566 (9th Cir. BAP 1992); see also 11 USC §554(a) (“After notice and a hearing, the trustee may abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate.”).

F. “Waiver requires a voluntary act, knowingly done, with sufficient awareness of the relevant circumstances and likely consequences. [Citation.] There must be actual or constructive knowledge of the existence of the right to which the person is entitled. [Citation.] The burden is on the party claiming a waiver to prove it by evidence that does not leave the matter doubtful or uncertain and the burden must be satisfied by clear and convincing evidence that does not leave the matter to speculation.” *Kelly v. William Morrow & Co.* (1986) 186 Cal.App.3d 1625, 1635; see also CACI 336.

G. The good will of a business does not include a right to use the name of any person from whom the business was acquired. Cal. Bus. & Prof. Code § 14101. It has been the rule since Hubert Hansen was still alive that the good will of a business is the expectation of continued public patronage, but it does not include a right to use the name of any person from whom it was acquired. *Mahlstedt v. Fugit*, 79 Cal. App. 2d 562, 567, 180 P.2d 777, 780 (1947).

H. “In order for acceptance of a proposal to result in the formation of a contract, the proposal “must be sufficiently definite, or must call for such definite terms in the acceptance, that the performance promised is reasonably certain.” (1 Witkin, Summary of Cal. Law (9th ed., 1987) Contracts, § 145, p. 169.) A proposal “cannot be accepted so as to form a contract unless the terms of the contract are reasonably certain. [¶] The terms of a contract are reasonably certain if they provide a basis for determining...the existence of a breach and for giving an appropriate remedy.” (*Ibid.*, quoting from Rest.2d Contracts, § 33.) If, by contrast, a supposed “contract” does not provide a basis for determining what obligations the parties have agreed to, and hence does not make possible a determination of whether those agreed obligations have been breached, there is no contract. (See, e.g., 1 Williston on Contracts (4th ed. 1990, Lord) § 4:18, p. 414 [“It is a necessary requirement that an agreement, in order to be binding, must be sufficiently definite to enable the courts to give it an exact meaning.”]. *Weddington Prods., Inc. v. Flick*, 60 Cal. App. 4th 793, 811, 71 Cal. Rptr. 2d 265, 277 (1998).

I. The general rules of statutory construction are (1) to ascertain the intent of the Legislature to effectuate the purpose of the law, (2) to give a provision a reasonable and commonsense interpretation consistent with its apparent purpose, which will result in wise policy rather than mischief or absurdity, (3) to give significance, if possible, to every word or part, and harmonize the parts by considering a particular section in the context of the whole, (4) to take matters such as content, object, evils to be remedied, legislation on the same subject, public policy, and contemporaneous construction into account, and (5) to give great weight to consistent

administrative construction. (*DeYoung v. City of San Diego* (1983) 147 Cal.App.3d 11, 17-18 [194 Cal.Rptr. 722].)

As the court noted in *Mt. Hawley Ins. Co. v. Lopez*, 215 Cal. App. 4th 1385, 1396-98 (2013), courts interpreting statutory schemes “begin with the fundamental rule that our primary task is to determine the lawmakers' intent.” (*Delaney v. Superior Court* (1990) 50 Cal.3d 785, 798.) “In construing statutes, we aim ‘to ascertain the intent of the enacting legislative body so that we may adopt the construction that best effectuates the purpose of the law.’” (*Klein v. United States of America* (2010) 50 Cal.4th 68, 77, quoting *Hassan v. Mercy American River Hospital* (2003) 31 Cal.4th 709, 715.)

California courts “have established a process of statutory interpretation to determine legislative intent that may involve up to three steps.” (*Alejo v. Torlakson* (2013) 212 Cal.App.4th 768, 786–787.) The “key to statutory interpretation is applying the rules of statutory construction in their proper sequence ... as follows: ‘we first look to the plain meaning of the statutory language, then to its legislative history and finally to the reasonableness of a proposed construction.’” (*MacIsaac v. Waste Management Collection & Recycling, Inc.* (2005) 134 Cal.App.4th 1076, 1082, quoting *Riverview Fire Protection Dist. v. Workers' Comp. Appeals Bd.* (1994) 23 Cal.App.4th 1120, 1126, 28 Cal.Rptr.2d 601.)

“The first step in the interpretive process looks to the words of the statute themselves.” (*Alejo, supra*, 212 Cal.App.4th at p. 787; see *Klein, supra*, 50 Cal.4th at p. 77, 112 [“[w]e look first to the words of the statute, ‘because the statutory language is generally the most reliable indicator of legislative intent’ ”].) “If the interpretive question is not resolved in the first step, we proceed to the second step of the inquiry. [Citation.] In this step, courts may ‘turn to secondary rules of interpretation, such as maxims of construction, “which serve as aids in the sense that they express familiar insights about conventional language usage.”’ We may also look to the legislative history. [Citation.] ‘Both the legislative history of the statute and the wider historical circumstances of its enactment may be considered in ascertaining the legislative intent.’ [Citation.] [¶] ‘If ambiguity remains after resort to secondary rules of construction and to the statute's legislative history, then we must cautiously take the third and final step in the interpretive process. [Citation.] In this phase of the process, we apply “reason, practicality, and common sense to the language at hand.” [Citation.] Where an uncertainty exists, we must consider the consequences that will flow from a particular interpretation. [Citation.] Thus, “[i]n determining what the Legislature intended we are bound to consider not only the words used, but also other matters, ‘such as context, the object in view, the evils to be remedied, the history of the times and of legislation upon the same subject, public policy and contemporaneous construction.’ [Citations.]” These “other matters” can serve as important guides, because our search for the statute's meaning is not merely an abstract exercise in semantics. To the contrary, courts seek to ascertain the intent of the Legislature for a reason—“to effectuate the purpose of the law.”’” (*Alejo*, at pp. 787–788; see *MacIsaac, supra*, 134 Cal.App.4th at p. 1084.)

Courts do not necessarily engage in all three steps of the analysis. “It is only when the meaning of the words is not clear that courts are required to take a second step and refer to the legislative history.” (*Soil v. Superior Court* (1997) 55 Cal.App.4th 872, 875; accord, *Sisemore v. Master Financial, Inc.* (2007) 151 Cal.App.4th 1386, 1411; see *MacIsaac, supra*, 134 Cal.App.4th at 1084 [“[i]f ambiguity remains after resort to secondary rules of construction and to the statute's

legislative history, then we must cautiously take the third and final step in the interpretative process”].)

3. Judicial Notice.

Defendants requested judicial notice of the 1989 order of the Bankruptcy Court whereby certain assets of Hansen Foods were sold to California Co-Packers. Ex. 2184.

Courts of appeal review a trial court's ruling granting a request for judicial notice pursuant to the abuse of discretion standard of review. (*In re Social Services Payment Cases* (2008) 166 Cal.App.4th 1249, 1271.)

A court may take judicial notice of the acts and records of a federal court. (Evid. Code, § 452, subs. (c), (d).) Evidence Code section 453 provides that a trial court must take judicial notice of any matter specified in Evidence Code section 452, upon a party's proper request.

In *People v. Harbolt* (1997) 61 Cal.App.4th 123, 126 -127, the court discussed the limited purposes for which a court may take judicial notice of a court record:

"Evidence Code sections 452 and 453 permit the trial court to 'take judicial notice of the *existence* of judicial opinions and court documents, along with the truth of the results reached—in the documents such as orders, statements of decision, and judgments— but cannot take judicial notice of the truth of hearsay statements in decisions or court files, including pleadings, affidavits, testimony, or statements of fact.' [Citations.]

Judicial notice is granted in accordance with the foregoing.

4. The Evidence.

In making any express credibility determinations set forth below, the court considered, among others, the factors underlying CACI 107.

The first witness was Mitchell Drasco. Married to Jeanne Hansen since 1996; known her since 1959. The trust's purpose. Richard Hansen was her father. He died in 1996. Her mother died in 1991. Jeanne Hansen has siblings: Kay, Mary Jane, Elizabeth and Susan.** Jeanne is Hubert's granddaughter.

Drasco was sworn in as a lawyer in 1981. Corporate lawyer focused on high tech. Teaches business law at a junior college. Has drafted trusts. Beneficiaries of Hubert Hansen Trust are the direct descendants of Hubert Hansen.

Trustees: there are three.

Hubert died June 3, 1951. Ex. 1249. He was married to Florence at his death. She died 12/6/88.

Residue clause – catch all or net. His will: Ex. 1250.

All descendants are beneficiaries of trust. Purpose: promote Hubert Hansen's legacy.

Jeanne's uncles: Thomas, Vincent and Eugene. Thomas died in 1998. Married to Agnes. She died in 2015. She assigned her rights to the Trust. Jeanne's aunt was Mildred. Married to Robert Rose. 5 children. Robert died in 1998. Mildred died in 2012.

Thomas and Agnes had a trust. Agnes was under conservatorship; her son Gary was conservator. He transferred her rights to the Trust. Gary was also the trustee of the Thomas/Agnes trust.

Vincent died in 1987. Was married to Patricia. She died in 2003.

Eugene had no children. Died in 1979. Married to Guadalupe. She did not transfer rights.

Witness drafted agreements to transfer all Hubert's grandchildren's rights to trust. Ex. 1242. All grandchildren have transferred their rights of publicity to the Trust. All sellers were paid one dollar. Consenting spouses got \$2.00. Non-compete was additional \$2.00. Paid by Trust.

Timothy Hansen was paid. Todd was paid. James was paid. Mary Michele was paid; she died after signing Ex. 1242. Ann Marie was paid. Kathleen was paid. Jeanne was paid. Mary Jane was paid. Elizabeth was paid. Patricia was paid. Nancy was paid. Anthony was paid. Jonathan was paid. Christopher was paid. Agnes Hansen's trust was paid. She died in Oct. 2015.

Hansen's juices. He purchased in 1990s. Not sure about 2000s. Saw labels yesterday. Never saw before.

Ex. 2. Photo of uncut dollar bills. Idea was to keep the bills together forever.

Cross: He was designated as PMK for Trust. Not a probate attorney. A/C privilege waiver since deposition. Aware of company called Hansen Foods Inc. Not aware of its advertising or licensing. Did not participate in trademark related transactions. Did not work at the company. Did not participate in bankruptcy.

Never worked at Hansen's Juices Inc. No knowledge of advertising or licensing or copyright or trademark. Not involved in 1992 trust.

Did not open bank account for the Trust. \$100 a gift from him. Ordered sheets of \$1 bills. Rolled up in a closet in his home. Redirect at 11:10.

11:15: second witness is Jeanne Hansen. She is a RN. Granddaughter of Hubert Hansen; Richard was her father. Started Hansen's Juices on Melrose Ave. in LA and then Juanita Ave. in LA. First juice bar in Calif. Sold door to door, home delivery. Sold to cast and crew at studios. Carrot juice was first. First president of juice conglomerate. Had famous customers. Died in 1951. Married to Florence. Her dad worked for Hubert; so did her three uncles and her aunt.

Hubert's face not on bottles. Her aunt's face was. Hubert's name not on products. Hubert's kids continued running the business.

Father Richard: accounting – self taught, not a CPA

Uncle Vincent: president

Uncle Tom: engineer

Uncle Eugene: ran office

Not sure about her aunt continuing in the business.

She worked at Hansen's Juices as a teenager; so did her sisters and some of her cousins. Late 1950s early 1960s

Florence did not work in the business.

Recalls one brochure.

Worked at Hansen Foods Inc. in late 1960s (for her cousin Tim's company). Went to conventions and trade shows, served juice samples. Cousins did too. Spokespersons for a family business. Hub's Family Juice started by Maureen. Hub was Hubert's family nickname. Maureen asked for permission and received. Good for legacy of family name. Plant in OC. She helped with distribution in SD. Labels told the story of Hubert.

First time she saw Hubert's lemonade: 2014 or 2015. In a market in SD. Surprised. Then saw a big yellow truck with grandfather's name on it. Drinking Hansen's juice her whole life. Denies seeing labels displayed in defense opening statement.

Tim approached her in 2015 about looking into Monster's rights. Wanted to get the family history together. Royalty agreement. Discussed with her father. Was an agreement for royalties that were never paid. Her dad was upset. "We know we do not have the rights to the Hansen name."

Ex. 1241. Trust was formed to preserve Hubert's rights of publicity. The trustees "self selected."

Ex. 1242. \$100 still in trust. She wrote checks to each seller. Filing with Secretary of State. Monster filed one too. Don't know the date. Cease and desist letter. Ex. 1297. Response is Ex. 1298. Reply is Ex. 1299.

Emails to collect family history.

Resumed direct after lunch recess. Ex. 295. Trust's registration filed June 5, 2015. Ex. 1300 is defendants' registration.

Florence, her grandmother, had a will. Ex. 1252.

Witness was trustee of her father's trust. Ex 78A is her parents' trust. Ex. 1254 is the amended trust. Appointed her conservator in the event this became necessary.

Not about Hansen's trademark. Purpose of lawsuit is to preserve my grandfather's right of publicity.

Ex. 5 is her email to her cousins. Aug. 17, 2014. Cross at 1:52. She was seven when Hubert Hansen died. Worked there when she was 12-13 years old. Never had ownership of Hansen's Juices. Hansen Foods. Impeached with depo 2x.

Hansen Beverage owned Hansen's name in 1990s. Maureen did not pay for right to use Hub. Not in writing.

Ex. 9 is Tim's email to her. Ex. 10: same. Ex. 321 is her email. Same with Ex. 319. Ex. 322 is an email to her. Ex. 323 is her email. Same with Ex. 324. Was shown her interrogatory

responses. Hubert Hansen's name, likeness, photographs and persona were used in the 1980's by Hansen Juice and Hansen Foods with permission in marketing brochures. Same with 1987 radio ads in 1987 and 1988. Impeached with deposition. Redirect at 2:28.

Third witness is Maureen Todd *nee* Hansen. Hubert Hansen granddaughter. She was not born until 1956. Vincent is her father. He died 1987; her mother Patricia died in 2003. Ex. 1251: trust disbursement from probate court. She has 4 siblings. She is youngest. She is a co-trustee of the Trust with Jeanne and Tim.

Vincent ran the full operations of Hansen's Juices. Witness worked there starting 7th or 8th grade. Described duties. Most of the cousins and siblings worked there part time. Met Gary Todd when Tim started Hansen Foods Inc. She worked there. 1977-1983. DNR hearing Hubert Hansen's name in ads. Pasteurized juices and eventually natural sodas. Started a family in 1983.

2001, she and Gary started a business. Hub's Family Juice Company Inc. Wanted to use Hansen's but Monster owned it. Hub was his nickname. He was a legend. Gary had been working for Hansen's Juices for a long time. Sought and received permission from family members because he's their grandfather too. Patricia thought it was a wonderful idea. Aunt Millie was excited. Called Jeanne and asked her to ask her sisters. Spoke to siblings too. They thought it was a great idea. Ex. 1266 – labels. She got permission as she was a family member, limited to her use alone.

Her mother left everything equally to her and her siblings when she died in 2003.

Ex. 1267 – flyers used at farmer's markets. Corner stores. Food trucks. School districts. Southern California only. Smoothies and fruit/vegetable juice only. Had a website in 2003.

Ex. 307 – mission statement. Ex. 312 was on the website. Closed the company in 2008 or 2009. Registered Hub's Family Juice as a trademark. Use of Hubert Hansen not challenged by Monster. First saw Hubert's lemonade van on freeway in 2012. "Took me by surprise." Went to market and was shocked. 1990s advertising: she did not see Hubert's name or likeness. Surprised yesterday when saw labels in opening statement.

Sale of rights to trust. Filing of registration. 2012-2015 a difficult time. "Trying to get back on our feet having lost our company." We always knew Hubert's name and legacy belonged in our family. Cross at 3:40. Ex. 295. Not aware of business aspects of either company. Felt people would make the association. No writings reflect 2001 permissions she says she got. Ex. 292. Her email of 8/15/15. No licensing efforts by trust since its inception. Tim Hansen got permission. Each company has used publicity rights with permission from Hubert Hansen's heirs. Interrogatory responses verified by her. Got permission because other grandchildren owned rights too. But did no legal research. Redirect at 4:04 p.m.

Fourth witness: Christopher Rose. His mom was Mildred Hansen. Robert Rose (his dad) died in 1998. Mildred died in 2012. Parents had wills. He had four siblings. Mildred's will is Ex. 87. 87A is his dad's will. They also had a trust, Ex. 1255. His sister Patricia was the trustee but he helped her at her request. Ex. 1277.1-9. is a history his mother Mildred wrote. Admitted under hearsay exception for family history, Evid. Code section 1313.

Mr. Rose resumed testimony on the following morning, November 20. His mother's image was on products. He assigned his interest to the Trust in Ex. 1242. So did his siblings. Did so at Jeanne Hansen's request. Received check for \$3.00. Believed it was fair.

Saw Hubert's lemonade. Surprised. Never saw the labels shown in opening statement. Cross at 9:18 a.m. Nothing important.

Fifth witness was James Hansen. A Hubert Hansen grandson. Vincent was his father. Worked at Hansen Juices. 1982-1985. Outside sales. Also worked at Hansen Foods. Also sales. Did a voice over 60 second spot which aired on KMPC. Cross at 9:27 a.m. No personal knowledge of IP. Never met Hubert. Does not know if Hansen Juices used Hubert's image. Does not know disposition of Hansen Foods assets or how it stopped operating. Ex. 2198 is the script for the voice-over.

Ex. 281B was written by him in 1985-1986, not in 1980. Ex. 15 was written by him. They are different versions of the same thing. Ex. 282 not drafted by him. Recounts deposition testimony regarding Monster's use of Hubert Hansen in mid-1990's.

Redirect at 9:45. Ex. 2198 was for the retirement party of Richard. Errata to deposition – testimony changed regarding awareness in 1990s. Recordings played.

Sixth witness at 10:00. Timothy Hansen. Vincent was his father. Grandson of Hubert. All siblings were alive when his mother died and she left everything to them equally. Started working at Hansen Juice when he was 5 or 6 years old. Cleaning the floor. Duties expanded. Ex. 1278 is the plant on Juanita. Ex. 1351 – bottle of juice – copyright 2014. Has same picture as 1278. Never used his first name or his names together. 1970: Hansen Juices Inc. He worked there 1970-77. Started own company in 1977. Left Hansen Juices Inc. Started Hansen's Natural. Shelf stable. Company was Hansen Foods Inc. Advertising campaign. Forbes article. "Tim Hansen travels the world."

Filed Chapt. 11 in December 1988. Got a license to use Hansen trademark. Paid a royalty to Hansen Juices Inc. Ex. 290. Signed by owners of Hansen Juices Inc. He defaulted so lost the license. Never a right of publicity license.

California Co-Packers bought assets of Hansen Foods out of bankruptcy. Did not get right of publicity. Trademark reverted to Hansen Juices and they made their own deal.

Sacks is CEO of Monster. Asked him for his right of publicity. Wanted to use Tim's name on a product. Ex. 1215. Photos of travels the world commercials. Two industrial brochures Exs. 288-289. Not given to public. Got authorization from father and uncles to use Hubert Hansen's names. Limited to brochure. Limited to him personally. Not trying to get Hansen's trademark back. Ex. 9. His email. Concluded the Hansen brand belonged to Hansen Beverage. Ex. 10.

2011 saw bottle of Hubert's lemonade. Ex. 1352 not the one he saw. Ex. 1353, 1354: also bottles he saw after 2016. Used to say natural flavors. The one he saw in 2011 had "only the best will do." Never saw Hubert's name on cans in the 1990s.

Ex. 2224A. Labels. Never saw before. Worked with Hansen Beverage/Monster from 1994 until 2015 – transportation, storage and other capacities.

Cross at 11:05. A Hansen Juices brochure mentioned Hubert Hansen with a photo. Ex. 56 – after he left in 1977. Ex. 288 used by Hansen Foods. I received permission to use pictures of Hubert Hansen and the plant. Permission was verbal – early 1980's. No writing.

Interrogatory responses again. [Both James and Timothy are elderly and infirm and became confused at times.]

1988 bankruptcy. Ex. 2184 is the order selling the assets. Told debtor's counsel of the permissions he had.

Ex. 294. His email from 2016. Ex. 56.

Seventh witness: Gary Hansen. Another grandson of Hubert. His father was Thomas Hansen. He died in 1998. Married to Agnes, and she died in 2015. One sister died in 2018. One living sister. His parents had a trust. Ex. 62 is the trust. He was appointed his mother's conservator in 2008. Signed assignment as her conservator. Both sisters approved. He later became trustee of his mother's trust. Worked at Hansen Juices as a child and a teenager, summer vacations. Worked part time during college, joined after college in 1982. Hubert Hansen's name not used on products. Came up hard. Worked on the production line. Worked his way up. Finally made it upstairs. Vincent was president. Became manager and then VP in 1992. VP 1992-1994. Became president in 1994, thru Dec. 1996. Resigned. Merged three companies and he exited. Fresh Juice Company. Met Sachs when he was VP. Hubert's name was not used on our labels. Nor as the name of a drink.

C/X at 11:47. Scope of duties as VP, president. His father retired in 1992 as president. Material in brochures contributed to Hansen's Juices Inc. reputation. Ex. 58 - brochures from 1988. Used Hubert's name/history. Ex. 57. Brochure for 1989. Moved from Juanita to Azusa in 1993. Not finished by noon recess.

Resumed at 1:30. Ex. 2202. Ex. 59 – 1996 marketing plan. Importance of legacy and story. DNR being asked by Maureen for permission to use name.

Ex. 2186A Trust agreement between Hansen's Juices Inc. and Hansen Beverage Company. Several agreements at that time. July 27, 1992. He was VP at the time. Ex. 2186B is amendment no. 1 to 2186A from 1996.

Ex. 2187 is the Fresh Juices license agreement he signed. Ex. 2188 is another 1992 agreement – carbonated beverages agreement. Amended in 1996 – Ex. 2189. Ex. 2190 is a 1992 royalty sharing agreement. Ex. 2191 certificate of merger 12/1/96.

Ex. 1334. Another 1992 license agreement. Same with Ex. 1335, 1336. Ex. 1337: Agreement between Hansen's Juices Inc. and Calif. Co-Packers. Ex. 1340. Ex. 1350 license agreement between Hansen Juices and Calif. Co-Packers. Ex. 67 was another royalty agreement.

Redirect at 2:00. Ex. 59 not for consumers – for wholesalers or distribution.

Several witnesses, including the eighth witness Mr. Sacks, testified via video deposition. The court was required to work over the course of an evening at home and a noon recess in chambers to address numerous "inconsequential written evidentiary [and] blunderbuss objections," made

by counsel “without focusing on those that are critical.” *Reid v. Google, Inc.*, 50 Cal. 4th 512, 532 (2010). The court made written rulings on all said objections.

June 1992 – his company, later renamed Hansen Beverage Company, purchased the rights owned by California Co-Packers. “Acquired the Hansen’s brand and business.” 34:17-18. “We investigated the trademark rights” as there was very little else. Page 38. There was a license between Calif. Co-Packers and Hansen Juices. He understood that Calif. Co-Packers “acquired all the intellectual property rights and intangible rights ... and other information that was being used ... by Hansen Foods.” 39:19-24. All the IP rights were later contributed into the trust. Later ended up buying all Hansen Juices rights. Pp. 40-41. Thinks the history of the brand is part of what he acquired. Page 42. Due diligence did not address right of publicity. Swept into “intangibles.” Pages 47, 71-72. Testimony seemed scripted at times. “DNA of the brand.” Pages 63-64. No due diligence on “Hubert Hansen” registration. Didn’t look at it as a right of publicity. Another reference to “DNA.” 86:5, 227:20.

Page 185: Saw Ex. 2184 during Calif. Co-Packers due diligence. Page 187: had IP experts doing due diligence. Believes “shared history” was an intangible. 194:16.

Ninth witness: Kevin Greene. Professor of law at Thomas Jefferson School of Law. Since 1997. Classes taught. Focus IP issues and publicity rights. Ex. 1339 is his resume (not received). 4-5 articles on rights of publicity. 2009 article - best 10 IP article in that year. Award from State Bar. Prior expert work. Yale Law School. New York Bar. Worked at Cravath 2+ years. Entertainment boutique. Worked on agreements on the right of the publicity. Early to mid-1990s.

1992 asset purchase agreement did not transfer rights of publicity of Hubert Hansen. He saw no document suggesting transfer of a right of publicity. If person is deceased, the right goes to heirs as specified in the statute. No prohibition on oral transfer but a skilled draftsman would not do this.

The direct (which consumed about 8 minutes of substantive testimony) ended with 25 minutes remaining in the November 20 session. Defense counsel claimed she was not ready to cross examine Professor Greene. The court denied her request to require Greene to return the following day. The witness was excused with defendants having constructively waived cross. Plaintiffs ran out of witnesses. The following morning, the defendants’ request to play excerpts of the Greene depo was denied, because although the depo notice complied with the requirement of CCP section 2025.620(d), the notice of intention was untimely under CCP section 2025.340(m). The notice was sent late in the evening of November 20.

Plaintiffs’ case in chief resumed on November 21 at 9:12. Anthony Kane was the 10th witness testifying via video deposition. He is married to a grandchild, Kathleen, who is a daughter of Richard Hansen. Richard was his father in law. He was president of Hansen’s Juices. Left company in 1993 after Azusa facility opened. Had started at Hansen’s Juices in 1967 as a bottle washer. Wife worked there too. Worked his way up to management – production foreman soon after Tim left the company. Was VP; became president when Tom left the company. Brochures by outside agency. Labels too. Questions about marketing and use of Hubert’s name and

likeness. Open house for opening of Azusa plant. Brochures. Fliers. Mostly for distributors but some evidence consumers may have seen. 1992 trust agreement (Ex. 2186A) between Hansen Beverages and Hansen Juices. He signed it. No involvement with company after he left in 1993. But he did sign 1996 amendment as a trustee.

Father and mother in law created a trust. He and Lauren Schott became trustees. Father in law and mother in law never discussed owning rights to Hubert Hansen's story. April 2015: Wife sold rights to Trust and he consented. Thinks \$1 is fair.

Eleventh witness, also by video, was Guadalupe Krikorian. Widow of Eugene Hansen (son of Hubert). Married around August 1978. He died July 1979. His will was admitted to probate. Met at a bowling alley in LA. He was VP when they met. She never worked there. Denies being approached to sell IP rights. Never signed an agreement to sell. Denies awareness of ownership of IP rights. Denied need for Spanish interpreter. Denies belief that she owns IP rights. Never licensed or sold IP rights. Tim Hansen never asked permission; neither did Maureen Todd. Denies any discussion of IP rights. No plans to sell or license.

Witness no. 12 was Timothy Kane, via video deposition. Born in LA in 1966. Great grandson of Hubert. Richard's grandson. Started at Hansen's in 1991, worked there until 1996. 3 siblings. Degree from SLO. Hansen Juice Creations 1997-2002 or 2003. Started at the bottom. Joined ownership in 1994 or 1995. Director of purchasing/marketing. Described reasons for decision to sell. Juice Creations was a juice bar – walk-in type facilities. Had permission from buyer to use the name. Closed because "wasn't working." Juice Creations never used Hubert name or likeness. Marketing he did while at Hansen's did not either. Recalls flier at the grand opening. Juice Creations had right to put Hansen trademark on the stores only, in exchange for a 1% royalty.

The thirteenth witness, also by video, was Kathleen Kane. Anthony's wife. Cousin Gary sold it. Grew up on Hansen juices. Granddaughter of Hubert. Worked at Hansen's Juices while in HS. Did samplings at stores. Thinks one dollar for sale of her rights to the 2015 Trust was fair. Brochures. DNR request for permission to use. Parents had a trust. No discussion of ownership of rights with parents.

Plaintiffs rested at 11:35. Defendants made no motion under CCP section 631.8.

Defendants called Mr. Sacks, CEO of Monster fka Hansen Beverage Company. Repeated background already shared in video deposition. Acquired Hansen Foods. Soda and shelf-stable beverage. Investigated the opportunity. Due diligence and history of brand. "History and what it stood for." Got a written report. Purchase price was \$14.5 million. Bought a "viable beverage business." Intended to run it. Two more references to DNA.

Ex. 288. Saw in course of due diligence. "Authentic." Another reference to DNA.

Ex. 2184 – saw during due diligence. Calif. Co-Packers had insufficient capital. Thought general intangibles covered everything. Not finished by noon recess. Resumed at 1:30. Broad understanding of rights Co-Packers had acquired. Formed Hansen Beverage Company. Ex. 165. Page 10. On or off the books. Went over other paragraphs.

Ex. 2186 trust. Hansen Foods held most of the trademarks. Co-packers transferred marks to Hansen Juices, which then licensed it back for shelf stable/carbonated and kept fresh juices. He was not happy with that, and this gave rise to the Hansens Trust (Ex. 2186). Trust then licensed Hansen Juice and Hansen's Beverage. Exs. 2187, 1335, 1340, 2190, 2188. Amendments Exs. 2186 B and C. July 8, 1996 and Feb. 10, 1998, respectively.

Ex. 168. Naked sold all rights in Hansen brand to Hansen Beverage Company. 9/22/99. Captured all rights in the trust and licenses. Then wound up the trust, transferred all rights to Hansen Beverage Company. Ex. 2186D.

Schedule 7 to Ex. 168. Ex. 2227 – described the marks.

In the 1990s, used Hubert Hansen on a label in mid 1990s. Certainly by 1997. No label repository. Ex. 2224A Label refresh 1997 – Both Hansens were operating. No complaint from Hansen's Juices about Hansen Beverages' use of Hubert Hansen's name and story. Same with 1999 label -2224C, D. No complaints from the then owner of Hansens. Continued using 2000, 2001, 2002, 2003. No complaints from family. Continued use of Hubert Hansen and his story in 2005, 2006, 2007, 2008, 2009.

Hubert's label Ex. 2229 – 2012. Launched in 2010. Updated in 2012. No complaints until 2015. Has a different Hubert Hansen story from the 2224 exhibits.

Reasons for Coca-Cola/Monster deal.

Cross at 3:10 p.m. His first understanding of the existence of the right of publicity was in 2015. Nobody mentioned the right of publicity to me when the agreements were signed. Relied on the broad language of the agreements. In 2000, bargain for the right of publicity? DNR. Robert Black/Blue Sky transaction? 8K signed by him. Ex. 2230. Has language specifically referring to rights of publicity.

Ex. 2195. In 2014, Coke agreement specifically references right of publicity. Hubert's was launched in 2010. Acknowledges he could only buy what Co-Packers had to sell. More questions about labels.

15th witness (second defense witness) was Jonathan Rose. A grandson of Hubert. Mildred was his mother. She died in 2012. Maureen Todd is a cousin. Does not know if his mother granted Maureen Todd permission to use Hubert's name.

16th witness: Elizabeth Peckenpaugh. Granddaughter; Richard was her father. Never worked at Hansen's. Knew Maureen stated a juice company – Hub's Family. DNR Maureen ever asking her for permission. Did not recall giving Maureen permission. Maureen did not approach her but Jeanne did – errata sheet so reflects.

Mary Jane Thomsen. 17th witness. Granddaughter of Hubert; Richard was her father. Knew Maureen started a juice company. Maureen did not ask her permission personally, but Jeanne did.

18th witness was Susan Schott. Another granddaughter/daughter of Richard. Did not associate HUB's with her grandfather. Maureen never asked her for permission. Her sister did.

19th witness: Jennifer Rothman. Law professor at Loyola since 2007. Teaches a course on the right of publicity and other IP courses. Also taught at Washington Univ. in St. Louis. "The leading expert on the law of publicity." Book published last year traces the right of publicity. She thinks it is the definitive work. Has a right of publicity website. Top legal books of 2018. Numerous law reviews. Cited by courts. Previous expert work – 2x. *Amicus* briefs. Written testimony to legislature. MFA, JD. Member of California Bar. Law clerk. Associate in litigation dept. of Irell & Manella. 2003-2005. Negotiated contracts at Paramount.

Critical of Greene. 1992: would not expect to see "right of publicity." Not at the forefront of people's minds. Broad language was enough. People were not clear until 2007 whether right was retroactive. Original statute 1984. 2007 amendment clarified this. Before this, many people thought it was not retroactive. Courts had found it not retroactive. Not finished by end of session.

Phase one of the trial resumed Monday, November 25. Professor Rothman resumed her testimony. 2007 amendment added explicit retroactivity. Bankruptcy order (Ex. 2184) transferred right of publicity "if it was held there." Was considered intellectual property. Ex. 165 – Asset Purchase Agreement. "If the right of publicity was held by the company," it was transferred. Ex. 2186 Hansen's Trust agreement. 1999 agreement "would not be on the radar of sophisticated attorney." Monster 2015 filing – can have more than one valid registration. "If it is a license." If it was vested to the company it would stay with the company. Cross: 9:30. Not a probate lawyer. Film industry before law school. Law school grad: 2002. Holding of *Milton Greene* case: "not clear whether retroactive." Other cases.

The 20th witness, at 9:51a.m., was Tom Kelly. Ex. VP of Monster. CPA since 1984. Worked at Hansen Foods 1985-bankruptcy. Was controller there until Oct. 1988. Bankruptcy filed in first 10 days of Nov. 1988. Went to Co-Packers as controller 1990-June 1992. Then Hansen Beverage Co. Still there (name change). Ex. 288. Brochure was expensive diversion. To give to potential customers and bankers, potential acquirers. Cross at 10:08. 10-Ks filed with SEC.

Defense rested. Plaintiffs' rebuttal case started at 10:43. 21st witness was Hilton Schlosberg, called under Evid. Code section 776. His background in M&A work in South Africa and London, 1976-1985. Came to US in 1995. Acquisition of Unipac. Knew the concept of the right of publicity at the time of Calif. Co-Packers deal in 1992. Attorney Benjamin Polk. Now director of Monster. Ex. 2234 is a 10-K from 2001. Winston & Strawn. Specific reference to right of publicity. Zip codes. Outreach to Tim Hansen regarding right of publicity. Blue Sky transaction. WIC program. Blair Owens. Wanted to start a lemonade brand. Obvious "Hubert" came from Hubert Hansen. "Retains" kept until end of shelf life. Steve Clark - keeper of labels. Ex. 2241. Herbert vs. Hubert Hansen label. Friendly cross at 11:24.

Deposition of Steve Clark read. 22^d witness. Regarding labels. Closet containing binders with labels.

Tim Hansen was recalled to the stand. Retains. Proofs. Sold concentrate to Hansen Beverage.

Evidence concluded just before noon on November 25.

5. Discussion and Rulings.

A. The Court's Questions to Counsel.

When evidence concluded on November 25, the court gave the parties specific guidance on questions it wanted them to address in their closing briefs. ROA 968. The court asked the parties for a dispassionate, linear "connecting of the dots," and refreshingly, both sides more or less delivered (obviously from different perspectives).*** The questions the court asked, and the court's resolution of those questions, are as follows:

1. *What percentage, if any, of Hubert Hansen's right of publicity did Hansen Foods Inc. own between 1977-1984? Is there a California case recognizing a common law right of publicity prior to 1/1/85?* The parties are in rare agreement that *Eastwood v. Superior Court*, 149 Cal. App. 3d 409, 417 (1983), and *Lugosi v. Universal Pictures*, 25 Cal. 3d 813, 821-22 (1969), recognized a common law right to publicity prior to enactment of former Civil Code section 990. The court concludes that the evidence preponderates in favor of a finding that Hansen Foods, Inc. did not own any portion of the Hubert Hansen right of publicity between the date Timothy Hansen founded the company in 1977 and the end of 1984. The evidence preponderates in favor of a finding that during this timeframe, ownership of the Hubert Hansen right of publicity resided in Florence, Mildred, Richard, Thomas, Vincent and Eugene until Eugene's death in 1979, and in Florence, Mildred, Richard, Thomas, Vincent and Ms. Krikorian thereafter.
2. *What effect, if any, did the 1984 passage and 1/1/85 effective date of Civil Code § 990 have on the ownership percentage of Hubert Hansen's right of publicity? In other words, did the effective date of the statute result in any change in the ownership of Hubert Hansen's right of publicity from that which existed prior to the effective date of the statute?* The court concludes that the evidence preponderates in favor of a finding that as of January 2, 1985, ownership of the Hubert Hansen right of publicity resided in Florence, Mildred, Richard, Thomas, Vincent and Ms. Krikorian. Enactment of the statute did not change ownership of the rights, as the legislative enactments merely complemented the common law. See *Eastwood, supra*, 149 Cal. App. 3d at 416.
3. *What day in November 1988 did Hansen Foods Inc. file for bankruptcy?* Within the first ten days of November, and probably November 9. In any event, prior to Florence Hansen's passing on December 6, 1988.
4. *Did any percentage of Hubert Hansen's right of publicity become property of the Hansen Foods, Inc. bankruptcy estate? If so, what percentage?* The court concludes that no portion of the Hubert Hansen right of publicity became property of the Hansen Foods, Inc. bankruptcy estate. There is no evidence that Hansen Foods, Inc. owned any rights to the Hubert Hansen right of publicity prior to the bankruptcy filing. Hansen Juices, Inc. licensed to Hansen Foods, Inc. the right to use the name "Hansen" in the "name of its companies and on any of its products" in exchange for a license fee. Ex. 290, pages 2-3. Notably absent from the "Subject Names" listed in Ex. 290 are the names "Hubert Hansen" and "Hubert's." The right of publicity is not mentioned, and it clearly had been recognized under California law by November, 1988. Although Ex. 290 does not contain explicit provisions regarding events of default, Timothy Hansen testified that he defaulted and thereby lost the license. Defendants offered no contrary

evidence. Timothy Hansen also testified there was never a right of publicity license. He testified he got a verbal authorization from his father and uncles to use Hubert Hansen's names, that this was limited to a couple of brochures (Exs. 288-289), and that it was limited to him personally. Timothy Hansen did not enter bankruptcy; only Hansen Foods, Inc. did. The court finds the evidence preponderates in favor of a finding that Hansen Foods Inc. did not own this limited verbal permission at the time it entered bankruptcy.

5. *What percentage of Hubert Hansen's right of publicity did Hansen's Juices, Inc. own when Hansen Foods Inc. entered bankruptcy?* Although there is some evidence to the contrary, the evidence preponderates in favor of a finding that Hansen's Juices, Inc. did not own any part of the Hubert Hansen right of publicity on November 9, 1988. Rather, those rights were held, until December 6, 1988, by Florence, Mildred, Richard, Thomas, Patricia, and Ms. Krikorian.
6. *What effect, if any, did the amendment to Civil Code § 990 effective July 1, 1988, have on ownership of Hubert Hansen's right of publicity?* Again, the parties are in rare agreement: None.
7. *What effect did Florence Hansen's passing on 12/6/88 have on:*
 - a) *the ownership of Hubert Hansen's right of publicity;*
 - b) *any ownership interest held by the bankruptcy estate of Hansen Foods Inc.*

The evidence preponderates as follows: After she died on December 6, 1988, and until the Probate Court made its decision regarding her estate, the Hubert Hansen rights of publicity were held by the Estate of Florence, Mildred, Richard, Thomas, Patricia, and Ms. Krikorian. After July 25, 1989, per Ex. 1252 the Hubert Hansen right of publicity was owned by Mildred, Richard, Thomas, Patricia and Ms. Krikorian. Florence's passing had no effect on the bankruptcy estate, as it never had an interest in the Hubert Hansen right of publicity.

8. *Is there a California case holding that "intangible personal property" and "other general intangibles" as used in Ex. 2184 includes statutory rights of publicity?* The parties seem to agree there is no California case with a direct holding to this effect. In any event, inasmuch as the Hubert Hansen right of publicity never became an asset of the Hansen Foods bankruptcy estate, that right could not have passed to California Co-Packers as an intangible pursuant to Ex. 2184.
9. *As of July 7, 1989 (the day after Ex. 2184), what percentage of Hubert Hansen's right of publicity did California Co-Packers own?* None.
10. *What percentage of the ownership of Hubert Hansen's right of publicity were transferred to Hansen Beverage Company on June 8, 1992 (Ex. 165)?* None. California Co-Packers did not receive the Hubert Hansen right of publicity out of the bankruptcy, as the right never was a part of the bankruptcy estate to begin with. Thus, Co-Packers could not have transferred that right to the newly formed Hansen Beverage Company. Rather, in June of 1992, the Hubert Hansen right of publicity was owned by Mildred, Richard, Thomas, Patricia and Ms. Krikorian.

11. *What is the significance of the absence of "Hubert's" in paragraph I(g)(1) on page 2 of Ex. 165?* It is additional evidence that the parties did not intend any transfer of the Hubert Hansen right of publicity. The court will add that, based on the court's independent research and the absence of any citation in defendants' closing brief, the "DNA of a business" does not appear to be a concept recognized in California law (either in the 1989-1999 timeframe or presently).
12. *Is there a California case holding that "good will" as used in ¶ I(j) of Ex. 165 includes the right of publicity?* No. The rule is to the contrary. The good will of a business is the expectation of continued public patronage, but it does not include a right to use the name of any person from whom it was acquired. *Mahlstedt v. Fugit*, 79 Cal. App. 2d 562, 567, 180 P.2d 777, 780 (1947); B&P Code section 14101.

Defendants have conflated the good will of a business with the "good will" enjoyed by a celebrity. In explaining why the enforcement of the right of publicity would not violate the First Amendment, the Supreme Court has stated: "[T]he rationale for [protecting the right of publicity] is the straightforward one of preventing unjust enrichment by the theft of good will. No social purpose is served by having the defendant get free some aspect of the plaintiff that would have market value and for which he would normally pay." *Comedy III Prods., Inc. v. Gary Saderup, Inc.* (2001) 25 Cal. 4th 387, 401, quoting *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 576, 97 S. Ct. 2849, 2857, 53 L. Ed. 2d 965 (1977). But two years later, the High Court made clear (at least to this court) that it was not using "good will" in the sense it is used in B&P Code section 14101:

"Such commercial use of an individual's identity is intended to increase the value or sales of the product by fusing the celebrity's identity with the product and thereby siphoning some of the publicity value or good will in the celebrity's persona into the product. This use is premised, in part, on public recognition and association with that person's name or likeness, or an ability to create such recognition. The commercial value of a particular person's identity thus primarily depends on that person's public visibility and the characteristics for which he or she is known."

Lugosi v. Universal Pictures (1979) 25 Cal. 3d 813, 834 (emphasis added).

Again, inasmuch as Co-Packers did not own the Hubert Hansen right of publicity, it could not transfer same to Hansen Beverage Company in Ex. 165 or otherwise.

13. *As of July 26, 1992, what percentage ownership did Hansen Juices Inc. hold in Hubert Hansen's right of publicity? Does any document in evidence reflect this?* Although there is some evidence to the contrary, the evidence preponderates in favor of a finding that Hansen's Juices, Inc. did not own any part of the Hubert Hansen right of publicity on July 26, 1992. Rather, those rights were held, as of that date, by Mildred, Richard, Thomas, Patricia and Ms. Krikorian.
14. *As of the first iteration of Ex. 2186 on July 27, 1992, what percentage of the ownership of Hubert Hansen's right of publicity did the Hansen's Trust own?* Zero. The trust could only receive what the trustors contributed to it. Ex. 2186 is notable for the absence of a reference to the Hubert Hansen right of publicity, fully seven years after the effective date of former

Civil Code section 990. And it is crystal clear all parties knew who Hubert Hansen was and what he had done to begin the enterprise.

15. *Did the 1996 amendment to Ex. 2186 change the percentage of ownership of the Hubert Hansen's right of publicity? If so, in what manner?* No.
16. *What is the impact, if any, of the 1996 and 1998 deaths of Richard and Robert as to ownership of Hubert Hansen's right of publicity?* After 1998, ownership of the Hubert Hansen right of publicity was as follows: Mildred, Kathleen, Jeanne, Mary Jane, Elizabeth, Susan, Hansen Family Trust, Patricia and Ms. Krikorian.
17. *As of September 23, 1999 (the day after Ex. 168 and Exs. 2227 and 2228), what percentage of ownership of Hubert Hansen's right of publicity did Hansen Beverage Company own?* Zero. Ex. 168 is bereft of any reference to the Hubert Hansen right of publicity. This subject is discussed further *infra*.
18. *What is the significance of the absence of "Hubert" from Ex. 2227 and 2228?* It is additional evidence that the parties did not intend any transfer of the Hubert Hansen right of publicity.
19. *Do defendants contend that Exs. 168 and 2227-2228 resulted in them owning a larger percentage of Hubert Hansen's right of publicity than they owned via the Hansen's Trust?* They do. But as discussed herein, the court disagrees and finds that the evidence preponderates in favor of a finding that they hold no ownership interest in, or license to, the Hubert Hansen right of publicity.
20. *What impact, if any, did the 1999 amendments to Civil Code § 3344.1 have on ownership of Hubert Hansen's right of publicity?* No impact to this phase of the case.
21. *Do defendants claim they are the exclusive holder of the Hubert Hansen's right of publicity? If not, describe what rights are claimed.* Defendants claim to "have 100% of the right to use Hubert Hansen's name and story in connection with fresh juices, pasteurized juices, and sodas (and any beverage expansions)." Defendants disclaim other ownership rights, although this nuanced position seems to come as a surprise to plaintiffs.
22. *What impact, if any, do the 2007 and 2009 amendments to Civil Code § 3344.1 have on ownership of the right of publicity?* The 2009 amendment has no impact on this case. The 2007 amendments merely clarified existing law, and did not change it. The 2007 amendments are discussed more fully *infra*.
23. *Do defendants claim that the extent of their ownership of the Hubert Hansen rights of publicity grew or expanded between 1999 and 2010? If so, how?* Defendants do not so contend, according to their closing brief at 25:26. They do, however, take plaintiffs to task for failing to object to their use of Hubert Hansen's "name and story" for "nearly 20 years." Cl. Br. at 6-7. They wish the court to draw the inference that the absence of a complaint by plaintiffs is the same as an acknowledgment that their claim of right is just. The problem with this, of course, is that exactly the opposite inference is permissible from the fact defendants never registered their asserted rights until after receiving plaintiffs' cease and desist letters, Exs. 1297-1330. It is noteworthy that the entire first paragraph of section 4a

on page 11 of defendants' closing brief is bereft of any citation to any sort of authority. In any event, to the extent defendants were seeking to establish plaintiffs' waiver of the right to claim ownership of the Hubert Hansen right of publicity, defendants did not, at least in this phase of the trial, meet the clear and convincing standard required in the law summarized in part 2F above.

B. Declaratory Relief Granted as to Count 2 of the SAC.

At the time of trial, the rights recognized in section 3344.1 "shall be deemed to have existed at the time of death of any deceased personality who died prior to January 1, 1985, and, except as provided in subdivision (o), shall vest in the persons entitled to these property rights under the testamentary instrument of the deceased personality effective as of the date of his or her death. In the absence of an express transfer in a testamentary instrument of the deceased personality's rights in his or her name, voice, signature, photograph, or likeness, a provision in the testamentary instrument that provides for the disposition of the residue of the deceased personality's assets shall be effective to transfer the rights recognized under this section in accordance with the terms of that provision."

Although defendants now dispute whether Hubert Hansen is a "deceased personality,"**** there is no dispute he died in 1951. Thus, the first question the court must confront in this phase of the trial is: in whom did the rights vest upon Hubert Hansen's death? As the court has already noted, the evidence preponderates in favor of a finding that the Hubert Hansen rights of publicity became the property of Florence, Mildred, Richard, Thomas, Vincent and Eugene upon Hubert's passing in June of 1951. These rights never became the property of Hansen's Juices Inc., and never became the property of the company started by Timothy Hansen in 1977 (Hansen Foods, Inc.).

Having resolved the disposition of Hubert Hansen's personality rights following his death, the court now turns to what happened after the death of the last survivor of his issue.

The evidence preponderates in favor of a finding that Hubert Hansen's publicity rights did not become an asset of either Hansen's Juices, Inc. or Hansen Foods. The fact that there were sporadic uses of Hubert Hansen's likeness and name and history by the two entities over the history of the two companies did not, in the court's view, create a property interest in Hubert Hansen's right of publicity. Use within the family (or even within enterprises bearing the family name), with express or tacit permission, did not, in the court's view, transmute the publicity right into property of the companies. The owners of the companies were not all the same people who had the ownership rights to Hubert Hansen's right of publicity; only the owners of the rights could transfer or license them. Timothy Hansen testified the permissions he received were personal to him.

Mr. Sacks testified he looked into and was attracted the Hansen "history and what it stood for." This should have clued him into the need to make sure that anyone with a stake in that history was relinquishing the rights they held. In other words, from 1992 through 1999, as the rights to the Hansen's mark were being acquired, he and Mr. Schlosberg had the opportunity to approach

the heirs of Hubert Hansen to acquire the right of publicity. The court concludes that the evidence preponderates in favor of a finding that they did not do so.

The expert testimony was not in conflict on this key point: neither of the experts identified a single provision in any of the documents whereby defendants claim they acquired ownership of Hubert Hansen's rights of publicity where those documents explicitly say "rights of publicity." While the experts differ on whether this *lacuna* was at or below the standard of care, that is relevant, the court believes, only to a theoretical (and likely long since time-barred) professional negligence claim against Mr. Polk (and not to the question of whether defendants acquired the rights).

Professor Rothman (who did not practice law during the time period she was opining on, having not finished law school until 2002) testified that she would not expect to see the right of publicity expressly referenced in the 1989-1999 documents because the law was not clear until 2007 whether the right of publicity was retroactive. The court reaches the opposite conclusion. A fact finder is not required to accept an expert's opinion. As with any other witness, it is up to the fact finder to decide whether to accept the expert's testimony and choose whether to use it as a basis for decision. CACI 219.

While it may be true the courts had not yet explicitly adopted a rule of retroactivity, retroactivity (and many other uncertainties with the new statutory scheme) were the subject of robust debate even before the timeframe of the 1989-1999 documents defendants rely upon. The enactment of section 990 was accompanied by extensive academic discussion: Rubin, *Right of Publicity Survives in California: Cal. Civ. Code Section 990*, 12 W. St. U. L. Rev. 299 (1984); Williams, *The Right of Publicity: You Can't Take It with You*, 12 Pepp. L. Rev. 999 (1984); Karlen, *Descendible Publicity Rights: California's Grateful Dead*, 8 Comm/Ent L.J. 111 (1985).

Each of these articles discussed the uncertainties to a greater or lesser extent, and it is precisely this uncertainty, and any uncertainty created in later years by differing court decisions, that should have clued the drafters of the contracts now relied upon by defendants to explicitly include "rights of publicity" *if that had been the intention of the parties*. The job of the drafter is to take into account these sorts of uncertainties. A skilled drafter in 1989-1999 would have resolved the uncertainty and eliminated all doubt by including the language "rights of publicity" *if that had been the intention of the parties*. This is borne out by documents drafted for defendants very close in time to the 1999 Assignment and Agreement (Exs. 168/2227/2228). Exhibit 2230, the 8-K from 2000, has explicit reference to "rights of publicity and privacy." So does Ex. 2234, the 10-K from 2001.

Moreover, the *Crosby* court made crystal clear that the 2007 amendments merely clarified existing law, and did not change it:

Section 3344.1, as Originally Enacted, Applied to Celebrities Who Died Prior to January 1, 1985.

The parties dispute whether the 2008 amendment modified the law, thereby creating a new right, or merely clarified it to emphasize the Legislature's original intent. The trial court concluded that, prior to the 2008 amendment, section 3344.1 did not allow celebrities who died before its enactment to "exercise the right of publicity." The trial court reached this conclusion based solely on the 2008 amendment's provision that it was "retroactive" and without analyzing the pre-2008 version of the statute. In fact, prior to the 2008 amendment, section 3344.1 provided that it applied to "any such natural person who has died within 70 years prior to January 1, 1985." (Former § 3344.1, subd.

(h.) Even the California and New York federal district courts, which held that the Legislature could not have intended to authorize celebrities who died before the enactment of the statute to transfer a subsequently created right, concluded that, as to those celebrities, the right still vested in their heirs. By contrast, here, the trial court appears to have ignored the statute's application to "any such natural person who has died within 70 years prior to January 1, 1985."

The provision of section 3344.1 and its legislative history show that the 2008 amendment did not create a new right in predeceased celebrities to transfer the right of publicity by will, but only clarified the statute's original intent. "The fundamental task of statutory construction is to 'ascertain the intent of the lawmakers so as to effectuate the purpose of the law. [Citations.] In order to determine this intent, we begin by examining the language of the statute.' [Citation.]" (*People v. Cruz* (1996) 13 Cal.4th 764, 774–775, 55 Cal.Rptr.2d 117, 919 P.2d 731.) However, even if the plain meaning of a statute is clear, a court may still inquire whether the "literal meaning of [the] statute comports with its purpose." (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 729, 248 Cal.Rptr. 115, 755 P.2d 299.) Consideration of the circumstances surrounding the amendment of a statute "can indicate that the Legislature made material changes in statutory language in an effort only to clarify a statute's true meaning." (*Western Security Bank v. Superior Court* (1997) 15 Cal.4th 232, 243, 62 Cal.Rptr.2d 243, 933 P.2d 507.) "One such circumstance is when the Legislature promptly reacts to the emergence of a novel question of statutory interpretation: 'An amendment which in effect construes and clarifies a prior statute must be accepted as the legislative declaration of the meaning of the original act, where the amendment was adopted soon after the controversy arose concerning the proper interpretation of the statute....' [Citation.] [Citation.]" (*Ibid.*) "Even so, a legislative declaration of an existing statute's meaning is neither binding nor conclusive in construing the statute. Ultimately, the interpretation of a statute is an exercise of the judicial power the Constitution assigns to the courts. [Citations.]" (*Id.* at p. 244, 62 Cal.Rptr.2d 243, 933 P.2d 507.)

The plain language of section 3344.1 indicates that it always applied to celebrities who had died prior to the enactment of the statute: it always recognized a "deceased personality's" right to control the commercial usage of his "name, voice, signature, photograph, or likeness," and defined a "deceased personality" as any person who died within 50 or 70 years prior to January 1, 1985. Although the amendment added a provision that "expressly" made the rights "recognized by this section" retroactive to "includ[e] ... those deceased personalities who died before January 1, 1985," the plain meaning of this phrase read in light of the entire statute (including the statute's stated application to celebrities who died prior to 1985), could only be interpreted to mean that such rights were previously *implicitly* "retroactive." (§ 3344.1, subd. (p).) In addition, the original version of the statute provided that the right of publicity was "freely transferable ... by contract or by means of trust or testamentary documents" without distinguishing between celebrities who had died within 70 years prior to 1985 or afterwards. In addition, the Legislature explicitly stated that it was *clarifying* section 3344.1 by the 2008 amendment. The legislative history provides that the purpose of the amendment was not to "change ... existing law, but, rather ... [to] clarify] it in order to prevent needless litigation."

Crosby v. HLC Properties, Ltd., 223 Cal. App. 4th 597, 607–08 (2014). Under familiar precepts of *stare decisis*, this court is obligated to follow *Crosby*. See *Auto Equity Sales v. Superior Court*, 57 Cal. 2d 450, 455 (1962). Defendants' statement that the 2007 amendment "abrogated" existing law (Cl. Br. at 25:18) is clearly incorrect.

Plaintiffs established, through testimony and documentary evidence, how ownership of the Hubert Hansen right of publicity passed through inheritance and testamentary documents to Hubert's widow, children, and grandchildren. Exhibit A to plaintiffs' closing brief helpfully charts this progression. In 2015, the named plaintiffs got together and retained Mr. Drasco to draft Hubert Hansen Trust and to facilitate transfers from the then-owners of the Hubert Hansen right of publicity to the Trust. Mr. Drasco's testimony was credible. The end result of his efforts was that 90% of the ownership interests in the Hubert Hansen right of publicity were transferred to the 2015 Trust as of April of 2015. (The remaining 10% is owned by Ms. Krikorian.) 90% is certainly more than the "one half interest in the rights" contemplated by section 3344.1(d). Although the consideration for these transfers was nominal, a peppercorn is sufficient

(particularly when the rights being transferred were already known to be hotly disputed by entities with significant resources).

Defendants produced a helpful chart of their own. Exhibit B to their closing brief summarizes their contentions. But because the court finds the evidence preponderates in favor of a finding that neither Hansen Foods nor Hansen's Juices ever owned the Hubert Hansen right of publicity, the court rejects defendants' conclusions. The court finds all of the documents used by defendants to support their claim of ownership of the Hubert Hansen right of publicity to be unambiguous: none of them transferred the right of publicity to defendants.

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In light of the foregoing, the prevailing parties on phase one of the trial are plaintiffs. The court declares that the owners of the Hubert Hansen rights of publicity are the 2015 Hubert Hansen Intellectual Property Trust reflected in Ex. 1241 (as to an undivided 90%), and Guadalupe Krikorian as to an undivided 10%. These persons, and not defendants, own and control all rights of publicity related to Hubert Hansen. The Successor in Interest Registration filed June 5, 2015 (Ex. 295) is valid. The Successor in Interest Registration filed by Monster on April 8, 2015 (Ex. 1300) is void *ab initio*, invalid, unenforceable, and of no legal effect.

The court stresses the narrow scope of this declaration of rights. The court makes no finding and no decision on any of the following:

1. Whether Hubert Hansen was a natural person whose name or likeness had commercial value at the time of his death;
2. Whether defendants' use of Hubert Hansen's right of publicity was directly connected to defendants' commercial purpose;
3. Whether plaintiffs were harmed;
4. Whether defendants' conduct was a substantial factor in causing plaintiffs' harm; or
5. Whether plaintiffs suffered any damages, and if so, how much.

The latter element may be the most important: Hubert Hansen's right of publicity may be worth the one dollar each of the heirs was paid for her/his assignment to the Trust in 2015. It may be worth more. This will be up to the jury. The court is only finding and declaring that whatever it is worth, the right belongs to the plaintiff Trust and Ms. Krikorian as aforesaid.

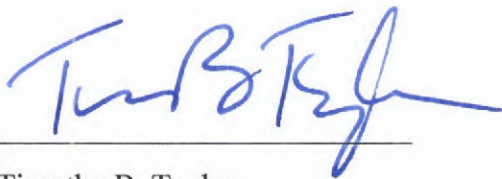
The clerk is ordered forthwith to provide copies of this tentative decision to both sides. Plaintiff's counsel must forthwith present the court with a form of interlocutory judgment consistent with the foregoing.

The "402" hearing contemplated by the court's MIL ruling with respect to plaintiffs' expert witness Faber will take place December 30, 2019 at 9:00 a.m. Faber is ordered to appear.

Examination will be by defendants first, then plaintiffs. Trial call is confirmed for 8:30 a.m. on January 3, 2020. Jury selection for phase 2 will begin January 6, 2020. Proceeding in this fashion will avoid juror and witness concern regarding holiday plans, and will also allow the parties to plan their schedules and allow defendants to seek writ relief if desired regarding the foregoing ruling. This will also allow the parties to discuss settlement, although this seems unlikely. In the meanwhile, the parties are ordered to meet in person for purposes of revising the form of special verdict and the jury instructions for phase 2 in a manner consistent with the foregoing, and to redouble their efforts to prepare a joint statement of the case to be read to the prospective jurors.

December 10, 2019

IT IS SO ORDERED.



Timothy B. Taylor

Judge of the Superior Court

*The indiscriminate use of the phrase “cause of action” to mean “count” is discussed in section 25 of the Witkin treatise on Pleading (Cal. Procedure, 4th Ed. at p. 87). It is also discussed at pp. 394-395 of the Supreme Court’s opinion in *Baral v. Schnitt*, 1 Cal.5th 376 (2016).

** The court’s use of first names of persons who share or shared a surname or family name is not intended to be disrespectful, but is a device adopted by the courts of appeal for clarity. See *Marriage of Smith*, 225 Cal.App.3d 469, 475-76 (1990).

***At last, both sides provided the court with timelines and chronologies – something the court would have expected at the outset.

****This is true notwithstanding Ex. 1300, wherein defendants stated under oath he was.

Appendix A

(Trial Ex. 2229)

16oz Label

CENTER OF FRONT SIDE

2"

CENTER OF BACK SIDE

3.1496"



4.0625"

4.0625"



22025 Hubert's 2013 Label Update 032714



Court's Ex. 2229
 Case # 2016-21046
 Rec'd. 11/21/19
 Dept. 72 Clk. B.O.