United States District Court, C.D. California.

Warner Bros. INC., Successor in Interest to Warner Bros. Pictures, Inc.,

Plaintiff,

v.

CURTIS MANAGEMENT GROUP, INC., an Indiana Corporation, Curtis Licensing Corp., an Indiana Corporation, Curtis Publishing Co., a Pennsylvania Corporation, the James Dean Foundation Trust, an Indiana Trust, Mark Roesler an Individual and Greg Thomas an Individual, Defendants.

No. CV 91-4016-WMB.

March 31, 1993.

Arter Hadden Lawler Felix & Hall, Stephen W. Tropp, Mark S. Lee, Cara R. Burns, Los Angeles, CA, for plaintiff.
Dean T. Barnhard, Klineman Rose Wolf & Wallack, Indianapolis, IN, William E. Wegner, Scott A. Edelman, Vivienne A. Vella, Gibson Dunn & Crutcher, Los Angeles, CA, for defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

BYRNE, District Judge.
*1 The above action was tried before the Hon. Wm. Matthew Byrne, Jr. The Court now issues the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

A. The Parties.
1. Plaintiff is Warner Bros. Inc. ("WB"), a Delaware corporation with its principal place of business in Burbank, California. WB is the successor in interest to Warner Bros. Pictures, Inc.
2. Defendants are the James Dean Foundation Trust, a for-profit trust formed under the laws of Indiana by the relatives of James Dean (the "Foundation"), Curtis Management Group, Inc., an Indiana corporation with its principal place of business in Indianapolis, Indiana, Curtis Publishing Co., Inc., a Pennsylvania corporation with its principal place of business in Indianapolis, Indiana, Curtis Licensing, formerly a division of Curtis Publishing Co., Mark Roesler, the President of Curtis Management Group, Inc., and Greg Thomas, a former officer of Curtis Licensing Corporation (collectively "Defendants").
B. The Lawsuit.
3. In 1954, the actor James Dean signed a standard form employment agreement ("1954 Employment Agreement") with WB pursuant to which he starred in three motion pictures, "East of Eden," "Rebel Without A Cause" and "Giant." WB brought this action claiming that, pursuant to the 1954 Employment Agreement, WB acquired sole and exclusive ownership of Dean's "right of publicity," under Section 990 of the California Civil Code. WB also brought a claim for alleged violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), asserting that the acts of Defendants in exploiting Dean's rights of publicity constituted fraudulent acts of racketeering against WB, the alleged true owner of Dean's rights of publicity. WB's third cause of action is for declaratory relief, and seeks a declaration regarding the rights and duties of the parties with respect to Dean's rights of publicity. In particular, WB seeks a declaration that the rights of publicity in James Dean as set forth in Section 990 of the Civil Code of the State of California do not belong to the Foundation, but instead are the exclusive property of WB, and that Defendants be required to account for all revenues they have received from licensing James Dean's name and likeness, and for an order directing reconveyance of same, to WB. Defendants, on the other hand, contend that the 1954 Employment Agreement terminated at James Dean's death in September of 1955, and that his descendible rights of publicity passed to his sole living lineal heir, his father, Winton Dean. Defendants contend that WB has no right--much less an exclusive right--to merchandise Dean's name and likeness.
4. Pursuant to the Federal Rules of Civil Procedure 42(b), the Court severed the question of what rights of publicity, if any, WB obtained under Civil Code Section 990 from James Dean under the 1954 Employment Agreement, and ordered that issue to be tried first. The Court stayed all discovery

relating to WB's RICO claims and Defendants' defenses to the Complaint pending a determination whether the 1954 Employment Agreement gave WB the right to sell merchandise based on or using Dean's name and likeness. Both sides waived their right to a jury trial for this phase of the lawsuit.
C. Issues Stipulated As Not In Dispute.
*2 5. Pursuant to the Court's request, the parties presented a joint statement of the specific issues to be tried, and those not in dispute.
6. WB stated that it does not claim rights:
a. In any photograph of James Dean, or likeness derived therefrom, taken before April 7, 1954 (the date of the 1954 Employment Agreement);
b. In any photograph likeness of James Dean, or likeness derived therefrom, taken after September 30, 1955 (the date of Dean's death and termination of the 1954 Employment Agreement);
c. To use James Dean's name apart from his photograph or likeness derived therefrom except in advertising and promoting through any media any or all of the three WB motion pictures in which James Dean appeared ("East of Eden", "Rebel Without A Cause" or "Giant");
d. To use James Dean's name, photograph and/or likeness derived therefrom in advertising tie-ups or commercial tie-ups;
e. To non-photographic likenesses of James Dean which are not specifically derived from photographs of James Dean which were taken by WB or under its direction during the term of 1954 Employment Agreement; or
f. In recordings of James Dean's voice which were not recorded by or at the direction of WB or which were recorded prior to April 7, 1954 or subsequent to September 30, 1955 (the date of Dean's death).
7. Defendants stated that they do not dispute WB's rights to:
a. Exhibit and/or distribute the three motion pictures as such in which James Dean appeared pursuant to his 1954 Employment Agreement;
b. Sell and/or license the sale of the three motion pictures as such in which James Dean appeared pursuant to his 1954 Employment Agreement or reproductions of those motion pictures as such (i.e. videocassettes);
c. Use the name and photographs of James Dean taken by WB during the term of the 1954 Employment Agreement to advertise the motion pictures as such, i.e., to reasonably inform the public where and when they might:
(i) observe the motion pictures; or
(ii) purchase the motion pictures as such or reproductions (such as videocassettes) of the motion picture as such;
d. Sell and/or license the sale of phonograph records (of any type, on any medium and made by any method) or the soundtracks or any portions of the soundtracks from the three motion pictures in which James Dean appeared;
e. Use the name of James Dean to identify him as appearing in the motion pictures, as such, or any reproductions of the motion pictures as such (such as videocassettes); or
f. Obtain copyrights to the motion pictures produced pursuant to the 1954 Employment Agreement or to photographs taken by WB during the term of the Agreement (although this issue is not relevant to the lawsuit).
D. Issues In Dispute.
8. Each side presented the issues it believes are disputed and need to be resolved by the Court. WB presented the following five issues. Whether:
a. The 1954 Employment Agreement granted WB the exclusive and perpetual right with respect to each photograph of James Dean taken by WB or under its direction, during the term of the 1954 Employment Agreement and any likeness specifically derived therefrom to utilize each such photograph or likeness on or in any item of merchandise manufactured, licensed and/or sold;
*3 b. To advertise and promote any or all of the three WB motion pictures in which James Dean appeared, WB has the exclusive and perpetual right with respect to each photograph of James Dean taken by WB, or under its direction during the term of the 1954 Employment Agreement and any likeness specifically derived therefrom to utilize each such photograph or likeness on or in any item of merchandise manufactured, licensed and/or sold, subject to the condition that any such item shall include the name or names of such motion picture(s);
c. The 1954 Employment Agreement granted WB the exclusive and perpetual right to exploit in any manner the voice of James Dean recorded by or at the direction of WB during the term of the 1954 Employment Agreement;
d. With respect to a, b, and c above, WB has the right to use the name of James Dean to identify any such photograph, likeness or voice; and

e. With respect to a and b above, WB's rights extend to such photographs and not to likenesses which were specifically derived therefrom.
9. Defendants presented one issue for this Court to decide:
a. Whether WB acquired from James Dean under his 1954 Employment Agreement any perpetual rights to James Dean's name, likeness, or voice (his right of publicity) for any purpose other than the exhibition, sale, or advertisement of the motion pictures as such, and sale of phonograph records.
10. For all the reasons set forth below, the Court answers all the issues posed by the parties in the negative, and finds for the Defendants on all issues. The Court's findings are based on the language of the 1954 Employment Agreement itself, the extrinsic evidence offered by the parties, including the documentary evidence and testimony of witnesses.
E. The Language Of The 1954 Employment Agreement.
11. Paragraph 2 of the 1954 Employment Agreement describes the purpose of the 1954 Employment Agreement as an acting contract for motion pictures. Specifically, in paragraph 2 "the Artist agrees to act, pose, sing, speak, or otherwise appear and perform as an actor in such roles and in such photoplays and other productions or assignments as Producer may designate." Ex. 6, ?2. The Artist further agrees in paragraph 2 "that if and when requested by the Producer so to do, he will report at Producer's studio, or at any other place Producer may designate, to participate in discussions or in tests or for wardrobe fittings, publicity interviews, publicity photograph sittings, and for such other purposes as the Producer may deem necessary or desirable." Id.
12. In paragraph 3, the term of the contract is defined to expire "sixty-one (61) days after the date when the Artist has completed all services required by Producer...."
13. Paragraph 5 defines "motion picture" to include "motion pictures and trailers thereof" exhibited or transmitted through a wide variety of media. Any use herein of the term "motion picture" or "motion pictures" in connection with the 1954 Employment Agreement incorporates paragraph 5's definition of "motion picture."
4 14. In paragraph 6(A) of the 1954 Employment Agreement, on which WB relies to support its claims, Dean gave to WB the right to photograph his "acts, poses, plays and appearances of any all kinds, and to produce and reproduce the same or any part of them by photography, printing, and all other methods, and to distribute and exploit the same in motion picture films, or otherwise...." Ex. 6, ?6 (emphasis added) (the three paragraphs of paragraph 6 are referred to as paragraphs 6(A), 6(B) and 6(C), respectively). WB asserts that the "or otherwise" language conveys merchandising rights. Paragraph 6(A) also authorizes WB "to distribute [Dean's] photograph in connection with advertising matter, or otherwise, as the Producer may deem necessary." However, nowhere in paragraph 6 (much less the entire 1954 Employment Agreement) are merchandising rights discussed. The subject matter of paragraph 6(A) is WB's right to exploit Dean's acts, poses, plays and appearances (his motion pictures as such), and to advertise them. Paragraph 6(A)'s reference to "motion picture films" incorporates paragraph 5's definition of "motion picture."
15. Paragraph 6(B) covers phonographic records, and gives WB the right to make sound tracks of the motion pictures in which Dean appears, and to distribute, sell, or license others to, make, reproduce, or distribute such records in connection with the advertising matter, "or otherwise." Despite the use of the phrase "or otherwise," paragraph 6(B) explicitly grants to WB the right to sell phonographic records separate from the motion pictures. There is no explicit grant of such a right with respect to merchandising.
16. In contrast to paragraph 6(A), whose subject matter is motion pictures, paragraph 8 specifically addresses the limited grant by James Dean to WB of his right to use his name and likeness other than in connection with his motion pictures. In paragraph 8, Dean granted to WB during the term of the contract the right "to use or make use of and control his name"; and "to use and/or distribute his pictures, photographs or other reproductions of his physical likeness for advertising, commercial or publicity purposes...." Ex. 6, ?8 (emphasis added). Unlike the rights conferred in paragraph 6(A), these rights could be exploited "whether or not in connection with the acts, poses, plays and appearances of the Artist or the advertisement or publicity of the photoplay produced hereunder." WB's right to exploit these rights in "advertising tie-ups" could extend two years beyond the term of the 1954 Employment Agreement, and "thereafter [Dean] shall be privileged to enter into such agreements or transactions with reference to the use of his name and likeness as he may deem proper."
F. Extrinsic Evidence Regarding The Parties Intent.
1. The Actions Of Dean's Heirs And WB After Execution Of The 1954 Employment Agreement.
17. Starting in 1955, the James Dean Memorial Foundation, an entity founded by James Dean's family, took actions to exploit or protect their purported rights to license, manufacture and sell merchandise bearing James Dean's name and likeness. See, e.g., Exs. 542, 564, 731, 809. In

contrast, there is no evidence that WB asserted the expansive rights to merchandise Dean's name and license which it now believes it has.
*5 18. WB was aware that the James Dean Memorial Foundation was actively licensing James Dean's rights of publicity. See, e.g., Exs. 556, 560, 564, 565, 567, 568, 787, and 809. There is no evidence that WB made any kind of protest or claim against the Foundation for doing so. See, e.g., Ex. 830, WB's Supplemental Responses to Defendant Thomas's First Set of Interrogatories, Nos. 4 and 5. To the contrary, WB, through its acquiescence and subsequent cooperation with the Foundation, recognized that the Dean family and Foundation had those merchandising rights and that WB did not. See, e.g., Exs. 560, 565, 567, 568.
19. In numerous instances, WB acknowledged to third parties, to the James Dean family and internally that it does not have the right to merchandise or use in any manner Dean's name, likeness or voice after his death. See, e.g., Exs. 718, 720, 787, 788, 789, 790, 791, 793, 798, 803, 808, and 839. WB's internal summaries of the 1954 Employment Agreement do not mention merchandising rights. See, e.g., Exs. 511, 512. Correspondence between Dean and WB after execution of the 1954 Employment Agreement shows that, far from acting as a powerless young actor willing to cede all rights to his employer, Dean vigorously guarded his rights. See Ex. 514.
2. Kupferman's Testimony As To The Intent Of The Parties.
20. As evidence of an intent on the part of either Dean or WB to convey or obtain merchandising rights, WB offered the testimony of Justice Theodore Kupferman, who represented James Dean as his lawyer in his negotiations with WB concerning the 1954 Employment Agreement. Justice Kupferman testified that he never spoke with Dean about the terms of the 1954 Employment Agreement, but instead dealt with Dean's agent, Jane Deacy. Justice Kupferman testified that he and Deacy did not discuss the terms of the 1954 Employment Agreement presently at issue.
21. Justice Kupferman worked for WB for approximately nine years prior to representing Dean, as a junior member of WB's legal staff. WB attempted to offer Justice Kupferman as a person who had at the time of negotiation based on his experience at WB, an understanding of WB's intent of the 1954 Employment Agreement. Justice Kupferman testified in support of WB's position that the phrase "or otherwise" should be read very broadly to convey all rights. The Court, however, gives little weight to the testimony of Justice Kupferman because he has no personal knowledge of WB's intent with respect to the disputed provisions of the 1954 Employment Agreement.
22. Justice Kupferman stated that the contract was ineptly drafted, and conceded that he never had any discussions with any members of WB's staff concerning what WB intended by the "or otherwise" language of paragraph (6)(A). In fact, Justice Kupferman's testimony was based solely on his present day reading of the 1954 Employment Agreement and his belief that WB wanted all the rights it could obtain. In addition, Justice Kupferman did not draft the contracts he worked with while at WB, but instead only negotiated minor provisions (such as the starting dates of actors and actresses) and "filled in the blanks."
3. WB's Identical Contracts With Other Performers.
*6 23. As early as 1937, WB had form contracts containing language identical, or nearly identical, to paragraphs 6 and 8 of Dean's 1954 Employment Agreement. See Exs. 774, 781. However, WB did not develop a practice of exploiting actors' names and likenesses apart from promoting motion pictures until the 1950's, and it did not start a merchandising department until 1958.
24. WB has construed other form employment contracts containing language either identical or very similar to that at issue in the 1954 Employment Agreement as restricting it from using the performer's name and likeness for merchandising or other commercial purposes. See e.g. Exs. 577-583, 586, 590, 595, 654, 655, 667, 668, 687, 770, 7i8th 73, 777, 778, 780.
4. WB Had Contracts With Actors In The Same Time Period Which Had Specific Merchandising Provisions.
25. In contrast to James Dean's 1954 Employment Agreement, which contained no express merchandising provision, WB did enter into employment agreements during that time period with other actors which, in addition to containing paragraphs dealing with the actors' "acts, poses, plays and appearances" (the subject matter of paragraph 6(A) of Dean's 1954 Employment Agreement) and name and likeness (the subject matter of paragraph 8), also had specific provisions relating to merchandising. See Exhibits 837, 838 and 844.
5. Other Studios Also Used Contracts With Specific Merchandising Provisions.
26. Defendants introduced into evidence a 1936 contract between Hal Roach Studios and "Spanky" McFarland. See Ex. 503. Unlike the 1954 Employment Agreement at issue here, it contained a specific merchandising clause in addition to the standard provision relating to "acts, poses, plays and appearances" and "name and likeness."

6. The Testimony Of Photographers Sid Avery And Frank Worth.
27. To save time, the parties submitted portions of the depositions of photographers Sid Avery and Frank Worth rather than present their live testimony. That testimony shows that it was general studio practice in the 1950's to invite or permit both free-lance photographers and photographers employed by magazines on the sets and locations where a given motion picture was being photographed. The studios understood that these photographers had or would in turn sell their photographs to the many motion picture fan magazines then in vogue. WB followed this practice and photographer Frank Worth took many photographs of James Dean on the sets and locations of "Rebel Without A Cause" and "Giant." Photographer Sid Avery likewise took photographs of James Dean on the sets and locations of "Rebel Without A Cause" and "Giant." At no time did WB impose any controls or restrictions on these photographers' or the magazines' uses of their photographs of James Dean nor did it assert any proprietary or possessory interest in those photographs, or in the photographs and souvenirs of Dean advertised for sale in fan magazines. See, e.g., Ex. 600, at 38-39; Ex. 601 at 24-27, Ex. 617, at 20- 22, 62, 64, 66, 69-70; Ex. 619 at 39-41, 95, 110, 117; & Ex. 640, at 56 & 63.
7. Expert Testimony Regarding The Custom And Practice Regarding the Conveyance Of Merchandising Rights In The 1950's.
7 28. Both sides provided expert testimony regarding the means by which merchandising rights were typically conveyed in the 1950's. WB called Leon Kaplan, a prominent entertainment lawyer who previously served for a substantial period of time as WB's outside counsel. Although Mr. Kaplan contradicted himself on whether WB's alleged merchandising rights were dependent on the "or otherwise" language, he eventually concluded that they were. Mr. Kaplan testified that the "or otherwise" language was intended to secure a broad conveyance of all rights. He conceded, however, that he was "surprised" and found it "odd" that there was no specific language regarding merchandising, and admitted that he would have drafted the contract differently. He also testified that his reading of paragraph 6(A), as a broad conveyance of all merchandising rights in perpetuity, would render paragraph 8 surplusage. Mr. Kaplan testified that "acts, poses, plays and appearances" (the subject matter of paragraph 6) and "likeness" (the subject matter of paragraph 8) are the same, a conclusion the Ninth Circuit rejected long ago in the cases of Autry v. Republic Productions, Inc., 213 F.2d 667, 668-669 (9th Cir.), cert. denied, 348 U.S. 858 (1954), and Republic Pictures Corp. v. Rogers, 213 F.2d 662 (9th Cir.), cert. denied, 348 U.S. 858 (1954). Although Mr. Kaplan testified that paragraph 6(A) was the equivalent of a standard "results and proceeds" clause that, according to Kaplan, would entitle WB to all revenue, including merchandising, his own handwritten notes showed that he initially did not view paragraph 6 as a "results and proceeds" clause. See Exhibit 835. The Court finds Mr. Kaplan's testimony to be less credible than that of Defendants' experts.
29. Defendants offered the expert testimony of Rudy Petersdorf and Milton Pickman. Mr. Petersdorf is a veteran television and motion picture lawyer, having worked at Universal Studios, WB, and Desilu Productions. He worked extensively with the form employment agreements used in the movie industry, including those used in the 1950s. Mr. Pickman, though he has also worked for studios, spent over thirty-five years representing motion picture actors and actresses as an agent. Both testified that it was the custom and practice in the 1950's that when merchandising rights were conveyed (which was far less frequently than today, because merchandising was not then a significant source of revenue), such rights were conveyed pursuant to specific, separate contractual provisions. Both testified that paragraph 6(A) did not address merchandising rights at all, and would not, based on the custom and practice in the industry, have conveyed such rights. According to industry custom and practice in the 1950's, paragraph 6(A) of the 1954 Employment Agreement granted to WB the right to produce, exhibit, and advertise Dean's motion pictures. Paragraph 8 granted WB the right to use Dean's name and likeness during the term of the contracts, whether or not in relation to a specific motion picture, for "advertising, commercial and publicity" purposes and to use his name and likeness for advertising tie-ups for a limited time thereafter. However, neither paragraph 6 nor paragraph 8 granted WB the perpetual right to manufacture and sell, or license the sale of, merchandise bearing Dean's name and likeness.
8. 1952 Screen Actor's Guild Collective Bargaining Agreement
8 30. Defendants presented the expert testimony of Chester Migden regarding the effect of the Codified Basic Agreement of 1952 (hereinafter "CBA") (Exhibit 764) between WB and the Screen Actors Guild ("SAG"). Mr. Migden served for over thirty years at SAG. He participated in the negotiation of several collective bargaining agreements between producers and SAG and eventually became the Chief Executive Officer of SAG. The 1954 Employment Agreement makes reference to the CBA at paragraph 33. Ex. 6, ?33. Section 10 of the CBA provides that its terms are to govern all employment contracts between signatory producers (including WB) and guild members. There is no

dispute that WB was a signatory to the CBA, or that Dean was a member of SAG. Section 10 of the CBA states that "The provision of this agreement ... shall be deemed incorporated in all contracts of employment now in effect or hereafter entered into in which such provisions are applicable." CBA, Ex. 764, ?10; see also Id., ?7.
31. Without reaching the issue of Defendants' ability to enforce the CBA, the Court finds that the CBA provides extrinsic support for Defendants' contention that the parties did not intend the 1954 Employment Agreement to convey merchandising rights. Mr. Migden testified that WB's interpretation of paragraph 6(A) of the 1954 Employment Agreement is inconsistent with the industry's understanding of the CBA's requirements.
32. Because James Dean was employed for a specific picture, "East of Eden," in a designated role, Cal, he must be considered a "free-lance player" and Schedule B of the Collective Bargaining Agreement governs the 1954 Employment Agreement for that engagement. See CBA, Ex. 764, Schedule B at 23. When Dean was hired for the role of Jim Stark in "Rebel Without A Cause," he remained a Schedule B player. Id. With respect to James Dean's role as Jett Rink in "Giant," Schedule C applies. Id., Schedule C at 35. Although WB took the position prior to trial that Dean was a Schedule F player, at trial its witnesses conceded that Dean was a free-lance player governed by Schedules B and C.
33. Paragraph 41 of Schedule B, entitled "Rights Granted to Producer," provides that the Producer's rights to exploit a player's "acts, poses, plays and appearances" and to use and give publicity to the player's "name and likeness" only in connection with the "photoplay" (motion picture) of the Producer. Id., Schedule B at 31. This provision is also found in Schedule C at paragraph 30. Id., Schedule C at 41. WB has acknowledged that, under the applicable provisions of the CBA, it could not sell merchandise based on the name and likeness of free-lance players (such as Dean), and that its rights were limited to advertising and exploiting the picture. See, e.g., Ex. 793.
34. WB obtained no waiver from SAG of the terms of the CBA schedules in connection with the 1954 Employment Agreement. See Response to Interrogatory No. 16, Ex. 823, at 11.
35. Any Conclusion of Law deemed to be a Finding of Fact is hereby incorporated into these Findings of Fact.

CONCLUSIONS OF LAW

9 1. Any Finding of Fact deemed to be a Conclusion of Law is hereby incorporated into these Conclusions of Law.
2. This Court has jurisdiction over WB's action under 18 U.S.C. ?1964, 28 U.S.C. Ë 1331 and 1332 and the principles of pendent jurisdiction in that there is both federal question and diversity jurisdiction herein.
Read As A Whole, The 1954 Employment Agreement Shows That James Dean Retained His Right Of Publicity.
3. It is a basic tenet of contract construction that a contract is to be interpreted as a whole, giving effect to each of its provisions. Cal.Civ.Code ?1641. See Republic Pictures Corp. v. Rogers, 213 F.2d 662, 665 (9th Cir.), cert. denied, 348 U.S. 858 (1954). Similarly, a court must interpret a contract to avoid internal conflict. See Trident Center v. Connecticut General Life Ins. Co., 847 F.2d 564, 566 (9th Cir.1988).
4. The 1954 Employment Agreement, read as a whole, grants WB the right to produce, reproduce, exhibit, sell and advertise the motion pictures made under the 1954 Employment Agreement and to continue "advertising tie-ups" beyond the termination of said Agreement for a reasonable period of time not to exceed two years. Other than the above rights, the 1954 Employment Agreement granted WB no additional right to exploit Dean's name and likeness. Ex. 6, □ 2, 3, 8 and 26A.
5. In particular, paragraph 8 allowed WB to control publicity concerning Dean during the term of the contract. After a two-year period during which "advertising tie-ups" previously arranged by WB were permitted to continue, Dean would be privileged to enter into any agreement or transactions with reference to his name and likeness as he deemed proper. Ex. 6, ?8.
6. Paragraph 6(A) of the 1954 Employment Agreement does not refer to generalized exploitation of Dean's name and likeness (his right of publicity), but only to his activities and appearances in WB's motion pictures as such. Ex. 6, ?6(A). The words "or otherwise" merely give WB the right to transmit or exhibit Dean's "acts, poses, plays and appearances" (the motion pictures as such) in any media other than motion picture films. They do not expand "acts, poses, plays and appearances" to encompass Dean's name and likeness outside the context of the photoplay. Paragraph 6(B) of the 1954 Employment Agreement, relating to phonograph records, shows that when WB wished to obtain a specific right to sell an item separate from the motion picture, it used very specific language to obtain

that right.
7. Defendants' reading of paragraph 6(A) of the 1954 Employment Agreement is further supported under the doctrine of ejusdem generis. Under that doctrine, where general words follow the enumeration of particular classes of persons or things, the general words will be construed as applicable only to persons or things of the same general nature or class as those enumerated. See Lawrence v. Walzer & Gabrielson, 207 Cal.App.3d 1501, 256 Cal.Rptr. 6 (1989), review denied, (Cal.1989). Here, the "or otherwise" language is preceded by references to motion picture films and acts, poses, plays and appearances. In addition, the term motion picture is defined in paragraph 5 of the 1954 Employment Agreement, and that definition is incorporated by reference into paragraph 6, thus providing an extensive enumeration of the different media in which the acts, poses, plays and appearances could be exploited. To construe the phrase "or otherwise" as WB urges would render these particular things surplusage. See also Harris v. Capital Growth Investors XIV, 52 Cal.3d 1142, 1160, 278 Cal.Rptr. 614 (1991).
B. WB's Reliance On Paragraph Six Of The 1954 Employment Agreement Fails Under Well Accepted
***10** 8. A court must interpret a contract to avoid internal conflict. Trident Center, supra, 847 F.2d 564, 566 (9th Cir.1988). WB's own expert conceded that his reading of paragraph 6(A) would render the grant of rights in the first sentence of paragraph 8 surplusage. That the "or otherwise" language of paragraph 6(A) does nothing more than grant WB the right to use its photographs of Dean's acts, poses, plays and appearances in motion pictures, or other media (such as television), is seen through a reading of the entire 1954 Employment Agreement. This interpretation is not only consistent with paragraph 8 but with the remainder of paragraph 6, which states WB shall have the right "to the name of the Artist in connection with motion pictures produced hereunder...." It is also consistent with the use of that same term "or otherwise" in paragraph 26A. Ex. 6, ?26(A)(1) ("such a program shall be deemed a live television program hereunder and provided however that any recording of any live television hereunder on film or otherwise, may be used only for the following purposes....")
9. In addition, when a general and a particular provision are inconsistent, the specific provisions control. Cal.Code of Civ.Proc. ?1859. See also Rest.2d, Contracts, ?203(c) ("specific terms and exact terms are given greater weight than general language"). Thus, even if there were an inconsistency, paragraph 8 would control because it specifically deals with WB's rights to exploit Dean's name and likeness apart from exploitation of the motion pictures, whereas the "or otherwise" language of paragraph 6 is vague and general.
10. Furthermore, because the 1954 Employment Agreement was drafted by WB and is a form contract, any uncertainty must be interpreted against WB. Cal.Civ.Code ?1954.
"Acts, Poses, Plays and Appearances" Are Not The Same Thing As "Name And Likeness."
11. The Ninth Circuit has recognized that "acts, poses, plays and appearances" (the subject matter of paragraph 6) are not the same thing as "name and likeness" (the subject matter of paragraph 8). See Autry v. Republic Productions, Inc., 213 F.2d 667, 668-669 (9th Cir.), cert. denied, 348 U.S. 858 (1954); Republic Pictures Corp. v. Rogers, 213 F.2d 662 (9th Cir.) (applying California law), cert. denied, 348 U.S. 858 (1954). The former phrase "refers to the artist's activities or appearances in a motion picture as such; the latter [phrase] refers to a reproduction of the name, voice or likeness of the artist apart from his activities ... in [a] motion picture." Autry, 213 F.2d at 668-69. Accord Rogers, 213 F.2d at 665- 66; Price v. Hal Roach Studios, Inc., 400 F.Supp. 836, 840 (S.D.N.Y.1975). WB's interpretation of paragraphs 6(A) and 8 of the 1954 Employment Agreement ignores this important distinction.
12. For these reasons, the Court concludes that paragraph 6(A) gave WB rights only to produce, reproduce, exhibit, advertise, and sell the motion pictures made pursuant to its contract with Dean. WB has no rights to Dean's name and likeness which survived the term of the 1954 Employment Agreement except those embodied in the motion pictures themselves, and then only for the purposes of reproduction, exhibition, advertising and sale of the motion pictures as such.
E. The Overwhelming Weight Of Extrinsic Evidence Confirms That WB Did Not Acquire Any Exclusive And Perpetual Right To Exploit Dean's Name And Likeness.
***11** 13. The extrinsic evidence offered by WB is not probative or persuasive and the overwhelming weight of extrinsic evidence offered by the Defendants confirms that Dean did not convey to WB the right to his name and likeness in perpetuity.
1. Evidence Of Custom And Usage Demonstrates That WB Did Not Acquire The Rights It Seeks In This Litigation.
14. Under California law, if the words of a contract are used by the parties to a contract in a special meaning given to them by custom and usage, evidence is admissible that they were so used and understood in the particular instance, and the special meaning must be followed. Cal.Civ.Code ?1644.

Accord Cal.Civ.Code Ë 1645 & 1646, 1655 & 1656; Cal.Code of Civ.Proc. ?1861.
15. This Court concludes that the custom and usage evidence offered by Defendants at trial establishes that the 1954 Employment Agreement does not grant WB ownership of James Dean's rights of publicity, including the right to exploit Dean's photographs, other than in connection with reproduction, advertising, exhibition, and sale of the motion pictures in which Dean performed.
2. Defendants' Course of Performance Evidence Also Establishes That WB Did Not Acquire The Rights It Seeks In This Litigation.
16. Acts of the parties, subsequent to the execution of the contract and before any controversy has arisen as to its effect, may be used in determining the meaning of the contract. Crestview Cemetery Assoc. v. Dieden, 54 Cal.2d 744, 775, 8 Cal.Rptr. 427 (1960).
17. Here, WB's subsequent actions were not consistent with the grant of rights from James Dean, which it claims in this litigation. Indeed, the evidence proffered by Defendants as to WB's performance under the 1954 Employment Agreement demonstrates that WB, throughout the years, took positive and deliberate action in confirming to the James Dean family, the James Dean Memorial Foundation and to third parties and internally, that it does not own the rights it now claims to own. In addition, the evidence shows that WB consistently acquiesced in Defendants' licensing of James Dean's name and likeness. To the extent any of this evidence does not qualify as actual "course of performance," it nonetheless is relevant to show the parties' intent, and some of it constitutes admissions by WB that it does not have the rights it asserts in this litigation.
3. WB Has Provided No Direct Evidence Of Either Party's Intent Regarding The 1954 Employment Agreement.
18. Although WB has offered the testimony of Justice Theodore Kupferman as dispositive "direct" evidence of the parties' intent with respect to the 1954 Employment Agreement, Kupferman has no knowledge of either party's intent as to the provisions at issue, and Kupferman's "knowledge" offered by WB with regard to WB's intent cannot, as a matter of law, be imputed to Dean. See, e.g., Blanton v. Womancare, Inc., 38 Cal.3d 396, 212 Cal.Rptr. 151 (1985); Winet v. Price, 4 Cal.App.4th 1159, 6 Cal.Rptr.2d 554 (1992).
4. Defendants' Evidence Of Related Contracts Also Establishes That WB Did Not Acquire The Rights It Seeks In This Litigation.
12 19. Evidence of a parties' actions under identical provisions in other contracts is relevant to aid in the interpretation of a contract because it shows course of conduct. See Whittaker Corp. v. Execuair Corp., 736 F.2d 1341, 1347 (9th Cir.1984); Cibro Petroleum Prods., Inc. v. Sohio Alaska Petroleum Co., 602 F.Supp. 1520, 1551 (N.D.N.Y.1985), aff'd, 798 F.2d 1421, cert. dismissed, 479 U.S. 979 (1986); Boral v. Caldwell, 223 Cal.App.2d 157, 165, 35 Cal.Rptr. 689 (1963).
20. The evidence offered by Defendants at trial as to WB's understanding of the scope of its rights under similar agreements with other performers also proves that WB found itself bound by the time restrictions on its use of its performers' "names and likenesses," ignored the words "or otherwise" as they related to "acts, poses, plays and appearances," and instructed its licensees accordingly.
5. WB's Contracts With Other Performers In 1954 And 1955, Which Contained Specific Merchandising Provisions, Is Persuasive Evidence That The 1954 Employment Agreement Did Not Convey Merchandising Rights.
21. Evidence introduced at trial shows that WB entered into contracts with other performers during the time period at issue in this lawsuit which contained specific merchandising provisions. Defendants also introduced into evidence a contract from other studios dating as far back as 1936, which showed that even then specific merchandising provisions were employed to obtain merchandising rights. These contracts provide persuasive evidence that if WB had intended to obtain merchandising rights from James Dean in the 1954 Employment Agreement, it would have included a specific provision to that effect. As discussed below, WB's arguments regarding the disappearance of the "or otherwise" language in the contracts of other performers does not rebut this evidence.
6. The 1952 Screen Actors Guild Collective Bargaining Agreement Supports Defendants' Position And Is Consistent With WB's Position Concerning The Intent Of The Parties To The 1954 Employment Agreement.
22. The Collective Bargaining Agreement further supports the proposition that the parties to the 1954 Employment Agreement intended that Dean retain the right to his name and likeness apart from WB's right to reproduce, advertise, exhibit, and sell the motion pictures. In particular, paragraph 41 of Schedule B and paragraph 30 of Schedule C (those being the schedules applicable to Dean's work under the 1954 Employment Agreement) plainly state that WB's right to exploit Dean's "name and likeness" was permitted only in connection with the "photoplay" (motion pictures) produced by WB. CBA, Schedule B at 31 & Schedule C at 41. The Court concludes that the parties to the 1954

Employment Agreement intended that WB's rights to exploit Dean's name and license be limited to producing, reproducing, advertising, exhibiting, and selling the motion pictures in which he acted.
F. WB's Evidence Regarding Other Performers Does Not Support Its Claims.
*13 23. WB introduced into evidence its contracts with other performers, such as Ronald Reagan (Exs. 7-9), and Humphrey Bogart (Exs. 14-15). In an attempt to show that, as actors developed greater bargaining power, they were able to renegotiate their contracts to eliminate the "or otherwise" language found in paragraph 6(A) of Dean's 1954 Employment Agreement.
24. However, WB offered no evidence whatsoever regarding the significance of this change. Moreover, WB's conduct does not support its contentions regarding the meaning of the words "or otherwise." For example, during the term of Bogart's 1942 contract with WB, which contained exactly the same language as paragraph 6 of the 1954 Employment Agreement, including the words "or otherwise," WB concluded:
While we have the right to use the name and/or physical likeness of Bogart and Bacall in a commercial tie-up, we must keep in mind that we have the obligation ... To advertise and exploit a motion picture in which they appear, and in this use I understand it to be "THE BIG SLEEP...."
Ex. 778 (emphasis added). Accordingly, WB refused to grant Loew's, Inc. permission to use Bogart's name in an unrelated motion picture because "we are limited and restricted to the use of his physical likeness and name to only motion pictures in which he appears and not otherwise." Ex. 777 (emphasis added); see also Ex. 774 (letter from WB's Obringer to Paramount declining Paramount's request to use name of Humphrey Bogart in motion picture because "under the terms of our contract with Bogart we are restricted in the use of his name and/or physical likeness to photoplays in which he renders his services").
25. A rider to the paragraph of the Bogart contract equivalent to paragraph 8 of the 1954 Employment Agreement clarified that the Producer retained for the term of the contract the right to use Bogart's name or likeness in "advertising tie-ups" advertising or exploiting a motion picture made under the contract. Despite WB's arguments to the contrary, however, that rider is not reasonably read as an explicit restriction on the rights granted pursuant to that paragraph equivalent to paragraph 6(A) of the 1954 Employment Agreement. The rider therefore does not undermine the relevance of the above referenced exhibits.
26. WB offered evidence of its negotiations with Ronald Reagan to show that Reagan's agent understood "or otherwise" to relate to merchandising rights. (See Exs. 10-12.) However, WB's reliance on evidence concerning its contractual relations with performers other than Dean is misplaced. For example, WB's negotiations with Ronald Reagan's agent in 1944 did not address merchandising or the effect of the words "or otherwise," but instead WB's right to separately sell phonograph records. See Exs. 10-12. No reference is made to "acts, poses, plays and appearances," or to the words "or otherwise." Likewise, WB's responses and the agent's follow-up address only "the distribution of records" and WB's rights "to dispose of phonograph records for commercial use." Exs. 11, 12 (emphasis added).
*14 27. As further support for its argument that it intended to acquire merchandising rights from Dean, WB also asserts that it entered into a license agreement involving the use of a likeness of Natalie Wood, James Dean's co-star in "Rebel Without A Cause," on paper dolls and authorized the making of postcards featuring Henry Fonda. However, this evidence is of little assistance to WB.
28. As to Natalie Wood, WB granted the license in question only with Wood's and her mother's express written consent. Thus, WB's action does not constitute evidence that it believed itself the sole owner of the right to use Wood's name and likeness. Moreover, WB authorized, not the use of Wood's image on paper dolls, but the use of her name and likeness on "display cards to be placed in supermarkets ... [and in] bakery trade papers, point of sale pieces, salesman's portfolios and other promotional materials," each of which was required to include a "credit reference" reading: "Everybody loves NATALIE WOOD in 'REBEL WITHOUT A CAUSE,' a Warner Bros. Production in CinemaScope and WarnerColor." Ex. 20. This transaction is an ordinary advertising "tie-up" to support WB's motion picture, and not a license to manufacture and merchandise "paper dolls" (or any product) in ways unrelated to promotion of any motion picture. Similarly, the arrangement to which WB's exhibit regarding Henry Fonda refers is another advertising tie-up, specifically requiring a reference to Fonda's employment as "a Warner Bros. star" or to a particular motion picture to be designated by WB, and Fonda's written consent was required and obtained. See Ex. 18. WB has offered no evidence concerning either Wood's or Fonda's contracts, so it is impossible to tell whether any analogy between those contracts and WB's contract with Dean can be drawn.
WB's Evidence Of Post-Execution Conduct Is Unpersuasive.
29. None of the documents on which WB relies as evidence of conduct consistent with the rights it

now claims have any persuasive bearing on those rights. In WB's Exhibit 19, for example, WB authorizes use of the names and likeness of three of the stars of "Rebel Without A Cause" in a book based on the movie, but only on express "condition that all advertisements in which the names and/or likeness of any of said persons are utilized shall state ... that the book "CHILDREN OF THE DARK" is based upon the Irving Shulman adaptation of the photoplay entitled 'REBEL WITHOUT A CAUSE.' " Ex. 19. Once again, the arrangement in question is an ordinary advertising "tie-up" for promotion of a WB film, and it occurred within the two-year period after expiration of the 1954 Employment Agreement during which such arrangements were permitted to continue under the undisputed terms of paragraph 8.

30. WB's Exhibit 23, a May, 1957 agreement under which it authorized HEAR magazine to release a recording of James Dean's voice, is not persuasive, because this permission also was granted within the two-year extension for tie- ups, and expressly required that HEAR "obtain all consents and authorizations ... from the estate of the said James Dean." Ex. 23.

***15** 31. WB's July, 1956 letter to United Artists (Ex. 21) and its October, 1956 letter to NBC (Ex. 22), both of which were sent well within the contractual two-year extension period, also have little probative value. Neither entity even proposed to merchandise Dean's name and likeness; each sought only to produce a special program based on Dean's life. WB's complaints focused on the fact that two of Dean's pictures were then in active release and the third, "Giant," was yet to be released. Moreover, WB expressly acknowledged Dean's family's rights, telling NBC:

We are sending a copy of this letter to the representatives of the estate of the same James Dean.... We are prepared to take such steps as are necessary to enforce our rights, and we feel certain that the estate of the said James Dean is prepared to do likewise.

Ex. 22.

32. The deposition testimony of photographers Sid Avery and Frank Worth, which the parties introduced into evidence, provides a more persuasive account of WB's post-execution conduct. WB's failure to assert control over the photographs of James Dean taken by those photographers is inconsistent with its assertion in this lawsuit to the exclusive right to all photographs of Dean taken during the term of his 1954 Employment Agreement.

Defendants Are Entitled To Judgment In Their Favor On All Causes Of Action In the Complaint.

33. WB's complaint seeks relief under California Civil Code section 990. Because the Court finds that WB did not obtain from James Dean under the 1954 Employment Agreement those rights it asserts in this litigation, WB's Section 990 claim (its Second Cause of Action) is resolved in favor of Defendants. Pursuant to section 990 of the California Civil Code, Defendants, as the prevailing party in phase one of this action, are entitled to their reasonable attorney's fees and costs incurred in this action. A separate order is being filed regarding the amount of attorneys' fees and costs being awarded.

34. Because WB does not have the contractual rights that it has asserted in this litigation, it does not have standing to pursue its RICO claim. 18 U.S.C. Section 1964(c) allows "[a]ny person injured in his business or property by reason of a violation of Section 1962" to file suit. The plaintiff must demonstrate that the prohibitive conduct was the proximate cause of "injury to his business or property." Brandenburg v. Seidel, 859 F.2d 1179, 1187 (4th Cir.1988); Sedima S.P.R.L. v. Imrex Co., Inc., 473 U.S. 479, 496, 105 S.Ct. 3275 (1985). Without reference to the other arguments Defendants have raised, WB has failed to state a RICO claim because it does not have a "business or property" interest in James Dean's posthumous rights of publicity which could be subject to injury.

35. With respect to WB's Third Cause of Action for Declaratory Relief, the Court finds and declares that James Dean did not, through the 1954 Employment Agreement, assign any of his descendable rights of publicity to WB and that the 1954 Employment Agreement granted WB no rights to James Dean's name or likeness beyond the right to produce, reproduce, exhibit, sell, or advertise the motion pictures made under the 1954 Employment Agreement and any rights which Defendants, in the Joint Statement of Disputed and Undisputed Facts filed with the Court, have explicitly conceded to WB. WB's request for any further findings is rendered moot by this Court's findings regarding WB's lack of any contractual rights, and WB's lack of standing.

C.D.Cal.,1993.

Warner Bros., Inc. v. Curtis Management Group, Inc.

END OF DOCUMENT