

The story ends on a melancholy note. After losing the woman he fell in love with at the roundup, Johnny Spain reverts to the 90-year-old man who is reminiscing about his youthful adventures, and confesses that his life went downhill after that first Pendleton roundup. Even after a roping accident that cost him one hand, “when I had to take what ranch work I could get, I never thought of myself as a cowboy.” He concludes: “I thought of myself, always, as a rodeo star, down on his luck a little but on the mend, on the road back to the top. Maybe you always think of yourself as what you were in that short high noon of fame, not what you are all the rest of the long twilight and dark.”

So Mr. Kesey might have added that as well as being a ripsnorter of a yarn, the history he retells so energetically has a surprising degree of wistful complexity.

Faye references the article in support of her statement that the Novel received positive press.

The article is being offered only to prove that the *New York Times* published a positive review of the Novel, not to prove that the statements made in the article were true. What was said in the article is not nearly as important as the fact that it was said. As such, the article is not hearsay and is admissible. The copies of the Novel and the *New York Times* article are the best evidence of the contents of those two writings. Accordingly, Faye’s summaries of the contents of these items violate the best evidence rule and are stricken.

Defendants move to strike the footnote included in paragraph 12 which reads that “[o]f course, after the commencement of this litigation in 2006, the Wilson Defendants entered into a settlement agreement with plaintiff Kesey LLC acknowledging that Plaintiff owns the copyright and all other rights in the Screenplay and Novel” and references the stipulated judgment docketed in this case on September 12, 2007, as docket entry #44. Defendants’ objection to the court taking judicial notice of Wilson’s statement that Plaintiff owns the copyright to the Screenplay has been addressed above.

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h. paragraph 13

Paragraph 13 provides:

Many years later, I learned that on or about March 24, 1994, during the dispute with the Wilson Defendants concerning the publication of the Novel, counsel for the Wilson Defendants prepared and filed a copyright certificate purporting to register the copyright in the Screenplay with the U.S. Copyright Office as a “work-for-hire” of S&F under Registration Certificate No. PAU 1-846-336. A true and correct copy of said Registration Certificate is filed herewith as Ex. “L.”

Defendants argue that the term “many years later” is too vague to be admissible and that it contradicts Faye’s deposition testimony that she had received letters discussing the copyright registration by 1994. These arguments are relevant to whether a genuine issue of material exists and will be considered by the court in conjunction with its review of the summary judgment motions.

i. paragraphs 18 and 19

Defendants object to paragraphs 18 and 19 of the Faye Declaration asserting that the correspondence offered and discussed in these paragraphs relate to settlement negotiations and is barred by Rule 408. These paragraphs provide:

18. On or about December 13, 2004, Mike Kratville, counsel for the S&F Defendants wrote a letter to, among others, Sterling Lord, the literary agent who had represented Ken and subsequently Kesey LLC, asserting that S&F owned and controlled all rights, including the copyright, in and to the Screenplay. A true and correct copy of this December 13, 2004 letter, which I learned of sometime subsequent to said date, is filed herewith as Ex. “T.”

19. On or about October 14, 2005, after investigating the claims made by the S&F Defendants in their letter of December 13, 2004, David Aronoff, counsel for Kesey LLC responded to the letter by pointing out that the S&F Defendants’ claim of copyright ownership in the Screenplay was legally deficient under the work-for-hire and statute of frauds provisions of the Copyright Act and such legal authorities. A true and correct copy of this October 14, 2005, letter is filed herewith as Ex. “U.”

Again, as discussed above, the court has found that, in the absence of the existence of a dispute or

an offer of valuable consideration to compromise a dispute prior to the October 14, 2005, letter, Rule 408 does not apply. Defendants' objections to these exhibits and statements are overruled.

j. paragraph 20

Defendants assert relevance and legal conclusion arguments in support of its motion to strike paragraph 20 of the Faye Declaration its entirety. This paragraph provides:

Because the parties were not able to resolve their dispute respecting ownership of the copyright in the Screenplay, after receiving an assignment from Irby Smith of his copyright interest as a co-author of the Screenplay on April 11, 2006 (see ¶ 4 and "B", supra), Plaintiff filed this action on April 21, 2006.

These arguments bear on the question of whether a genuine issue of material fact exists, and the court will consider them in its review of the summary judgment motions.

5. Babbs Declaration signed June 13, 2008

Defendants object to numerous statements contained in Babbs's declaration signed June 11, 2008 (the "Babbs Declaration"), primarily because they are based on hearsay statements of Kesey and lack the proper foundation. Defendants' objection to the term "research" in paragraph 2 as vague will be considered by the court in weighing the evidence while considering the substantive arguments in the summary judgment motions.

a. paragraph 3

Defendants describe paragraph 3 of the Babbs Declaration as "pure hearsay" and move to strike the paragraph in its entirety. Paragraph 3 provides:

I learned of the 1911 Round-Up well over 30 years ago, when the famous story was first told to me by Kesey. He recounted to me how during the 1911 Round-Up the final competition, or "last go round," was decided in a match up involving George Fletcher, a popular local black cowboy, Jackson Sundown, an American Indian cowboy, and a young white kid named Johnathan Spain. The victory was awarded to Spain, but the audience, inspired by Fletcher's amazing final ride,

spontaneously decided to take up a collection to buy Fletcher a silver saddle of the kind awarded to the victor.

To qualify as a hearsay statement, Plaintiff must have offered Kesey's description of the 1911 Round-Up to prove that the description is an accurate summary of the events of that Round-Up. In the context of the issues raised by the pending motions, Plaintiff is not concerned with whether the described summary is factually true, but only that Babbs learned of this version of events in the late 1970's when Kesey shared his story of the 1911 Round-Up. The fact that Spain won the competition or that the crowd took up a collection for Fletcher is not important to the issues before the court. Accordingly, the court finds that paragraph 3 is not offered for the truth of the matter asserted, is not hearsay, and is admissible. Defendants' objections to Paragraph 3 are overruled.

b. paragraph 4

Paragraph 4 provides:

In 1979, sometime after Kesey had told me the famous story of the 1911 "last go round," Kesey and I traveled to Pendleton, Oregon, to observe and research the 1979 Round-Up as the setting for a possible motion picture. While we were there, Kesey was interviewed by Pendleton's *East Oregonian* about his interest in writing a screenplay about the Round-Up, which resulted in two articles that were published in the September 15, 1979 issue of that newspaper, "Round-Up . . . Ken Kesey Has His Own Version" and Kesey Looking to R-Up for Script Inspiration." True and correct copies of these articles are filed herewith as "Ex. "A." The second of these two articles stated, among other things, that "The plot [of Kesey's screenplay concerning the Round-Up] could be drawn from [Kesey's] admiration of Jackson Sundown, the Nez Perce Indian who won the all-around title in 1916 at the age of 50" *Id.*

The only objection Defendants make to this paragraph is that it relates to Exhibit A, which they argue is double hearsay and should not be admitted into evidence. The court has already addressed this objection and rules accordingly. As previously determined, Exhibit A is admitted as an ancient document. To the extent Plaintiff is offering Kesey's statements in the exhibit to prove

that Kesey was interested in writing about the Pendleton Round-Up in the 1970's, Defendants' objections are sustained and the statements are inadmissible for this purpose.

c. paragraph 5

Defendants' objections to paragraph 5 of the Babbs Declaration are based on lack of foundation, hearsay, and legal relevancy. The legal relevancy objection will be taken into account when the court addresses the merits of the summary judgment motion. Paragraph 5 provides:

During the mid 1980's, Kesey, with assistance from Irby Smith, wrote a screenplay entitled "Last Go Round" ("the Screenplay") based on the historical events at the 1911 Pendleton Round-Up but it was not produced as a motion picture. A true and correct copy of the Screenplay is filed herewith as Ex. "C." As a result, during the early 1990's, Kesey and I decided to write the Novel, which [was] based on the Screenplay. Kesey told me that, because the Screenplay had never been produced, he hoped that the Novel could become the basis for a motion picture based on the 1911 Round-Up. It was at all times my understanding that Kesey owned the copyright in the Screenplay since, among other things, Kesey had written it, it bore the designation (c) Ken Kesey 1984 on its cover page, and Kesey exercised ownership rights over it by planning to create new works based on the Screenplay such as the Novel and a proposed motion picture.

Defendants object to Babbs's statement that Smith assisted Kesey in writing the Screenplay, arguing lack of foundation. The court agrees. Plaintiff has failed to establish that Babbs had personal knowledge of the facts surrounding the writing of the Screenplay. Any information Babbs obtained from third parties about who wrote the Screenplay would be hearsay and inadmissible. Defendants' objection to this statement is sustained.

Next, Defendants object to Babbs's reference to Exhibit C as a copy of the Screenplay. Defendants argue that Babbs "has no personal knowledge that the screenplay attached as Exhibit C was the exact document delivered to Defendants in September 1984." (Objections to Pl.'s Evidence in Supp. of Mot. for Summ. J. at 9). Babbs does not describe Exhibit C as the document delivered

to Defendants. He merely states that it is a copy of the Screenplay. Defendants' objections to this description of Exhibit C are overruled.

Defendants object to Babbs's description of the copyright designation on the cover page of Exhibit C based on lack of knowledge. Babbs has personal knowledge of what he saw on the front page of copy of the Screenplay that he read. Again, the fact that he lacks personal knowledge about what copy of the Screenplay was given to Defendants in September 1984 is not relevant as Babbs never states that Exhibit C was the copy provided to Defendants at that time. This objection is overruled as well.

Finally, Defendants assert a hearsay objection to Babbs's statement that Kesey told him he hoped the Novel could become the basis for a screenplay. Plaintiff does not make clear the purpose for which it offers this statement. If it is offered solely to establish that Kesey and Babbs talked about the possibility that the Novel might result in a movie, its is not hearsay and it is admissible. If it is being offered to prove that Kesey truly hoped that the Novel would become the basis for a movie, it is hearsay and must qualify for an exception to be admissible. The court finds that the more likely purpose for the statement is to show that Kesey discussed this issue with Babbs at a specific point in time. Defendants' objections are overruled and the statement is admitted for this limited purpose.

d. paragraph 6

Defendants only objection to Paragraph 6 is that Babbs's characterization of himself as co-author of the Novel is a legal conclusion. That paragraph provides:

In or about 1991, I began co-authoring the Novel with Kesey. The Novel was based on the Screenplay and it also carried the title "Last Go Round." The Novel told the same story as the Screenplay, recounting the same fictional account of the

famous competition for the first world championship broncbusting title at the 1911 Pendleton Round-Up, including the classic “last go round” between friends and competitors George Fletcher, Jackson Sundown, and Jonathan Spain. A true and correct copy of the Novel is lodged herewith as Ex. “G.”

This objection will be considered when the court addresses the merits of the parties motions for summary judgment.

e. paragraph 7

Paragraph 7 of the Babbs Declaration provides:

The [N]ovel was published in 1994, it was distributed and sold nation-wide across the United States (in fact, it is readily available on Amazon.com), and it received considerable positive public, press and media attention across the nation. For example, the *New York Times*, in its review of the Novel, published on July 7, 1994, stated that “Ken Kesey [in the Novel] takes a deep dive into American mythology” and observed that “as well as being a ripsnorter of a yarn, the history [Kesey] retells so energetically [in the Novel] has a surprising degree of wistful complexity.” A true and correct copy of this book review is filed herewith as Ex. “H.”

Defendants’ sole objection to this paragraph is that Exhibit H is hearsay and not legally relevant. The court has already addressed these arguments above. The article is not hearsay and is admitted. Babbs’s summary of the contents of the article violates the best evidence rule and is stricken.

f. paragraph 9

Defendants assert that the contents of Paragraph 9 are a legal conclusion and that the entirety of the paragraph should be stricken. Paragraph 9 provides:

I have been personal friends for almost 40 years with defendant Mike Hagen, and I see him dozens of times each year. It is my understanding that Hagen is or was the president of defendant Sundown & Fletcher Inc. (“S&F”), which in this litigation is claiming ownership of the copyright in and to the Screenplay. Notwithstanding these facts, and my co-authorship of the Novel, Hagen has never once expressed to me that the copyright in [the] Screenplay is owned by S&F or that the Novel infringes any rights held by S&F in the Screenplay.

As with all other legal conclusion objections, the court will take the objection into account in determining whether a genuine issue of material fact exists during its consideration of the parties motions for summary judgment.

This proffered evidence raises the same issues as Kesey's failure to object to Francis's statement that S&F owned the rights to the Screenplay. However, to the extent that this paragraph offers evidence of ownership by way of Hagen's silence about whether he owned an interest in the copyrights to the Screenplay or because he never asserted that the Novel infringed on that alleged ownership interest, the evidence is admissible because it is not hearsay. If Hagen's conduct – his silence in failing to assert an ownership interest or an infringement on that interest – was not intended as an assertion, it is not barred by the hearsay rule, which bars only that conduct intended to be an assertion. 4 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 378, at 55 (2d ed. 1994). Alternatively, if Hagen intended his silence as an assertion, then it is an admission by a party under FED. R. EVID. 801(a)(2)(A). In either case, Hagen's conduct is admissible evidence, the only questions remaining are whether it constitutes an admission or instead mere evidence to be considered on the ultimate issue.

Here, there is no information upon which to base the conclusion that Hagen intended any silence or failure to object as an assertion. Without that foundation, the proffered evidence cannot be considered an admission. However, if Hagen's conduct is not viewed as an assertion, it is not hearsay and can be considered as evidence offered on the ownership question. The relevance of this evidence will be considered when the court considers the merits of the pending motions.

6. Smith Declaration signed June 10, 2008

Defendants object to numerous statements contained in Smith's declaration signed June 10,

2008 (the “Smith Declaration”) primarily because they are based on hearsay statements of Kesey and lack the proper foundation.

a. paragraph 3

Defendants’ objections to paragraph 3 of the Smith Declaration mirror their objections to paragraph 3 of the Babbs Declaration – that Smith’s statement is based on hearsay statements from Kesey. Paragraph 3 provides:

In early 1984, because of my experience in the motion picture business, my friend Ken Kesey (“Kesey”) asked me to help him to author a screenplay entitled “Last Go Round” (“The Screenplay”) which was based on the real life historic events at the Pendleton, Oregon, Round-Up in 1911. In that year, the final competition, or “last go round” was decided in a match-up between George Fletcher, a popular local black cowboy, Sundown Jackson, an American Indian cowboy, and a young white kid named Jonathan Spain. Surprisingly, the victory was awarded to Spain, but the audience, inspired by Fletcher’s amazing final ride, spontaneously took up a collection to buy for Fletcher the silver saddle that had been awarded to Spain as the victor.

For the reasons discussed above, the court finds that paragraph 3 is not offered for the truth of the matter asserted; thus, is not hearsay and is admissible. Defendants’ objections to paragraph 3 of the Smith Declaration are overruled.

b. paragraph 4

Paragraph 4 of the Smith Declaration provides:

Kesey and I co-wrote the Screenplay, working side-by-side on Kesey’s computer at his home in Pleasant Hill, Oregon, during the first half of 1984. I wrote the Screenplay with Kesey for between one to two months, during which time we completed approximately one-half of the Screenplay and created virtually all of the essential elements of the work, including the plot, sequence of events, characters, mood, tone, setting and pace. At that point in time, I became busy with other motion picture projects so Kesey completed the Screenplay without me. A true and correct copy of the Screenplay is filed herewith as Ex. “C.”

Again, Defendants’ objections to this paragraph are similar to those asserted against various

statements in the Babbs Declaration – legal conclusion, relevance, and lack of foundation. The legal conclusion and relevance objections, which relate to Smith’s characterization of himself as co-author of the first draft of the Screenplay, are more appropriately handled by the court during its review of the merits of the summary judgment motions. Defendants’ assertion that Smith has no foundation to state that Exhibit C was what was delivered to Defendants as the second draft in September 1984 is overruled as Smith refers to Exhibit C as a copy of the Screenplay, not a copy of the Screenplay that was delivered to the Defendants in September 1984. Defendants’ lack of foundation objection to Paragraph 4 also is overruled and the paragraph is admitted as Smith would have personal knowledge of writing the Screenplay with Kesey.

c. paragraph 5

Defendants object to the contents of Paragraph 5 asserting several general grounds.

Paragraph 5 provides:

Kesey made arrangements for me to be paid \$3,000 in connection with my work on the Screenplay by a company known as Sundown & Fletcher Inc. (“S&F”), which I understood had been formed by Michele Francis (then known as Michele McMIndes) and Mike Hagen. It is my understanding that Kesey received \$10,000 from S&F. At no time were Kesey and I employees of S&F. Among other things, S&F never provided healthcare or other employee benefits to us, it did not provide regular paychecks with income tax or social security tax withholding, it did not provide the office or computer that Kesey and I used in writing the Screenplay, and it had no rights to assign additional projects or to supervise the work that Kesey and I did on the Screenplay. The amounts that Kesey and I were paid by S&F were essentially a form of earnest money – designed to indicate S&F’s desire to acquire rights in the Screenplay that would have to be negotiated and memorialized in formal signed agreements providing for, among other things, much more substantial compensation to us, such as a participation in profits from the film. However, no such agreements were ever consummated.

Defendants’ objections – relevance, legal conclusion, and vagueness – will be considered by the court in conjunction with the merits of the summary judgment motion.

d. paragraph 7

Defendants object to Smith's characterization of himself as co-author of the Screenplay in Paragraph 7 asserting that it is a legal conclusion. Paragraph 7 provides:

On April 11, 2006, I executed a Copyright Assignment, Transfer and Quitclaim pursuant to which all of my rights as a co-author of the Screenplay were assigned to Kesey LLC, the limited liability company that was formed by Kesey's heirs to administer his literary estate after he died. A true and correct copy of this document is filed herewith as Ex. "B." Accordingly, my authorship rights in the Screenplay are now held by Kesey LLC, the plaintiff in this litigation.

As noted above, this objection is appropriately handled when the court reviews the merits of the summary judgment motions.

7. Exhibits

a. Exhibits I, J, and K

Plaintiff's Exhibits I, J, and K are copies of correspondence between legal counsel for Kesey and the Wilson Defendants. Defendants only objection to these exhibits is that they do not include all of the correspondence between the parties during this period. Defendants can cure any issue by submitting additional correspondence between legal counsel for all parties to this action, which, in fact, they have done. The court will consider all the submitted correspondence in conjunction with Plaintiff's exhibits. The court overrules Defendants' objections and admits the exhibits.

b. Exhibits P, Q, R, and S

Defendants also generally object to the admission of the pleadings and orders entered by the probate court in the Kesey estate (identified as Exhibits P, Q, R, and S), arguing that the exhibits are not relevant to any issue in this case. The relevance objection will be considered by the court when it addresses the merits of the parties motions for summary judgment.

8. Deposition Excerpts

In its objections to Defendants' Facts, Plaintiff argues that various factual statements lack foundation or are conclusory, speculative, vague, ambiguous, or constitute a legal conclusion. At this juncture, the court will consider only the lack of foundation objections and will consider the other objections in conjunction with its ruling on the merits of the parties' summary judgment motions. In some cases, it appears that Plaintiff is asserting that the deposition excerpt identified as support for that factual statement does not, in fact, provide a foundation for that statement. In others, Plaintiff seems to suggest that the declarant lacks the requisite foundation to make the statement in the deposition. In the first scenario, the court will consider the objections at the same time it addresses the parties' motions for summary judgment. In the latter case, the court will address the objections at this time.²⁶

a. Defendants' Facts paragraph 6

Paragraph 6 of Defendants' Facts provides that "Kesey admitted that Hagen is the one who brought the main ideas for this screenplay concept to him." In support of this factual statement, Defendants refer to Hagen's deposition (Index at pages 22 and 23) and a newspaper article from the *Tri-City Herald* dated September 13, 1984 (Index at page 240.) In his deposition, Hagen indicates that he doesn't remember being interviewed by the reporter. The highlighted portion of the newspaper article provides that "Kesey was approached to write the script by long-time friend and Beta Theta Pi fraternity brother Michael Hag[e]n of Pendleton." Neither the deposition excerpt nor the highlighted portion of the article support the factual statement found in paragraph 6 of

²⁶The court has addressed some of the objections while considering Plaintiff's objections to Francis's affidavits, above.

Defendants' Facts. In this instance, Plaintiff's foundation objection really pertains to whether the factual statement is supported by the referenced evidence, not whether the statements in the referenced evidence have the requisite foundation. Because the newspaper article does not support this specific factual statement, it is not relevant to the issues before the court and the court need not address Plaintiff's hearsay objection to the newspaper article.²⁷

b. Defendants' Facts paragraph 8

Paragraph 8 of the Defendants' Facts reads, in part, that "[t]he parties agreed that the corporation would own the copyright for the \$10,000 paid for two drafts." The deposition excerpts from Francis's deposition cited in support of this factual statement (page 32 of the Index) reveal only that Francis understood the Screenplay would be owned by S&F and do not support that the parties reached an agreement.

Q. Was it your understanding that Sundown and Fletcher would own the copyright in the script for \$10,000?

A. I felt that the first draft and the second draft that we got, yes, that it was to be owned by the corporation and developed by the corporation. From there, you know, when you're in development, you know, opportunities come up in and other contracts are done later.

Q. At this meeting on January 8, 1984, was it your understanding that the copyright in the script would be owned outright by Sundown & Fletcher merely upon payment of \$10,000 and nothing more?

A. Yes.

In this deposition excerpt, Francis discusses her understanding about who would own the

²⁷The factual statement found in paragraph 6 of Defendants' Facts is similar to the factual statement made by Francis in paragraph 3 of the First Francis Affidavit, in which she states that Kesey admitted to not knowing about the relationship between Fletcher, Sundown, and Spain. The court sustained Plaintiff's lack of foundation and hearsay objections with regard to that statement and finds it likely that its ruling would be the same in this instance.

Screenplay. This does not support the factual statement that the parties agreed the corporation would own the Screenplay. The lack of foundation argument goes to the support of the factual statement, not the supporting deposition excerpt.

c. Defendants' Facts paragraph 9

Similarly, paragraph 9 of Defendants' Facts provides, in part, that "Kesey knew the corporation would be the 'holding company' for the screenplay." The support for this statement, which is an excerpt from Francis's deposition found at page 34 of the Index, provides "So we were very much discussing it as Sundown & Fletcher, Incorporated, hoping the holding company for all of these activities, including the screenplay." Francis's statement that parties discussed her hope that S&F would be the holding company for the Screenplay does not support Defendants' statement that Kesey knew S&F would be the holding company for the Screenplay.

Also in paragraph 9 is the factual statement that "Kesey knew the corporation would hold whatever was created," a statement allegedly supported by the following excerpt from Francis's deposition found at page 35 of the Index:²⁸

Q. (By Mr. Aranoff) Okay. So you were purposefully nonspecific in Exhibit 1 so as not to frighten off Mr. Kesey?

A. No, I was tough – I was getting kicked under the table by Mike Hagen. No, I was very clear that it was written for the corporation, that there were investors that we needed to honor, and that the investors, you know, are putting up money to make a profit; that the corporation would own what we create – whatever we created, whatever monies were made would be contained in the corporation.

Again, Francis's statement does not support the factual assertion that S&F would own the

²⁸Defendants' also refer to page 36 of the Index as support for this statement. This page was not properly authenticated and has been stricken from the record.

Screenplay. It merely records Francis's belief that S&F would own everything that was created; it is not evidence that Kesey agreed to this proposition.

d. Defendants' Facts paragraph 19

Plaintiff objects to the evidence supporting a portion of paragraph 19 of the Defendants' Facts which provides that "Those option agreements with Sundown & Fletcher gave her the right to market the 1984 screenplay which Kesey wrote for the corporation started in 1990 and Exhibit 1005 extended the time to February 12, 1995."²⁹ As support for this factual statement, Defendants refer to pages 69 to 88 of the Index. The court has determined that pages 69-77, which are deposition excerpts from Wilson's deposition, and pages 82-84, which contain a copy of an edited Deal Memo Option Agreement between S&F and Associates signed August 14, 1990, were not properly authenticated and has stricken these documents from the record. The only support remaining for the factual statement are two Deal Memo Option Agreements between S&F and Associates, signed August 14, 1990, and August 12, 1992, which give Associates the option to purchase certain rights from S&F during the time period of August 12, 1990, through February 12, 1995. The agreements represent and warrant that S&F is the sole owner of the Screenplay, the question to be resolved in this lawsuit. Plaintiff calls into question whether these documents are a proper foundation for the statement that the documents gave Associates rights to the Screenplay, not whether the agreements, themselves, are supported with the proper foundation, and the court will resolve that question when it addresses the merits.

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²⁹Plaintiff also objects to the first sentence of paragraph 19, which is supported by page 67 and 68 of the Index. The deposition excerpts contained on those pages were not properly authenticated and have been stricken from the record.

e. Defendants' Facts paragraph 23

In paragraph 23 of Defendants' Facts, Defendants attempt to establish that Plaintiff was aware of S&F's claim of ownership to the Screenplay as early as the 1990's. The paragraph provides that "[t]he Keseys were aware as far back as the 1990s that the corporation had filed a copyright to the 1984 screenplay and were claiming rights to it." Defendants rely on deposition excerpts from Faye and Shannon Kesey to support this factual statement. In her deposition, Faye stated that she was aware that S&F had filed a certificate of registration for the right of the Screenplay. The excerpt does not indicate when Faye became aware of the registration and, as such, is not support for the factual statement. The excerpt from Shannon Kesey's deposition provides:

Q. Have you ever met Katherine Wilson?

A. Yes.

Q. And how did you come about meeting her?

A. It would have been through family friends.

Q. Was she in any way, that you know of, involved in "Last Go Round"?

A. Yes.

Q. And what was her involvement, if you know?

A. She claimed to have -- she claimed to have rights through Sundown & Fletcher.

Q. Rights in what?

A. The screenplay.

Q. She told you that?

A. I learned that.

- Q. When or where did you learn that from?
- A. Where or when? What did you say?
- Q. Well, let's say when first.
- A. I don't know the exact time, but it would have been in the '90s.
- Q. So sometime –
- A. It was before 2004 – I mean 1994.
- Q. Before 1994 –
- A. Uh-huh.

The excerpt establishes that Shannon Kesey knew that Wilson claimed to have rights to the Screenplay through S&F by 1994 but not that S&F had filed a copyright to the Screenplay. As such, the excerpts do not firmly support the factual statement found in paragraph 23 of Defendants' Facts.

All of Plaintiff's lack of foundation objections to Defendants' Facts raise the issue of whether the supporting facts referenced adequately support the factual statements, not whether the supporting facts themselves lack the requisite foundation. The court will give additional consideration to Plaintiff's lack of foundation objections to the factual statements at the time it addresses the parties' pending summary judgment motions.

Conclusion

General Evidentiary Objections

A. Authentication of Defendants' Evidence

1. Deposition Excerpts

Plaintiff's objections to pages 1, 2, 9-11, 16, 17, 25, 36, 39, 60, 62, 63, 65, 67-77, 89-94, 104, and 124 of Defendants' evidence in support of their concise statement of facts, which represent

deposition excerpts of Francis and Wilson not offered or authenticated by Plaintiff, are sustained and the evidence stricken from the record. Plaintiff's objections to the remaining deposition excerpts, which are found at pages 3-5, 8, 14, 15, 18-23, 26, 28-35, 37, 38, 40, 41-44-46, 49-57, 61, 64, 66, 97-103, 125-127, 130, and 131 and have been authenticated by Plaintiff's submissions, are overruled and the evidence is admitted.

2. Documentary Evidence

Pages 27, 42, 43, 47, 48, 58, 59, 78-81, 85-88, 105, 106, 108, 109, and 123, which represent documents also offered and authenticated by Plaintiff, are properly before the court and will be considered. Plaintiff's objections to this documentary evidence are overruled.

Additional documents, found at pages 95, 96, 107, 110-122, 128, 129, and 132, were produced by Plaintiff during discovery and are deemed authentic. Plaintiff's objections to these documents are also overruled.

Page 24, a newspaper article date September 13, 1984, from the *Tri-City Herald* entitled *Kesey Back in Saddle for Film on Round-Up*, is self-authenticating under Rule 902(6) of the Federal Rules of Evidence. Plaintiff's assertion that page 24 is not properly authenticated is without merit and is overruled.

Plaintiff's objection to pages 82-84, which appear to be a signed draft of the August 14, 1990, Deal Memo Option Agreement between S&F and Associates (pages 82-84), is sustained. The deposition excerpt that originally identified this document was not authenticated and Defendants have not attempted to authenticate this document in any other manner. The document is stricken from the record.

Finally, Plaintiff's objections to the pages of Francis's affidavit, found at pages 6, 7, 12, 13,

and 133-137 are overruled and the evidence admitted.

3. Unsubmitted Evidence

Any evidence referenced by Defendant but not filed with the court was not properly offered or authenticated and will not be considered by the court.

B. General Objections to Defendant's Concise Statement of Material Facts

To the extent Defendants' arguments are not based on proper evidence in the record, the court will discount or reject such arguments and rule accordingly when addressing the merits of the parties' motions for summary judgment.

C. Declarations Filed in Support of Plaintiff's Motion for Summary Judgment

Plaintiff's declarations clearly comply with the requirements of FED. R. EVID. 56 and 28 U.S.C. § 1746. Defendants' objections to Plaintiff's declarations are overruled.

D. Settlement Negotiations

In the absence of the existence of a dispute or an offer of valuable consideration to compromise a dispute, FED. R. EVID. 408 does not apply to the parties communications before October 14, 2005. Defendants' Rule 408 objections to these oral and written communications are overruled.

E. Statements Attributable to Ken Kesey

The confrontation clause applies only in criminal matters. Defendants' confrontation clause objection to hearsay evidence from Kesey admitted in this, a civil case, is overruled.

F. Request for Judicial Notice

Defendants' objection to Plaintiff's request for judicial notice is sustained to the extent that the court agrees that it will not take judicial notice of the truth of the statements contained in the

settlement document between Plaintiff and the Wilson Defendants or the documents filed by Kesey and Faye with the U.S. Copyright Office.

Specific Evidentiary Objections

A. First Francis Affidavit

1. paragraph 2

Francis's statement that Hagen had no knowledge of the story behind the 1911 Pendleton Round-Up lacks the requisite foundation. Plaintiff's objection is sustained.

2. paragraph 3

Francis's knowledge that Kesey did not know of the relationship between Sundown, Fletcher, and Spain is derived solely from Kesey's alleged admission. Kesey is not a party opponent under Rule 801(d)(2), the statement does not qualify for the specific exceptions of present sense impression (Rule 803(1)), state of mind (Rule 803(3)), or statement against interest (804(b)(3)), and does not qualify for the residual exception (Rule 807). Plaintiff's lack of foundation objection to this statement is sustained.

3. paragraph 5

Kesey's failure to object to Francis's statements that S&F owned the Screenplay is not assertive conduct and is not subject to the hearsay rules. Francis has the required personal knowledge to support a claim that she did not hear Kesey object to her claim of ownership but not that Kesey did not object to anyone outside of Francis's presence. Plaintiff's hearsay and lack of foundation objections are overruled to this extent and the court will allow the evidence to support Francis's assertion that she did not hear Kesey object to her statement that S&F owned the rights to the Screenplay.

4. paragraph 8

Francis's statement that Smith assured her that he and Kesey would not go forward with the Screenplay is admissible with regard to Smith alone. Neither Francis nor Smith had personal knowledge of Kesey's plans for the Screenplay. To the extent Francis is offering this statement to prove that Smith, in fact, agreed to not pursue the Screenplay, Plaintiff's hearsay objection is sustained. The statement is admitted to show the effect that Smith's statement had on Francis.

B. Second Francis Affidavit

Plaintiff's lack of foundation objection to Francis's statement that she did not remember seeing the copyright logo on the Screenplay or the second proof of the brochure found in paragraph 2 is overruled. Francis may testify to her memory of the documents she received and reviewed.

C. Third Francis Affidavit

Plaintiff's objection to the submission of the first proof of the brochure in paragraph 3 because it was not produced during discovery is overruled. Francis fails to establish that she has personal knowledge that Susan Torrey added the copyright logo to the second proof of the brochure. Plaintiff's lack of foundation objection to this statement is sustained.

D. Faye Declaration

1. paragraph 3

Defendants' hearsay objection to Faye's statement that Kesey had plans to write about the Round-Up is overruled to the extent Plaintiff is offering the statement to prove that Kesey discussed the issue with Faye based on the fact that, in this context, the statement is not being offered to prove the truth of the matter asserted. To the extent Plaintiff is offering the statement to prove that Kesey, was, in fact, planning to write about the Round-Up as early as the 1970's, the statement is hearsay

that does not qualify for any hearsay exception, and Defendants' hearsay objection is sustained. With regard to Faye's statement that Kesey had a longstanding interest in writing about the Round-Up as evidenced by her description of Kesey's research and writing, Kesey's conduct was not "assertive" and does not qualify as a hearsay "statement." Defendants' hearsay objection to this evidence is overruled.

2. paragraph 4

Defendants' hearsay objection to Faye's description of Kesey's conduct in pulling his Round-Up research together, which does not qualify as assertive conduct, is overruled. To the extent Faye's description of Kesey and Smith writing the Screenplay and Kesey's relationship with Francis and Hagen are derived from Faye's personal observation of Kesey with Smith, Francis and Hagen, Defendants' hearsay objection is overruled. Similarly, Faye is entitled to testify about what occurred between Kesey, Francis and Hagen at a meeting that she attended. Faye has failed to present evidence that she has personal knowledge of Francis and Hagen's movie-making experience. Defendants' lack of foundation objection to Faye's statement that neither Francis nor Hagen were experienced in motion picture film production is sustained and the statement stricken from the record.

3. paragraph 5

Defendants' objection to Faye's description of the Screenplay is sustained. The Screenplay is part of the record and is the best evidence of what it contains.

4. paragraph 6

Defendants' Rule 408 objections to Faye's testimony regarding the communications between the parties after September 1984 are overruled.

5. paragraph 7

Defendants' Rule 408 objections to Faye's testimony regarding the communications between the parties after September 1984 are overruled. Defendants' objection to Faye's description of the "To Whom it May Concern" letter is sustained. The letter is part of the record and is the best evidence of its contents. Faye lacks the foundation to testify on what legal interpretation Defendants give the letter. Accordingly, Defendants' objection to Faye's statement that S&F did not consider the letter to constitute a transfer of rights to S&F is also sustained.

6. paragraphs 8 and 9 - Defendants' Rule 408 objections to Faye's testimony regarding the communications between the parties after September 1984 are overruled.

7. paragraph 10

Defendants' objection to Faye's description of the Novel is sustained. The Novel is part of the record and is the best evidence of its contents.

8. paragraph 13

Defendants complain that Faye's statement regarding when she found out about the filing of the March 24, 1994, copyright certification is vague and contradicts her prior testimony. The court defers its consideration of this issue.

9. paragraphs 18 and 19

Defendants' Rule 408 objections to Faye's testimony regarding the communications between the parties prior to the October 14, 2005, letter are overruled.

10. paragraph 20

Defendants' relevance and legal conclusion objections to Faye's testimony regarding the assignment of Smith's literary interest in the Screenplay are deferred. The court will consider these

objections when it addresses the merits of the parties' pending summary judgment motions.

E. Babbs Declaration

1. paragraph 2

The court defers its consideration of Defendants' contention that the use of the term "research" in the second paragraph of the Babbs Declaration is vague.

2. paragraph 3

Babbs's description of the story that Kesey told him about the 1991 Round-Up is not offered to prove that the story was true. Rather, it is offered to prove only that Kesey shared the story with Babbs well over 30 years ago. The description is not hearsay and Defendants' hearsay objection to the contents of this paragraph are overruled.

3. paragraph 4

Defendants' objection to this paragraph is based solely on their argument that the *East Oregonian* newspaper articles are hearsay. To the extent the Plaintiff is offering Kesey's statements in the article to prove the truth of the matter asserted – that Kesey intended to write about the Round-Up at the time the articles were written – the statements are offered for the truth of the matter asserted, are hearsay statements that do not qualify for an exception, and are inadmissible. Defendants' hearsay objection is sustained for this limited purpose.

4. paragraph 5

Babbs failed to present evidence that he has personal knowledge that Smith assisted Kesey in writing the Screenplay. Defendants' lack of foundation objection to this evidence is sustained. The hearsay objection to Babbs's statement that Kesey hoped the Novel would become a movie is sustained to the extent the statement is being offered to prove that Kesey, in fact, hoped to make a

movie from the Novel.

5. paragraphs 6 and 9

Defendants' legal conclusion objections to Babbs's characterization of himself as coauthor of the Novel is deferred. The court will consider this objection when it addresses the merits of the parties' pending summary judgment motions.

6. paragraph 7

Defendants' objection to Babbs's description of the New York Times newspaper article is sustained. The article is part of the record and is the best evidence of what it contains.

F. Smith Declaration

1. paragraph 3

Smith's description of the story that Kesey told him about the 1991 Round-Up is not offered to prove that the story was true. The description is not hearsay and Defendants' hearsay objection to the contents of this paragraph are overruled.

2. paragraph 4

Defendants object to Smith's characterization of himself as coauthor of the Screenplay arguing that it is a legal conclusion. The court will consider this objection when it addresses the merits of the parties' pending summary judgment motions.

3. paragraph 5

Defendants assert legal conclusion, relevance and vagueness objections to Smith's description of the circumstances surrounding his work on the Screenplay and what the payments from Defendants represent. The courts consideration of these objections are deferred.

/////

4. paragraph 7

Defendants' legal conclusion objections to Smith's characterization of himself as coauthor of the Screenplay is deferred. The court will consider this objection when it addresses the merits of the parties' pending summary judgment motions.

G. Aranoff Declaration

1. Exhibit A

Defendants' objection to the admission of the two *East Oregonian* newspaper articles is overruled in part and sustained in part. The articles themselves are admissible under the ancient document exception. To the extent Kesey's statements in the articles are offered to prove that he made the statement to the reporter or that he discussed an interest in writing about the Round-Up, the statements are not hearsay and are admissible. However, to the extent the articles are offered to prove the truth of the matter asserted – that Kesey, in fact, intended to write about the Round-Up, the statements are hearsay and Defendants' objections to the admission of the evidence for this purpose is sustained.

2. Exhibit C

Defendants' lack of foundation objection to the first page of the Screenplay, which contains a copyright logo, is overruled. The declarants referring to the Screenplay do not represent that it is the version of the Screenplay given to Defendants in September 1984 and Defendants offered the same document identified as page 58 to the Index.

3. Exhibits E, F, T, and U

Defendants' Rule 408 objection to these documents is overruled. In the absence of a dispute or an offer to compromise, Rule 408 is not applicable and does not bar the admission of this

evidence.

4. Exhibit H

Defendants' hearsay objection to the *New York Times* book review of the Novel is overruled. The article is not being offered to prove the truth of the matter asserted.

5. Exhibits I, J, and K

Defendants' objection to the evidence on the grounds that it is an incomplete representation of the correspondence between the parties during this period is overruled.

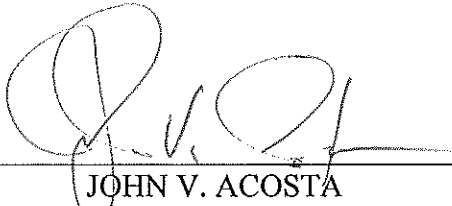
6. Exhibits M, O, and JJ

The court sustains Defendants' objections to these exhibits and will limit its judicial notice of these documents to the fact that the documents were filed. It will not accept the documents to prove the truth of the matters asserted therein.

H. Deposition Excerpts

All of Plaintiff's lack of foundation arguments to Defendants' Facts raise the issue of whether the supporting facts referenced adequately support the factual statements, not whether the supporting facts themselves lack the requisite foundation. The court will give additional consideration to Plaintiff's lack of foundation objections to the factual statements at the time it addresses the parties' pending summary judgment motions.

DATED this 3rd day of April, 2009.



JOHN V. ACOSTA
United States Magistrate Judge