relationship between the three main characters or of the climax of the story. This seems the sole basis for any personal knowledge Francis may have had regarding Kesey's knowledge of the events surrounding the 1911 Pendleton Round-Up. In this context, Francis is offering Kesey's out-of-court statement regarding his knowledge of the characters or climax of the story for the truth of the matter asserted – that Kesey was unaware of the factual background of the 1911 Round-Up until after his conversation with Hagen and Fracis. As such, these statements must be evaluated under the hearsay rule and its exceptions. Defendants did not file a brief responding to Plaintiff's objections to Francis's affidavits and, thus, Defendants have not asserted any arguments that the hearsay statements qualify for an exception to the hearsay rule.

The most likely basis upon which Kesey's statement could be admitted is an admission by a party opponent, which is not hearsay under Federal Rule of Evidence 801(d)(2). However, Kesey is not named as a plaintiff and, therefore, does not qualify as a party opponent. Plaintiff, the actual opposing party in this action, is a limited liability corporation created by Kesey's heirs for the sole purpose of receiving and holding all literary rights once owned by Kesey, including Kesey's rights to the Screenplay. Accordingly, Plaintiff would be properly characterized as the successor-in-interest to Kesey's rights in the Screenplay, which rights it received through Kesey's heirs.[16]

Historically, courts accepted the common law principles of privity and allowed an admission by a transferor to be admitted as evidence in litigation involving the transferee. This practice was interrupted by the adoption of the current version of Rule 801(d)(2), which specifically defines which statements are properly classified as admissions and thus, fall outside of the parameters of the

---

[16]Kesey died intestate in November, 2001. The assets of his estate, including all of his intellectual property rights, were distributed to Plaintiff pursuant to a court order filed March 10, 2003.

hearsay rule.

> To qualify as a admission by a party opponent under Rule 801(d)(2), the statement must be:
>
> (A) the party's own statement, in either an individual or a representative capacity or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

The majority of the federal courts have read this rule literally, determined that the draftsmen did not intend to give the courts the ability or discretion to add new categories of admissions, and held that privity-based admissions are not within the language of the rule. In doing so, the courts noted that such admissions may otherwise be admissible under a specific exception to the hearsay rule set forth in Rules 803 and 804 or under the residual exception found in Rule 807.

In *Huff v. White Motor Corp.*, 609 F.2d 286, 289 (7th Cir. 1979), Helen Huff, acting as personal representative of the estate of her deceased husband, initiated a wrongful death action against the manufacturer of a fuel system whose defective design allegedly caused the death of her husband. Huff asserted that the fuel system ruptured and caught fire after the truck which her husband was driving collided with an overpass support. Huff's husband eventually died from the severe burns he suffered in the fire. *Id.*

The manufacturer offered the decedent's statement that he lost control of the truck when he tried to put out a fire on his pant leg, to establish that the fire was caused by something other than a ruptured fuel system. *Id.* at 290. The manufacturer argued that privity existed between Huff and the decedent and that the statement was admissible as an admission. *Id.* The Seventh Circuit rejected this argument. While acknowledging that privity-based admissions generally were accepted

by the courts under common law, the court stated that:

> [t]he admissibility of privity-based admissions in the federal courts is now controlled, of course, by the Federal Rules of Evidence. A reading of Article VIII of those rules, the article on hearsay, leads us to conclude that privity-based admissions are to be tested for admissibility under the residual exception provided for in Rules 803(24) and 804(b)(5) rather than under the admissions provision, Rule 801(d)(2). Although neither the rules themselves nor the Advisory Committee Notes refer to privity-based admissions, and Congress added nothing on the subject in its consideration of the rules, the language of Rule 801(d)(2) and the general scheme of the hearsay article support our conclusion. Privity-based admissions are within the definition of hearsay, Rule 801(c), an extra-judicial statement offered "to prove the truth of the matter asserted," and are not among the specifically defined kinds of admissions that despite Rule 801(c) are declared not to be hearsay in Rule 801(d)(2). Nor are they covered by any of the specific exceptions to the hearsay rule listed in Rules 803 and 804. Thus privity-based admissions are not admissible, as such, if the rules are to be read literally. Moreover, the very explicitness of Rule 801(d)(2) suggests that the draftsmen did not intend to authorize the courts to add new categories of admissions to those stated in the rule. No standard for judicial improvisation or discretion are provided in Rule 801(d)(2), as they are in Rules 803(24) and 804(b)(5).

Id. at 290–91.

The Sixth Circuit used similar reasoning in excluding statements made by corporate agents offered in an action brought by the trustee of the bankrupt corporation. *Calhoun v. Baylor*, 646 F.2d 1158 (6th Cir. 1981). The court held that "Rule 801(d)(2) does not include statements by predecessors in interest among the types of statements the rule makes admissible" and then cited Weinstein as support:

> As one commentator has pointed out, the rule
>
> > rejects privity as a ground of admissibility by making no provision for it. Under the common law rule declarations by a predecessor in title offered against a successor were often admitted. Morgan objected strenuously to this result, arguing that there is no "magic" in privity and pointing out that acceptance of the privity principle leads to dubious distinctions, particularly in bankruptcies.
>
> 4 Weinstein's Evidence 801-165 (1979)(citations omitted).

Calhoun, 646 F.2d at 1162-63.

Both bankruptcy courts and district courts have followed suit. *See Teltronics Services, Inc. v. Anaconda-Ericsson, Inc.*, 29 B.R. 139, 165 (1983)(Rule 801(d)(2) rejects privity as a grounds of admission. "Thus, in order to be admissible, statements formerly recognized as privity-based admissions must fall withing another recognized hearsay exception."); *In Re Cornfield*, 365 F. Supp. 2d 271, 277 (E.D.N.Y. 2004)("Notably, Rule 801(d)(2)(A) provides for several types of party-opponent admissions-such as adoptive admissions, or statements made by an agent-but does not include any provision concerning privity-based admissions.") Virtually all of the noted treatises addressing the Federal Rules of Evidence have reached the same conclusion as well. *See* 30B MICHAEL H. GRAHAM, FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 7019 (Interim ed. 2000); 2 MCCORMICK ON EVIDENCE § 260 (6th ed. 2006); 4 CHRISTOPER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 430 (2d ed. 1994).

This court finds the reasoning discussed above to be logical and supported by the language of the Rule itself and, therefore, adopts the same.[17] Accordingly, the court finds that the statements attributed to Kesey in paragraph 3 of the First Francis Affidavit are not admissible under Rule 801(d)(2) as admissions by Plaintiff, Kesey's successor-in-interest to his rights in the Screenplay.

As to the applicability of hearsay exceptions under Rule 803 or 804, or the residual exception found in Rule 807, the only specific exceptions likely to apply to Kesey's statement are: 1) present

---

[17]This court recognizes that other courts have admitted a decedent's extrajudicial statements in actions brought on their behalf by their estate, finding that the decedent was a party to the action. *See Estate of Shafer*, 749 F.2d 1216 (6th Cir. 1984); *Phillips v. Grady County Bd. of County Commissioners*, 92 Fed. Appx. 692 (10th Cir. 2004); *Schroeder v. de Bertolo*, 942 F.Supp. 72 (D.P.R. 1996). This is distinguishable from the case currently before the court in that a successor-in-interest has filed the action, not the personal representative of Kesey's estate.

sense impression found in Rule 803(1); 2) state of mind found in Rule 803(3); and 3) statement against interest found in 804(b)(3). Rule 803(1) provides an exception to the hearsay rule for statements "describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." FED. R. EVID. 803(1) (2008). Kesey's statement that he did not know about the relationship between Fletcher, Sundown, and Spain does not describe or explain or event or condition and was not made while he was perceiving anything. Thus, it does not qualify for this exception.

The state of mind exception applies to statements "of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health) but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will." FED. R. EVID. 803(3). This exception applies only where the declarant's mental, emotional, or physical condition at the time the statement is made is at issue. In the civil context, this exclusion generally comes into play to prove motive, intent, or damages.

Kesey's statement that he was not aware of certain aspects of the 1911 Pendleton Round-Up is not evidence of his mental, emotional or physical condition at the time the statement was made. It is merely evidence that he lacked certain information at that time and, to that extent, it runs squarely afoul of Rule 803(3)'s prohibition against using statements of memory or belief to "prove the fact remembered or believed[.]" Kesey's statement does not qualify for the state of mind exception.

The statement against interest exception found in Rule 804(b)(3) applies only when the declarant is unavailable as a witness and allows the admission of:

> [a] statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true.

The rule requires that the declarant know that the statement was against his interests at the time it was made. Here, Kesey purportedly admitted that he was not aware of the background facts before the parties began discussing the Screenplay, before Kesey wrote the Screenplay, and well before the parties began arguing over who owned the rights to the Screenplay. If Kesey made the statement Francis describes, he did not know that his statement was contrary to his interests at the time he made it. The statement does not qualify for the statement against interest exception.

The last possible exception is the residual exception set forth in Rule 807 which provides:

> A statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under the exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

FED. R. EVID. 807 (2008). To qualify for the residual exception, the statement offered must be evidence of a material fact – it must be relevant to the ultimate issue before the court which, in this instance, is the question of who owns the literary rights to the Screenplay.

The statement at issue is evidence that Kesey did not know some of the factual details behind the plot of the Screenplay until Francis and Hagen provided him with that information in late 1983. The only possible relevance of this statement is as support of Defendants' argument, found in a

footnote to their motion for summary judgment, that they should, at the least, be considered "a joint author and co owner of the screenplay because of their contribution of the main concepts of the screenplay of which Kesey was not aware." (Defs.' Mot. for Summ. J. at 19 n. 3.)

The Copyright Act defines a "joint work" as "a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole." 17 U.S.C. § 101 (2007). The Ninth Circuit has held that "joint authorship requires each author to make an independently copyrightable contribution." *Ashton-Tate Corp. v. Ross*, 916 F.2d 516, 521 (9th Cir. 1990). Only original works of authorship are entitled to copyright protection. 17 U.S.C. § 102(a) (2007). "No author may copyright facts or ideas." *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 , 547 (1985).

Francis and Hagen's contribution of the factual information about the 1911 Pendleton Round-Up is not entitled to copyright protection. Accordingly, whether or not Kesey was aware of the factual background of the 1911 Pendleton Round-Up before discussing story ideas with Francis and Hagen in December 1983 is not a fact relevant to any of the claims or arguments currently before the court. Kesey's statement is not offered as evidence of a material fact and is not admissible under the residual exception to the hearsay rule. Therefore, Francis's statement in paragraph 3 of the First Francis Affidavit that Kesey admitted to not knowing of the relationship between Sundown, Fletcher, and Spain before his discussions with Francis and Hagen in December 1983 is hearsay and does not qualify for any hearsay exception. Plaintiff's objection to the admission of this statement is sustained and the evidence is stricken from the record.

c. paragraph 5

Paragraph 5 provides "that in all meetings where Kesey attended which Affiant estimates was

at least 30 meetings, the statement was always made by Affiant that the screenplay was owned by the corporation and not once in front of these third persons did Kesey ever disagree with that statement." Plaintiff objects to this evidence arguing that it lacks foundation and is hearsay, conclusory, vague, and ambiguous.

In this paragraph, Francis is offering evidence that Kesey never contradicted her statement that S&F owned the rights to the Screenplay. If this evidence is limited to an assertion that Francis never heard Kesey disagree with her statement, Plaintiff's lack of foundation argument is without merit. Francis clearly has personal knowledge of what she heard or, rather, did not hear. However, to the extent Francis is attempting to prove that Kesey never contradicted her statement to a third party outside of her presence, Francis lacks personal knowledge and the evidence is inadmissible on that point. Similarly, Francis lacks the requisite personal knowledge to establish that Kesey even heard her comment that S&F owned the rights to the Screenplay.

The court must now consider whether the limited evidence that Francis never heard Kesey contradict her statement that S&F owned the Screenplay is hearsay. Hearsay is defined as an out-of-court statement offered to prove the truth of the matter asserted. Rule 801 defines "statement" as "(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion." FED. R. EVID. 801(a). Clearly, Kesey's failure to act is not an oral or written assertion. The question then becomes whether Kesey's failure to act is "conduct" which he intended to be an "assertion." In other words, by not acting, did Kesey intend to agree with Francis's statement?

The Ninth Circuit has held that a criminal defendant's nonverbal conduct in consummating a drug transaction was not intended to be an assertion and that testimony describing the drug sales

was not hearsay. *United States v. Astorga-Torres*, 682 F.2d 1331, 1335 (9th Cir. 1982). Similarly, testimony from hotel owners that previous guests occupying a room where a guest was found dead of carbon dioxide poisoning did not complain was not hearsay and was relevant to prove that the gas heater was not the source of the carbon monoxide. *Cain v. George*, 411 F.2d. 572, 573 (5th Cir. 1969). Here, the court finds that Kesey's failure to object to Francis's declaration that S&F owned the Screenplay was not assertive conduct and, therefore, is not hearsay. The court overrules Plaintiff's objection to this paragraph and allows the admission of the evidence for the limited purpose of showing that Francis did not hear Kesey object to her statement that S&F owned the Screenplay. In light of Francis's failure to describe the meetings (for example, when and where the meetings occurred or who and how many people were present) or the context in which she claimed that S&F owned the Screenplay, and her lack of personal knowledge that Kesey even heard her state that S&F owned the rights to the Screenplay, the relevance and/or probative value of this evidence is questionable. The court will take this into consideration, as well as Plaintiff's assertion that the evidence is conclusory, vague and ambiguous, in determining whether the evidence creates a genuine issue of material fact.[18]

Plaintiff asserts a hearsay objection to paragraph 8 which reads:

> That Affiant believes that she had all of the missing records set forth above from about 1983-4 until about late 1995 when she discarded them. Before she discarded the documents, she spoke to Irby Smith who had called her to discuss the 1984 screenplay and Affiant told him that if he and/or Kesey ever went forward with the 1984 screenplay that she would make sure the corporation files legal action against

---

[18]Plaintiff asserts both a lack of foundation and a hearsay objection to paragraphs 16 and 18 of Defendants' Facts and the deposition excerpts from Francis's deposition offered as support. The court's ruling on Plaintiff's objections to paragraph 5 of the First Francis Affidavit are equally applicable to the statements found in Francis's deposition excerpts that support the factual statements in paragraphs 16 and 18.

them. Irby Smith indicated at that time that if Affiant felt that way that he and Kesey would not go forward with the 1984 screenplay.

At the outset, the court notes that there is no evidence that either Francis or Smith had any personal knowledge with regard to Kesey's intent to go forward with the Screenplay. Consequently, the statement lacks foundation with regard to the Kesey's intent and is not admissible for this purpose.

The question of whether Smith's statement that he would not go forward with the Screenplay based on Francis's threat of legal action is hearsay raises the issue of whether Francis is offering the statement to prove that Smith, in fact, did not intend to go forward with the Screenplay. Based on the context in which the statement is being offered, it appears that the statement is offered to prove the effect the statement had on Francis. She felt comfortable in discarding her records because Smith wanted to avoid legal action. In that context, the evidence is not offered for the truth of the matter asserted and is admissible to show the effect of the statement on Francis.[19] Plaintiff's additional objections that the evidence is conclusory, vague, and ambiguous will be considered by the court when it addresses the pending summary judgment motions.

2. Francis's Affidavit signed July 1, 2008

Paragraph 2 of Francis's affidavit signed July 1, 2008 (the "Second Francis Affidavit"), provides:

> That Affiant is the one who received the original of the second draft screenplay from Ken Kesey on or about September 16, 1984. That this was the second draft of the screenplay which Kesey had delivered in 1984 to Affiant. Affiant does not recall the second draft containing any copyright logo on it when Affiant received it and is sure that the first draft delivered did not contain any such logo and did not have Irby

---

[19]If Defendants have offered the statement to prove that Smith acknowledged that he did not have a right to go forward with the Screenplay or, in other words, that S&F owned the Screenplay, the evidence is not probative on that issue. Smith made no representations regarding the ownership of the Screenplay.

> Smith's name on it either. This brochure was printed prior to delivery of that second draft of the screenplay. That Affiant did not see or approve of the proof of the final version that was printed that contained a copyright logo on it and had Affiant seen it before it was printed, would have either had it reprinted or crossed it out.

Plaintiff objects to this evidence asserting that it lacks foundation. Francis is describing documents that she received and/or reviewed based on her memory of those documents. Francis has personal knowledge of these documents and of her memories, and is qualified to testify on this issue. Plaintiff's objection is overruled. Plaintiff also asserts that this evidence is vague, ambiguous, and irrelevant. The court will consider these objections when it addresses the merits of the pending summary judgment motions.

3. Francis's Affidavit signed July 7, 2008

Plaintiff also objects to paragraph 3 of Francis's affidavit signed July 7, 2008 (the "Third Francis Affidavit"), which provides:

> In those newly found materials is the first proof of the brochure that Affiant had seen before the final copy was made. That proof is attached hereto as Exhibit DD and incorporated by reference as if more fully set forth herein. Affiant's prior affidavit had mentioned that Affiant had never seen the final printer's proof that was sent to the printer and then became what was filed as Exhibit V by Plaintiff until the time of her second deposition in May 2008. Having now seen this first proof, Affiant now knows that the portion of the final brochure filed by Plaintiff as Exhibit V which contained the reference to "copyright 1984 Ken Kesey" was added by the person (Susan Torrey) who designed the brochure for the corporation.

Plaintiff objects to the statement that Francis knows that the copyright designation was added by Susan Torrey, arguing that it lacks foundation. Plaintiff also objects to the admission of the first proof of the brochure because it was not produced during discovery.

Francis explains that she discovered the first proof of the brochure in a chest that had been in the possession of her ex-husband. Nothing in the record casts doubt on this explanation, and the

court overrules Plaintiff's objection based on Francis's failure to produce the document during discovery.

Francis's statement credits her discovery and review of the first proof, which did not include the copyright designation, for her new-found knowledge that Susan Torrey added the copyright designation to the second proof of the brochure. The mere fact that the first proof did not include the copyright designation does not support Francis's conclusory statement that Susan Torrey added the copyright designation to the second proof. In the absence of other evidence that Francis had personal knowledge of Susan Torrey's conduct, this statement lacks the requisite foundation. Plaintiff's objection to this statement is sustained and the statement is stricken from the record.[20]

4. Faye Declaration signed June 13, 2008

Defendants object to numerous statements contained in Faye's declaration signed June 13, 2008 (the "Faye Declaration"), primarily because they are based on hearsay statements of Kesey and lack the proper foundation. Defendants also object to the admission of exhibits offered through the Faye Declaration.

a. paragraph 3

Defendants move to strike paragraph 3 of the Faye Declaration in its entirety arguing that it is based solely on hearsay statements from Kesey. Defendants cite to the phrases "Ken began telling me" and "Ken's longstanding interest in writing a screenplay" to support this argument. Defendants also move to strike the newspaper articles offered as Exhibit A as double hearsay.[21]

---

[20]Plaintiff's additional objection that the evidence is speculative is moot.

[21]Defendants made this objection in their opposition to the declaration of Ken Babbs. The court is addressing the objection at this time merely for the purposes of clarity.

> Commencing well over 30 years ago, Ken began telling me of his plans to write a novel or screenplay concerning the Pendleton Round-Up, a famous rodeo competition that has been annually conducted in Pendleton, Oregon, for almost 100 years. As a result, Ken frequently traveled to the Round-Up to research such a novel or screenplay. Indeed, while attending the Round-Up in 1979, Ken was interviewed by Pendleton's *East Oregonian* newspaper about his interest in writing such a screenplay, which resulted in two articles that were published in the September 15, 1979 issue of the *East Oregonian*, "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 collectively filed herewith as Exhibit "A."[22] The second of these two articles stated, among other things, that "The plot [of Ken's screenplay concerning the Round-Up] could be drawn from [Ken's] admiration of Jackson Sundown, the Nez Perce Indian who won the all-around title in 1916 at the age of 50 . . . ." See Ex. "A." Because of Ken's longstanding interest in writing a screenplay concerning the Round-Up, by 1984 Ken had attended the Round-Up many times, had conducted extensive research concerning the early history of the Round-Up and had written character sketches and story outlines in preparation for writing a work.

The first possible hearsay statement included in this paragraph is Faye's statement that Kesey told her of his plans to in write a novel or screenplay concerning the Pendleton Round-Up. Plaintiff offers no explanation of the purpose for which it offers this statement or which hearsay exceptions might apply to the statement.

Reading the paragraph's first sentence literally, the truth of the matter asserted in it is that Kesey told Faye he intended to write about the Pendleton Round-Up. The statement is not admissible for that purpose, but it is admissible for another purpose. Whether or not, at the time he made the described statements to Faye, Kesey actually intended to write about the Pendleton Round-Up, his statements are admissible to show that at a time well before Defendants' first discussions with him, Kesey had knowledge of the Pendleton Round-Up generally and the significance of at least one of the persons who ultimately became the Screenplay's and the Novel's key characters. In fact,

---

[22]The newspaper articles and all other exhibits referenced by Faye, Babbs and Smith in their declarations are attached to the declaration of David Aronoff.

it is certainly possible that at the time of the statements he made to Faye, Kesey actually had no intent to write anything about the Round-Up or, alternatively, was not certain that he could write a story that could be published as a book or produced as a play. What is significant about his statement is that it shows that his knowledge of the Round-Up and its history predated his discussions with Francis. The remainder of the paragraph bears out this conclusion: regardless of the truth of the various statements in the paragraph, those statements show Kesey's knowledge of the Round-Up and its history, including at least one of the three persons who became the crux of the Screenplay and the Novel. Accordingly, the statement is admissible as evidence of Kesey's knowledge of the Round-Up and its history prior to the discussions with Francis.

To the extent that Plaintiff is offering this testimony to prove that Kesey intended to write about the Pendleton Round-Up, the statement does not qualify for either the present sense (Rule 803(1)) or the state of mind (Rule 803(3)) exceptions. Kesey's statement does not describe or explain an event or condition, a requirement for the present sense exception. Additionally, Kesey's statement in the late 1970's that he was interested in writing about the Pendleton Round-Up at that time is not indicative of Kesey's intent or motive in writing the Screenplay in 1984 and, therefore, does not qualify for the state of mind exception. Finally, the lack of relevance between the statement about Kesey's literary interest in the Pendleton Round-Up in the late 1970's and the question of who owns the copyright to the Screenplay, written in 1984, prevents the application of the residual hearsay exception (Rule 807) as the statement is not relevant to any of the claims or arguments currently before the court. Accordingly Defendants' objection to the admission of the statement to prove that Kesey was interested in writing about the Pendleton Round-Up in the 1970's is sustained. The statement is not inadmissible for this purpose.

Defendants also assert that Faye's description of Kesey's longstanding interest in writing a screenplay and his actions in support of this interest are hearsay. Specifically, Faye describes how Kesey traveled to Pendleton to attend the Round-Up, conducted background research on the Round-Up and wrote character sketches and story outlines relating to the Round-Up. This conduct qualifies as a "statement" under Rule 801 only to the extent it was intended by Kesey as an assertion. The court finds that the conduct described by Faye was not intended by Kesey to be assertive conduct and, therefore, does not qualify as a statement under Rule 801. Kesey's conduct therefore falls outside the hearsay rule.

The rest of the paragraph consists of Faye referencing and quoting two newspapers articles reporting Kesey's plans to write a novel or screenplay using the Pendleton Round-Up as a backdrop. Defendants object to the admission of the newspaper articles published in the *East Oregonian* on September 15, 1979. Defendants argue that the articles are excludable as double hearsay based on statements allegedly made by Kesey.

Both newspaper articles were written by Bob Crider of the *East Oregonian*. The first article, entitled *Ken Kesey Has His Own Version* reads:

> PENDLETON – For the moment, put aside thoughts of all that has been written about the Pendleton Round-Up. All the film, the radio reports, the conversations.
>
> Ken Kesey – the manic Prankster of the 60's, life experimenter, challenger to The Establishment, and author of "Sometimes a Great Notion" and "One Flew Over the Cuckoo's Nest" – wants to tell his own version. It's a verison that has a lot of loose ends at the moment, fragments which he hopes to weave together for a screenplay.
>
> Kesey was in Pendleton this week for what he figured was his sixth Round-Up. He came away from his first one in 1953 with a trip back to Springfield that included an incident giving him the initial inspiration for "Cuckoo's Nest."

He's leaving this one with the hopes he'll have enough material to sell Hollywood on a screenplay. It's not a new idea for Kesey, who said he feels the rodeo can serve as a good background for any fictional story.

"AND I THOUGHT about doing a novel about it," Kesey said in an interview with the East Oregonian. "But it's so visual it just seems to me that it ought to be a movie. So each year I come back here I always kick myself for not coming and getting enough pictures to show somebody in Hollywood, and show what I mean."

This year he's banking on having use of about 30 minutes of video tape that Bill Bradbury, director for Portland's KGW Television's "PM Magazine" show, was shooting.

If it works, Kesey said he'll "make up the bones of a plot to be set against this backdrop. Go down into Hollywood, get the money for it, get them to get it together with actors and movie crew, and be back here next year to shoot a movie against this backdrop."

" . . . These guys in Hollywood aren't absolute dummies. They can't fail to recognize this as such a colorful setting for any kind of plot."

KESEY LED A colorful life after moving on from the field of athletics, where he was a standout wrestler for the University of Oregon, to become one of the bright young novelists of the early 1960's.

Today as he nears the age of 44, his graying, energized hair springs out from the side of a hat that keeps his head from blistering under the Indian Summer sun. Loose fitting clothes disguise his muscular frame, just as a soft tone of voice smooths over his wild and free-wheeling past.

Most publicized was his role as leader of the Merry Pranksters, a group from the San Francisco Bay area that turned heavily onto psychedelic drugs and altered the consciousness of obeying the establishment's gospel. Their music was that of the Grateful Dead. Although they painted their faces, it was no comparison to the painted faces of today's rock group Kiss, which Kesy mocked.

The Pranksters, including Pendleton native Mike Hagen, who joined Kesey at this year's Round-Up, painted up a 1939 bus with Day-Glo colors in 1964 and set upon a cross-country trip to New York and back to California, raising some smiles, but mainly a lot of consternation and police stops along the way.[23]

---

[23]The article continues on page 2A of the newspaper. This page was not offered by Plaintiff.

{SIB}

(Aronoff Decl. Ex. A at 1.) The second article, which is entitled *Kesey Looking to R-Up For Script Information* reads:

> PENDLETON – Should anyone get excited about the prospects of Ken Kesey writing a film script inspired by the Pendleton Round-Up, it should be kept in mind that putting the creative product before an audience is a long process.
>
> In an interview this week while attending the Round-Up, Kesey noted that his first inspiration for writing "One Flew over the Cuckoo's Nest" came in 1953, nine years before the novel was published.
>
> Two years later, his second novel, "Sometimes a Great Notion," was published. But when he started writing it, he had no idea of the plot.
>
> He's been working on another novel for the last 10 years, and the idea of either writing a novel or doing a film on the Round-Up has been kicked around in his mind for a long time.
>
> KESEY ACTED AS if he was his own interviewer – throwing out questions to himself about what shape the film would take and then answering them in fragments that later could be cemented into a common, but complex, interwoven theme.
>
> "When I wrote 'Great Notion,' Kesey said, "I had no idea what the plot was. I just moved in there and got a job logging and started taking notes. And if the broth is rich enough, you'll always get a good soup. And there's some good cooking here."
>
> To Kesey, the soup is how he perceives the mixture of Indians and their culture, cowboys and townspeople gathered in a region rich in its history. Together they fight the impersonal force of the 20th Century – a force that one is part of, and yet challenges. The impression is what Kesey perceives as the "American Myth."
>
> THE PLOT COULD be drawn from his admiration of Jackson Sundown, the Nez Perce Indian who won the all-around title in 1916 at the age of 50; his interpretation of the bulls being to cowboys what Moby Dick was to Captain Ahab; or his impressions of the Silver Saddle bar on S. E. Emigrant.
>
> "There are straight cowboys walking in there," Kesey said, "past horses tied to the fenceposts, the lamposts, as these great big muscle-car pickups drive by. Indians walking in and out of there. It's an amalgamation of the past and the present that's happening here. I'm not sure what the plot is, but the plot has to involve these two periods.

It is, perhaps, ironic that the Pendleton Round-Up that Kesey wants to use as a film backdrop now was a departure point in 1953 that sparked what later turned into his first novel. While taking the bus back to his home in Springfield, the traffic snarled on the Columbia Highway near Celilo Falls, where Indians were protesting construction of The Dalles Dam and its impending ruination of their fishing grounds.

Kesey said the bus driver told the passengers "some crazy Indian had taken a knife in his teeth and ran out in the road and ran into the grill of a truck that was bringing (equipment) to the dam they were building. And that was the initial inspiration of Cuckoo's Nest."

That incident represented "something native going against something predominantly strange and mechanical. And that's our myth, our native, our American Myth. The Indians personify it, but all of us are involved in it."

"That's why," Kesey said without pausing, "it was interesting in front of the Silver Saddle last night. Of shooting a scene that could have taken place a hundred years ago, except turning right by it are these big muscle cars with huge tires on the rear end of 'em. Our trying to work this thing out with our tradition of the West and still keep our frame in the 20th Century is our American Myth."

His first idea of a plot centers around a descendant of Jackson Sundown who comes to the Round-Up "with a derisive attitude. And in the course of his stay here learns a lot about his background, and about the whole Western American trip. And it changes his life."

WHILE KESEY HAS carried his feeling for the Indians for a long time, he learned something new at this Round-Up; the athletic ability of Brahma bull riders and the help they give to each other.

"Although they're competing against each other in points, their real competition is against that bull. And so there are these guys offering suggestions to each other to help them against this impersonal force. That brings it in to that Moby Dick theme that I'm interested in."

"Sure it's the 20th century, sure the Arabs are buying stuff up. But we're, whether we're Indians or cowboys, we've got to offer suggestions about how to ride that bull to our friend . . . It's not human. It's not Nixon. It's not the CIA. It's not the Arabs."

"The bull is a brute animal and if you go against it like Ahab you'll be defeated. But as (Hermann) Melville said, you got to be a little bit morbid to seek the truth."

{SIB}

(Aronoff Decl. Ex. A at 2.)

The term "statement" in Rule 801 includes an "oral or written assertion." Accordingly, newspaper articles offered by someone other than the author, or "declarant," of the article is considered hearsay if offered for the proof of the matter asserted. *Larez v. City of Los Angeles*, 946 F.2d 630, 643 (9th Cir. 1991). Additionally, any statement attributable to a third party referred to or discussed in the article is also hearsay. *Id.*

Rule 805 of the Federal Rules of Evidence provides that:

> Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules.

The first layer of hearsay – the newspaper articles and the author's statements contained therein – qualify for the ancient document exception set forth in Rule 803(16). This Rule provides an exception to the hearsay rule for "[s]tatements in a document in existence twenty years or more the authenticity of which is established." The newspaper articles were written in 1979, well more than twenty years ago. Rule 902 of the Federal Rules of Evidence provides that "[p]rinted materials purporting to be newspapers or periodicals" are self-authenticating. Fed. R. Evid. 902(6). The statements attributed to the author of the articles are excluded from the hearsay rule under the ancient document exception. Defendants' objections to the statements are overruled and the newspaper articles are admitted.

The court now turns to the admissibility of the statements attributed to Kesey in the articles. Both articles contain numerous statements made by Kesey to the author of the articles. To the extent Plaintiff is offering these statements merely to establish that Kesey was talking about writing a screenplay with the Round-Up as a backdrop or that Kesey actually said these words to the author,

the statements are not being offered for the truth of the matter asserted and are not hearsay, and therefore are admissible.

In its response to Defendants' objections to its concise statement of material facts, Plaintiff points to the articles as evidence that Kesey knew the factual underpinnings of the 1911 Pendleton Round-Up by 1979, four years before being approached by Hagen and Francis to write the Screenplay. In this context, Plaintiff is not offering the article to establish the truth of the matters asserted – that Kesey's historical rendition of the 1911 Round-Up was accurate – but rather that Kesey was aware of these facts. Again, in this context, Plaintiff is not offering the statements to prove the truth of the matter asserted, and Kesey's statements are not hearsay and are admissible.

Finally, to the extent Plaintiff is offering the statements contained in the articles to establish that Kesey was, in fact, planning to write a screenplay about the Round-Up, had numerous plots in mind and was engaged in research for the screenplay as early as 1979. In this context, the statements are out-of-court statements offered to prove the truth of the matter asserted and are hearsay.

The court has considered similar statements allegedly made by Kesey to Faye and determined that they do not qualify for any hearsay exception and should be excluded. The same reasoning is applicable to the statements Kesey allegedly made to the author of the articles discussing his intent to write about the Pendelton Round-Up as early as the late 1970s. Accordingly, Defendants' objection to the statements to prove that Kesey was interested in writing about the Pendleton Round-Up in the 1970s is sustained and the statements are inadmissible for this purpose.

b. paragraph 4

Defendants also move to strike paragraph 4 of the Faye Declaration in its entirety arguing that it is based solely on the hearsay statements of Kesey, that Faye lacks personal knowledge with regard

to Francis and Hagen's specific interest in producing the Screenplay or general experience in motion picture industry and that anything said to Faye at a meeting in the fall of 1984 was in furtherance of settlement negotiations. Paragraph 4 provides:

> In January 1984, Ken started pulling all of his research and ideas together in writing the "Last Go Round" screenplay ("the Screenplay") that is the subject of this lawsuit. In writing the Screenplay, Ken initially was assisted by our neighbor and good friend Irby Smith, who had worked as a producer and as an assistant director on many motion picture and TV productions. Irby later executed a Copyright Assignment, Transfer and Quitclaim dated April 11, 2006, a true and correct copy of which is filed herewith as Exhibit "B," pursuant to which all of his rights in the Screenplay were assigned to Plaintiff. Ken came up with the title "Last Go Round" for the Screenplay, and he wrote it at our house in Pleasant Hill, Oregon, on our computer. During or about the time that Ken was working on the Screenplay, Ken on several occasions spoke with defendants Mike Hagen ("Hagen") and Michele Francis (formerly known as MiShelle McMindes) ("Francis") who were interested in producing the Screenplay as a motion picture through a company they founded, defendant Sundown & Fletcher Inc. ("S&F"). Hagen was considered to be an old family friend and he introduced us to Francis. Neither of them was experienced in motion picture film production, but they apparently hoped to break into the movie business by using Ken's reputation as the author of such works as "One Flew Over the Cuckoos Nest" and "Sometimes a Great Notion."

Kesey's conduct in pulling together all of his research is not assertive conduct and, therefore, not a "statement" under Rule 801. Faye, as Kesey's wife, had the opportunity to witness Kesey writing the Screenplay with Smith. Accordingly, Faye had personal knowledge of both Kesey and Smith's actions while working on the Screenplay in the Pleasant Hill, Oregon, home she shared with Kesey. She also likely would have had personal knowledge of the fact that Hagen and Kesey spoke about the Screenplay, that Hagen was an old family friend, and that Hagen introduced her and Kesey to Francis. There is no dispute that Hagen and Francis were interested in producing the Screenplay through S&F. Finally, the court already has found that the continuing discussions and correspondence between Kesey, Hagen, Francis, and S&F were not in furtherance of settlement

negotiations and not excludable under Rule 408. Faye's presence at the meeting between Kesey and Francis in the fall of 1984 establishes that Faye had personal knowledge of at least one conversation between Kesey and Francis and has the requisite knowledge to testify about what occurred at that meeting.

The inadmissible statement in this paragraph is Faye's statement that neither Hagen nor Francis "was experienced in motion picture film production, but they apparently hoped to break into the movie business by using Ken's reputation as the author of such works as 'One Flew Over the Cuckoos Nest' and 'Sometimes a Great Notion.'" There is no evidence that Faye has independent personal knowledge of Hagen or Francis's past experience in motion picture film production or where Faye obtained this information. Therefore, this statement lacks the proper foundation and is inadmissible.

For these reasons, Defendants' objections to the contents of Paragraph 4 are overruled with the exception of Faye's statement that neither Hagen nor Francis had experience as motion picture producers, which lacks proper foundation and is stricken. All other evidence contained in this paragraph is admitted.

c. paragraph 5

Paragraph 5 provides:

> Ken spent much of the year 1984 writing the Screenplay, which told a fictional account of the famous real-life competition for the first World Championship Broncbusting tile at the 1911 Pendleton Round-Up. In that year, the final competition, or "last go round," was decided in a match up involving two broncbusting veterans, George Fletcher, a popular black cowboy, and Jackson Sundown, a Nez Perce Indian, and a young white kid named Johnathan E. Lee Spain. The story as recounted by Ken deals with the racism experienced by Fletcher and Sundown, the surprising rodeo victory that was awarded to Spain, and the audience's spontaneous decision, inspired by Fletcher's amazing final ride, to auction off

{SIB}

commemorative pieces of Fletcher's hat to raise $400 that was then used to buy for Fletcher the silver saddle that had been awarded to Spain as the victor. The storyline is told from the perspective of much [sic] older Spain as he visits the hospital room of an unconscious young broncobuster who has been severely injured in a present-day Pendleton Round-Up competition. A true and correct copy of the Screenplay is filed herewith as Exhibit "C."

Defendants move to strike this paragraph in its entirety arguing that the Screenplay speaks for itself and that a witness is not allowed to summarize a document that has been entered into evidence. The court agrees. A copy of the Screenplay has been submitted by Plaintiff and is the best evidence of its contents under the Federal Rules of Evidence. FED. R. EVID. 1003. Accordingly, Faye's summary of the story told in the Screenplay violates the best evidence rule, is duplicative of the Screenplay itself, and is inappropriate and unnecessary. Defendants' motion to strike this paragraph in its entirety is sustained and the paragraph is stricken.

Defendants also object to the admission of the first page of Exhibit C asserting that the handwritten copyright logo included on that page was not on the version delivered to Defendants in September 1984. First, Defendants had every opportunity to submit a version of the Screenplay without the copyright logo but it did not do so. In fact, the copy of the first page of the Screenplay offered by Defendants as Page 59 of the Index includes the copyright logo. Second, Defendants' objection to the copyright logo is adequately presented in the Second Francis Affidavit. Defendants' motion to strike the first page of Exhibit C is overruled.

d. paragraph 6

Defendants' object to the contents of paragraph 6 based on their Rule 408 arguments – that the paragraph presents evidence of the parties' communications in furtherance of settlement negotiations. Defendants also argue that Faye's representation that Kesey was not employed by S&F

but was an independent freelance writer is a legal conclusion and should be stricken from the record.

Paragraph 6 provides:

> Ken was not employed by S&F in his writing of the [S]creenplay, but authored it as an independent freelance writer – which is precisely how Ken wrote virtually all of his works. At no time did S&F treat Ken as an employee by, for example, providing health care or other employee benefits to Ken, paying Ken a regular pay check with tax withholding, giving Ken a business title or position with S&F, or providing the office or computer that Ken used when he wrote the Screenplay. Instead of taking the position that the Screenplay was a work for hire owned by S&F, Francis instead proposed a written agreement under which S&F sought to acquire from Ken a six-month option in the Screenplay. Although no such option agreement was ever agreed to and executed, S&F paid a total of $10,000 to Ken: First an initial payment of $5,000 was paid in January 1984, and a subsequent payment of $5,000 was made in September 1984. In addition, I understand that Irby Smith was paid $3,000 by S&F. Initially, Francis told me that these payments were made as an inducement for Ken to work on "Last Go Round" instead of "Sailor Song," a novel that Ken had started about the same time; later Francis told me that this money was a down payment on the six-month option on the Screenplay that Francis later proposed.

This court already has determined that the parties were engaged in business negotiations, rather then settlement negotiations, during this period and that Rule 408 does not apply. The court will take into account Defendants' objection that Faye's description of Kesey as an independent contractor is a legal conclusion when it considers the evidence while addressing the substance of the parties' summary judgment motions. Defendants' objections to this paragraph are overruled and the evidence is admitted.

e. paragraph 7

Defendants move to strike the entirety of paragraph 7, which provides:

> Ken never signed any contract or agreement granting an option or any other rights in "Last Go Round" to S&F, Hagen or Francis. Although Ken signed a "To Whom it May Concern" letter dated January 8, 1984, a true and correct copy of which is filed herewith as Ex. "D," that letter contains no language conveying the copyright , or any other rights, in the Screenplay to S&F or anyone else. On its face,

{SIB}

the "To Whom it May Concern" letter is merely a letter of introduction. Although the letter states that Ken was writing the Screenplay "for" S&F, the word "for" is not a grant or transfer of rights. The word "for" may denote that Ken was working on the Screenplay "for" S&F to read it or "for" S&F to consider making an offer to option or acquire it. The word "for" does not denote, however, that Ken was working on the Screenplay "for" S&F to own the copyright, especially since the letter contains no mention of copyrights. The letter, in its entirety, states as follows:

> Pleasant Hill, OR
> January 8, 1984
>
> To Whom it May Concern:
>
> I have agreed to write a screenplay about bygone rodeo greats Jackson Sundown and Nigger George Fletcher, concerning their historic confrontation at the Pendleton Round-Up in 1916.[24] The name of the production company that I am writing for is SUNDOWN FLETCHER INC. and the people I am dealing with are Mike Hagen and Mischelle McMindes.
>
> /s/ Ken Kesey
>
> Ken Kesey

See Ex. "D." It is clear that S&F did not consider the "To Whom it May Concern" letter to constitute a transfer of rights to S&F, since Francis subsequently contacted me on behalf of S&F in September 1984 to propose an agreement with Ken whereby he would grant an option to S&D in the Screenplay.

Defendants offer Rule 408, best evidence, lack of foundation, and legal conclusion arguments in support of their motion to strike this paragraph. The Rule 408 objection to admissibility has been previously rejected, and the legal conclusion argument will be considered by the court in deciding the merits of the summary judgment motions. However, the best evidence argument is well-taken with regard to Faye's description of the contents of the "To Whom it May Concern" letter, a copy of which has been admitted into evidence, and the court agrees that Faye lacks personal knowledge

---

[24]The Screenplay is about the 1911 Round-Up, not the 1916 Round-Up. Neither party disputes this fact, thought neither offers an explanation for the discrepancy.

{SIB}

of S&F's interpretation or understanding of the legal impact of the "To Whom it May Concern" letter. Accordingly, the court overrules Defendants' objections based on Rule 408 and sustains the best evidence and lack of foundation objections. Faye's description of the "To Whom It May Concern" letter and her statement that S&F did not consider the letter as a transfer of rights are stricken from Paragraph 7. The court defers its consideration of Defendants' conclusion of law argument for its determination of the merits.

f. paragraphs 8 and 9

Defendants again assert their Rule 408 argument in support of their motion to strike paragraphs 8 and 9 in their entirety, as well as their motion to exclude Exhibits E and F. These paragraphs provide:

> 8. Specifically, beginning in or about September 1984, Francis sent me correspondence and other materials pertaining to discussions that she had already commenced with Sue Kesey – my sister-in-law by marriage to Ken's brother – in an effort to negotiate a written agreement under which S&F was seeking a six-month option to purchase the Screenplay. In particular, in Francis's letter to me dated September 30, 1984, Francis wrote to me as follows:
>
> > Ken asked me to direct the contract papers and questions to Sue Kesey while he was here during the Round-Up. Since you do the books for you and Ken I feel that we should begin with you receiving agreement information also.
> >
> > I am sending copies of some recent correspondence with Sue. This includes copies of other option/purchase arrangements from unrelated projects that Sue requested for the purpose of familiarizing herself with the language and format.
> >
> > At the Bill Graham tribute Ken said that he wanted 2 1/2 percent of the producer's gross instead of the net. That is a considerable change. We will agree to put that in our agreement and then negotiate for that position for Ken when we form an alliance with our "line producers." Please consider the revised agreement that you will receive in a few days. We cannot move forward (i.e. solicit funds or seriously

{SIB}

negotiate) without the fundamental agreement between S&F Inc. and Ken. The sooner we get an agreement the more likely we can reach our goal of filming the next Round-Up . . . .

. . .

I hope we can get these agreements done as soon as possible. At that time we can write the check for $10,000 and begin the option period . . . .

A true and correct copy of the September 30, 1984 letter that I received from Francis is filed concurrently herewith as Ex. "E" (emphasis added).

9. A few days later, I received a hand-written note from Francis dated October 4, 1984, which enclosed her proposed revised agreement dated October 3, 1984. A true and correct copy of the handwritten October 4, 1984 is filed concurrently herewith as Ex. "F." The handwritten letter to me from Francis stated "[e]nclosed is the agreement w/ 2 1/2 [percent] of producer's gross. I have a couple investors waiting for your terms and signatures. Also, Carey Williams has a production company interest in discussing this as soon as we secure agreements. Id. (emphases added). The proposed agreement itself provided, among other things:

> This will confirm the basic terms you (Ken Kesey) and Sundown & Fletcher, Inc agreed upon relative to the option and purchase of certain rights to the literary material entitled LAST GO ROUND (herein property) written by Ken Kesey (herein "Owner.")
>
> 1. OPTION: Buyer is granted a 6 month option period commencing _____, 1984, to purchase all motion picture and certain ancillary rights in the property. The consideration for the option is $20,000.00 total ($5,000.00 paid January 8, 1984, $5,000.00 paid September 30, 1984, and $10,000.00 paid _____, 1984.[)] Buyer may extend the option period for an indefinite period for the payment of $1,000.00 a month. Sundown & Fletcher, Inc., holds the exclusive right of continuing the option period for that amount indefinitely until both parties agree to discontinue the option in writing.
>
> 2. Upon exercise of the option, Buyer will pay Owner the amount of Fifty Thousand Dollars ($50,000.00). An addtional [sic] $25,000.00 will be paid upon commencement of the principal photography of the first motion picture if the final approved budget of such motion picture is between 10 million dollars and 15 million dollars and an

> additional $50,000.00 if the final approved budget of the first motion picture is 15 million dollars or more. Owner will also recieve [sic] 2 and 1/2 per cent of one hundred per cent of the gross profits recieved [sic] by the producers from said motion picture.

See Ex. "F." Ultimately, neither the draft option that Francis sent me on October 4, 1984, nor any other written agreement with S&F was signed by Ken, and he never optioned or conveyed his rights in the copyright of the Screenplay to S&F.

As noted above, the court has determined that the parties were engaged in business negotiations during this period and that Rule 408 does not apply. Defendants' objections to paragraphs 8 and 9, as well as their objections to Exhibits E and F, are overruled. The evidence is admitted and will be considered by the court.

g. paragraph 10

Defendants move to strike paragraph 10 of the Faye Declaration arguing that it is primarily an attempt to summarize the Novel. Defendants also object to the admission of a copy of the Novel and a *New York Times* book review of the Novel as irrelevant to the issues before the court, and further object to the admission of the *New York Times* article as hearsay.[25] Paragraph 10 provides:

> By 1993, Ken, with assistance from his longtime friend Ken Babbs, began to write a novel based on the Screenplay, which also carried the title "Last Go Round" ("the Novel"). The Novel told the same story as the Screenplay, recounting the same fictionalized account of the famous competition for the first World Championship Broncbusting title at the 1911 Pendleton Round-Up, and the classic "last go round" between friends and competitors George Fletcher, Jackson Sundown, and Johnathan E. Lee Spain. A true and correct copy of the Novel is lodged herewith as Exhibit "G." The [N]ovel was published in 1994, it was distributed and sold nation-wide across the United States (in fact, it is readily available to this very day 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 Amercian mythology" and observed that "as well as being a ripsnorter of a yarn,

---

[25]Defendants assert the hearsay objection in its objections to the declaration of Ken Babb. The court will address that objection at this time as well.

the history [Ken 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."

The question of whether the Novel and the *New York Times* article are relevant to the issues at hand is for the court to decide when considering the merits of the parties' summary judgment motions. The question of whether the *New York Times* article should be admitted over Defendants' hearsay objection must be addressed now.

The *New York Times* article, entitled *A Western Tale as Tall as It Is True* and written by Christopher Lehmann-Haupt, was published on July 7, 1994. It read:

> It was "a great yarn" his father told him by a campfire one night, writes the novelist Ken Kesey in his introduction to "Last Go Round," a history in the form of a novel written with the aid of research by Mr. Kesey's friend Ken Babbs. The Keseys had been traveling to hunt antelope when they ran into the heavy traffic headed for the Pendleton Round Up, a famous rodeo in Oregon that reminded the author's father of what happened at the first roundup on the weekend of Sept. 16, 1911. He described it over the campfire that night, and it made, as Mr. Kesey repeats, "a marvelous yarn."
>
> Now this is a pretty big buildup to what follows, which is the story of that 1911 roundup told by an actual star participant, Jonathan E. Lee Spain of Nashville, as imagined by Mr. Kesey. Perhaps this accounts for why a certain sense of strain pervades the narrative, why, for instance, Frank Gotch, the wrestler in William Cody's troupe Spain meets on the train to Pendleton, Ore., is 'an unbelievably huge man, or at least something that walked enough upright like a man to have been squeezed into a man's suit." Spain's description continues: "He was hatless and he was hairless, not even any eyelashes. You could see the machinery of his muscles right through his skin and he was muscled all the way to this scalp."
>
> The sense of strain induced by Mr. Kesey's big buildup may also explain why Parson Montanic, the Indian preacher Spain meets after the train arrives in Pendleton, has undergone such an unusual conversion from drunkenness to Christianity. As someone recounts the legend to Spain: "Then, this whopper goes, just as this stinkin' scapegrace was sliding down into his final sleep, a babe appeared in the heavens, naked as a jaybird and glowing like a red-hot ember. It came down and curled up next to him and kept him from freezing to death. Naturally, Montanic says it was the baby Jesus."

Much of "Last go Round" is similarly far-fetched. But then of course Mr. Kesey is writing in the tradition of the tall tale, where anything goes in the cause of fleshing out the myths of the American past. And what could be more exaggeratedly American in this time of sensitivity to multiculturalism than a yarn in which the stars of a legendary rodeo turn out to be a southern gentleman, a black, an Indian and a Jewish woman, and in which the villains try to rig the outcome of the show in favor of the white man?

At least you think that Mr. Kesey's tale is a tall one until you come to the first section of photographs in the book. Now it may be true that a few of the outlandish characters in the story are not pictured here and must therefore be presumed to have been invented by Mr. Kesey. But there are photos of George Fletcher and Jackson Sundown, respectively the black man and Indian of Mr. Kesey's yarn. There is Frank Gotch, the wrestler, looking almost as gigantic as his prose description. There is Parson Montanic dressed up in ornate Indian regalia and possibly blessing his flock.

So it gradually becomes clear that as much as Mr. Kesey may be exaggerating events, he is simultaneously unearthing a reality that is not usually associated with the frontier.

As it works itself out, Mr. Kesey's complex plot does concern itself with how the people who ran the 1911 roundup did try to rig it so that Spain would prevail over the black man and the Indian, with whom he had become good friends by the time the competition had reached its climax. Buffalo Bill Cody, who wants Spain for his traveling show, sics his huge wrestler on George Fletcher to make sure a black man won't win the cowboy championship.

But the details of the story, not its moral, are what captivate in "Last Go Round." Mr. Kesey is richly informative on the skills of rodeo-riding, whether they involve basic broncobusting or such trick events as the backward-riding race, in which the contestants mount their horses back to front, or the wild-cow milking, which pretty much explains itself.

As Spain puts it at one point in his narrative: "Sundown often remarked that there really aint but two basic skills to rodeoing: there's catching holt and there's staying on – ropin' and ridin'. Everything else is just tricks."

Mr. Kesey's sense of the comically outrageous surmounts his zeal to get history straight. For instance, Gotch, the gigantic wrestler, after cruelly disjointing several lesser rivals, finally meets his match in Preacher Montanic, who defeats the bully by securing him with a jaw lock on his posterior. And in the grand finale of the broncobusting competition, Mr. Kesey manages to keep topping himself with successively more exorbitant contrivances.