2nd Civil No. B074848

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT, DIVISION TWO

EILEEN A. RODDENBERRY,

Plaintiff, Cross-Defendant,
Respondent and Cross-Appellant,

v.

MAJEL RODDENBERRY, AS EXECUTOR OF THE WILL OF EUGENE W. RODDENBERRY, et al.,

Defendants, Cross-Complainants,
Appellants and Cross-Respondents.

APPELLANTS' OPENING BRIEF

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INTRODUCTION

This is an ordinary case of contract interpretation arising out of the most extraordinary of circumstances--the incredible and unprecedented success of the television series, "Star Trek," and its progeny, many years after the original was canceled. But the uniqueness of the Star Trek phenomenon should not distract from the routine legal issue lying at the heart of this appeal--determining the intent of parties to a contract in light of the circumstances at the time they made their agreement. The trial court's failure to keep its focus on this central legal issue accounts for a stunning series of grievous and prejudicial errors.

In 1969, "Star Trek" was a failure. NBC took it off the air after three seasons because of low ratings and huge debts. Shortly after the series had been canceled, "Star Trek"'s creator, Gene Roddenberry, and his wife, Eileen, divorced. Gene and Eileen negotiated over their community property, including Norway Corporation, a loan-out corporation which owned all rights to "Star Trek." Gene offered to sell his interest in "Star Trek" to Eileen for $1,000, but she turned down the offer. Finally, Eileen agreed that Gene would receive her interest in Norway--including the right to royalties and rerun fees from "Star Trek"; in exchange, Eileen retained only her right to a "one-half interest in future profit participation income from 'Star Trek' to which the parties are entitled," and received, among other things, most of the couple's jewelry and substantial alimony payments. Eileen's attorney explained under oath that the intent was for Eileen to get one-half of all income from "Star Trek" "so long as that income was earned on account of services already performed, as distinguished from income for services to be performed, in which [Eileen] was not to participate."

After the divorce, Gene devoted himself to promoting "Star Trek" to anyone who would listen--through lectures, conventions, articles, books, and interviews. The series developed a loyal following in syndication. Gene also created a "Star Trek" animated television series, a number of "Star Trek" feature films, and, in 1987, a new television series, "Star Trek: The Next Generation" ("TNG"), which was so successful it spawned its own spin-off series in 1991, "Star Trek: Deep Space Nine" ("DS9").[1/] Gene died the same year.

1/ We use the following abbreviations throughout the brief: "JA": Joint Appendix; "RT": Reporter's Transcript; "Gene": Eugene W. Roddenberry; "Eileen": Eileen Roddenberry; "Majel": Majel Roddenberry; "TNG": "Star Trek: The Next Generation"; "DS9": "Star Trek: Deep Space Nine."

In 1984, Gene's efforts resulted in the original series beginning to return huge profits in which Eileen shared. Not satisfied with her windfall profits from the original series, Eileen commenced this litigation in 1987, in which she contended the 1969 divorce agreement also entitled her to a share of the profits from anything and everything related to "Star Trek," including "TNG" and "DS9." Gene contended that what he and Eileen meant by "Star Trek" in 1969 was the only thing that existed at the time--the original television series. Gene offered abundant, undisputed extrinsic evidence to support his position; Eileen offered only her own self-serving testimony of her previously unexpressed intent. In an apparent effort at Solomonic decision-making, the trial court issued a ruling which completely ignored the evidence and found Eileen was entitled to share in the profits from "TNG" and "DS9." But as shown below, aside from Eileen's irrelevant testimony regarding her intent, there is no evidence whatsoever that the parties intended their 1969 agreement to have that effect.

But Eileen sought even more. Eileen's profit interest in "Star Trek" was governed by the terms of the contracts in existence at the time of the 1969 divorce agreement, and Eileen said as much in a series of admissions, including a binding judicial admission in the operative complaint. But halfway through the trial, Eileen changed counsel and theories. She asserted her profit interest should be based, not on the contracts in existence during the marriage, but on the 1986 contract for "TNG" and "DS9" Gene had successfully negotiated 17 years after the divorce. The latter contract was more favorable to Norway in every respect, because Paramount was willing to give much better terms to get Gene creatively involved in the new series, to use his name and endorsement in marketing it, and to acquire Gene's right to exploit the Star Trek concept, which had greatly increased in value due to Gene's efforts between the 1960's and the 1980's.

Amazingly, the court found Eileen was entitled to share in these improved benefits. Again, this was plain error, a result reached only by ignoring the operative complaint, the plain language of the divorce decree, all substantial evidence of intent and the community property rights of Majel Roddenberry, Gene's wife from 1969 until his death in 1991. As explained below, neither the evidence nor the law supported the trial court's interpretation of the decree.

But Eileen was still not satisfied. In addition to extending her interest to future creations and future contracts not in existence and not contemplated at the time of the divorce, she sought to broaden the intended definition of "profit participation" to include additional items of

compensation in the 1986 contract which were not at all dependent on profitability and were contingent solely on Gene's rendition of personal services. The court added these items to Eileen's recovery--again, without any legal or evidentiary basis. The court then capped off its previous errors by finding Eileen's receipts from "TNG" were subject to 10 percent interest, although the controlling statute makes clear the correct rate is 7 percent.

Finally, in addition to the declaratory relief aspects of the lawsuit, Eileen also charged Gene and Norway with fraud for failing to pay her a full half share of profit participation income from the original "Star Trek" series. When that series went into profits in 1984, Gene recognized Eileen was entitled to a portion of the receipts under the divorce decree, but felt an equal division was unfair, in light of the tireless efforts he made which were principally responsible for the series' eventual success. So instead of paying her one-half, he paid her one-third. Based on this "fraud"--actually at most a breach of contract--the jury awarded Eileen $900,000 in punitive damages against Norway.

The punitive damage award cannot stand, for two separate reasons. For one thing, there was no evidence of the required elements of reliance or reliance-caused damages. This was a breach of contract cause of action masquerading as a tort claim, and the only damages were contract damages--which, incidentally, Eileen completely recovered.

For another thing, Norway cannot be liable for punitive damages as a matter of law. The court expressly found Norway was Gene's alter ego. Just as the statutory law, public policy and constitutional considerations prevent punitive damages from being assessed against a decedent or his estate, so do they prevent such damages from being levelled against the decedent's alter ego corporation. When the claimed wrongdoer is dead, punitive damages serve no lawful purpose, and punish only the innocent.

After more than a quarter century, "'Star Trek has become a permanent fixture in America's cultural landscape.'" (Joseph and Carton, The Law Of The Federation: Images Of Law, Lawyers, And The Legal System In "Star Trek: The Next Generation" (1992) 24 U.Tol.L.Rev. 43, fn. 1.) But in 1969, everyone considered "Star Trek" a disastrous and expensive mistake. Any interest Eileen has in "Star Trek" necessarily derives from the 1969 divorce decree, and the contractual rights to which Gene and Eileen were entitled during their marriage. Keeping in mind the essential principle that it is the parties' intentions at the time the contract was entered into which governs--not some post hoc wishful thinking about what Eileen might have intended had she been clairvoyant--leads inevitably to the conclusion that the judgment must be reversed.

STATEMENT OF FACTS

A. 1964-1965: Gene Roddenberry Contracts To Create, Write And Produce A New Television Series, "Star Trek."

Gene Roddenberry was born in 1921. (RT 1964.) He married Eileen Roddenberry in 1942. After working as a pilot and policeman, in 1948 he began a career as a free-lance and television writer, and in 1964, he created Star Trek. It grew out of stories he told his children about the stars in the galaxy. (RT 1481, 1483-1484, 1486.)

In 1965, Gene, through Norway Corporation,[2/] entered into various agreements with Desilu Productions, Inc. In a letter agreement, Desilu agreed to fund Norway for the development of three one-hour pilot scripts--a western, a World War I story, and "a science fiction property entitled 'Star-Trek'. . . ." (JA 939; RT 290.) In a more formal agreement, dated April 29, 1965 (Revised May 18, 1965) ["the 1965 contract"], Norway agreed to provide Gene's services to write and produce three scripts, including "[a] new 'STAR TREK' pilot script of one hour in length." (JA 952.) Once the pilot was produced, Desilu had the option to "order a series." (JA 956.) Norway and Desilu agreed to split profits 50/50 "[o]n any series produced in accordance with this agreement," and that "[a]ll other profit participations will come off the top. . . ." (JA 960.)[3/] Norway's interest was in net, not gross, profits. (JA 960, 945; RT 3502.)

B. 1966-1969: "Star Trek" Airs For Three Seasons And Fails.

The "Star Trek" television series went on the air in 1966. It had low ratings and was a financial disaster. NBC attempted to cancel it after the first and second seasons, but was persuaded not to do so by Gene and loyal fans (known as "Trekkers" or "Trekkies"). The series was finally canceled in 1969, after finishing third in its time slot for each of its three seasons. It was $3 million "in the hole," a sum which eventually grew to $5 million. Paramount[4/] believed it would

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2/ Norway was a "loan-out" corporation, a common entity in the entertainment industry. The entertainer or writer forms a corporation and is its sole shareholder and principal officer. In contracting with studios, the corporation lends the services of its shareholder. (RT 3291-3292.)

3/ This provision meant Desilu and Norway would split 50-50 any profits that remained after the shares of the other profit participants were deducted. (RT 1007.)

4/ In July, 1967, Desilu was acquired by Gulf and Western, which owned Paramount Pictures Corporation. The Desilu/Norway contracts were assigned to Gulf and Western and Paramount. (RT 460.)

never show a profit. (RT 362-364, 473-474.) "Star Trek" was considered a failure. (RT 365, 1498.)

Following network cancellation, "Star Trek" reruns continued to be shown in syndication on local stations, which paid licensing fees to Paramount. (RT 509-510.)

C. 1969: Gene And Eileen Divorce.

1. The negotiations.

The Roddenberrys separated in August, 1968. (JA 1020.) Eileen filed a complaint for separate maintenance, and Gene cross-complained for divorce. (RT 362, 370; JA 1019, 988.) Counsel conducted discovery and negotiations regarding the terms of the divorce agreement and the division of community property, culminating in three days of extensive, hard-fought negotiations at the courthouse in July, 1969. (RT 386-387, 395, 1332.) Eileen was accompanied by her attorney, Jerry Edelman, and her accountant, Henry Serlin; Gene was accompanied by his attorney, Leonard Maizlish, and his accountant, Philip Singer. (RT 1495.)

It was undisputed that Norway was community property. Gene's cross-complaint (and responses to discovery) described Norway as a "30% profit participant in the television series entitled 'STAR TREK.'" (JA 989.) Various proposals were made for disposing of Norway and its interest in "Star Trek." The lawyers discussed an equal division of community property, including the shares of Norway. (RT 1219-1220, 387-388, 1338, 1493.) However, Eileen was unwilling to divide the couple's jewelry, silver and china in half (RT 1220), and Gene was unwilling to have Eileen share financially in his future projects or future services other than by alimony. (RT 390-391, 1805.) Gene offered to sell his interest in "Star Trek" to Eileen for $1000, but she rejected that offer. (RT 4613.)[5/] Finally, the parties agreed that Gene would get all of Norway, except Eileen would get half of Norway's profit participation interest in "Star Trek." (RT 388.)

The only profit participation interest discussed during the courthouse negotiations related to the completed "Star Trek" television series. (RT 388-390, 441, 1046, 1050, 2040.)

5/ Eileen again declined to purchase Gene's interest in "Star Trek" in 1972. (RT 4611, 4613.) Despite her demonstrated lack of interest in "Star Trek," Eileen testified at trial more than twenty years later that in 1969 she did not think "Star Trek" was a failure and believed "it would be something someday." (RT 4003, 1499.)

2. The rough draft of the stipulated judgment.

Paragraph 7(c) of Eileen's counsel's original handwritten proposal stated that Eileen transferred to Gene her interest in Norway, "excluding any interest in 'STAR-TREK,' or any income directly or indirectly generated by 'STAR-TREK,' whether in the form of royalties, rerun fees, profit participation, or otherwise." (JA 995-996; RT 1049, emphasis added.)

This proposal was unacceptable to Gene. He wanted to retain the royalties and rerun fees from "Star Trek," and agreed to relinquish his claims to the couple's jewelry and to pay substantial alimony in exchange. The underlined language was struck, and the paragraph rewritten so that the sole interest Eileen retained was a "profit participation interest in 'Star Trek.'" (RT 408-409, 1050, 1200.) "Profit participation" was a specific category of revenue under the existing 1965 contracts. (JA 960.)

3. The stipulated judgment.

On July 2, 1969, Jerry Edelman, Eileen's lawyer, read the parties' stipulated agreement into the record. (JA 999; RT 417.) Paragraph 8(c) stated:

> "8: [Gene] sells, quitclaims and transfers to [Eileen] . . . . One-half interest in all future profit participation income from 'Star Trek' to which [Eileen] and/or [Gene] are entitled. Defendant will require the source of such funds to pay plaintiff's share (one-half of 30 percent-15 percent) without deduction or offset of any kind directly to plaintiff." (JA 1005-1006.)

4. The interlocutory judgment.

The Interlocutory Judgment Of Divorce was filed December 16, 1969. (JA 1035.) The specific percentages (30-15) were not carried over to the final draft because Norway's and Paramount's profit shares in "Star Trek" were later determined to be somewhat less than 30 percent. In the interest of accuracy, the 30-15 reference was dropped. (RT 420.)[6/]

The decree also provided, "Subject to the provisions of this Stipulation and Order, all future income of each party is that party's separate property." (JA 1041-1042.)

6/ Maizlish originally believed William Shatner and NBC had profit participation interests of 10 and 30 percent, respectively, leaving 30 percent each for Paramount and Norway. Maizlish later came to doubt the accuracy of these figures. Thus, no specific percentages were included in the final decree; the attorneys agreed Eileen was entitled to half of what Norway was entitled to receive. Maizlish eventually determined Shatner had a 20 percent share, and NBC, Paramount and Norway had shares of 26-2/3 percent each. Thus, Eileen's share was 13-1/3 percent. (RT 596, 1020-1021.)

The Final Judgment of Divorce was entered December 24, 1969. (JA 1034.)

D. 1970: Eileen's Claim To Royalty Payments From "Star Trek" Is Denied.

In late 1969, before the final decree was entered, the Roddenberrys' lawyers exchanged letters addressing the question whether the "profit participation" to which Eileen was entitled included royalty fees for the "Star Trek" reruns being shown in syndication. (RT 427-428, 431-439, 444-451; JA 1018.) Under the royalty provision in the 1965 contract, Norway was to receive fixed amounts for the first five reruns of each episode. (JA 958-960; RT 445.) Maizlish explained to Edelman that profit participation was contractually a completely different type of income than royalties. The latter were specific sums payable for the first five reruns, regardless of profitability. The former constituted the monies remaining if and when the huge production deficit was made up. (RT 444-448; JA 1018.)

Shortly after the final decree was entered, Eileen retained new counsel, Simon Taub, and brought a motion for new trial, claiming entitlement to rerun royalty fees in the television series "Star Trek." (RT 1562-1564; JA 1068.) In support of the motion, Eileen submitted the declaration of her former counsel, Edelman, concerning the intended meaning of the divorce decree. He declared it was the intent of the divorce stipulation that Eileen was to "participate in one-half (1/2) of all of the income from Star Trek, so long as that income was earned on account of services already performed as distinguished from income for services to be performed, in which [Eileen] was not to participate." (JA 1073; RT 1342; emphasis added.)

The court denied Eileen's motion for new trial on January 21, 1970. (JA 1076; RT 1564.)

E. 1970: Gene Begins His Efforts To Promote "Star Trek."

After the divorce, Gene married Majel Roddenberry, who had been an actress on "Star Trek," and began devoting great amounts of time and energy to trying to revive the failed television series as well as working on other Star Trek projects. (RT 2184-2185, 2194, 2199, 5036.)

In particular, from 1970 to the mid-1980's, Gene criss-crossed the United States, giving lectures (sometimes as many as 40-50 a year) at college campuses and other places about "Star Trek." (RT 2189-2191, 5045.) He explained the Star Trek philosophy as one of "infinite diversity and infinite combinations," i.e., "To have a different idea is not necessarily to be wrong. . . . For if we could not learn to appreciate the small variations between our own kind here on earth, God

help us if we get out into space and meet the variations that are almost certainly out there." (RT 5059.)

Gene travelled throughout the country, very often with Majel, participating in hundreds of Star Trek conventions. They would give speeches, answer questions, mingle with fans, sign autographs, and judge costume contests. (RT 2190, 2419, 5037-5042.) Gene wrote articles and books. (RT 2185, 2206.) He read and answered fan mail. (RT 2192, 2207.) He signed autographs. (RT 2185.) He gave hundreds of newspaper, radio and television interviews. (RT 2191, 2350, 5036.)

F. 1973: Gene Creates The Animated "Star Trek" Television Series.

In April, 1973, Gene, Paramount, Filmation, Inc., and I.F.A. (a talent agency) agreed to create and produce an animated cartoon television series based on "Star Trek." (RT 1100; JA 1077.) NBC ordered the series, specifying "Gene Roddenberry [is] of the essence." (JA 1081.) The principal characters were the same as in the live-action television series. (RT 626.) The series aired for two seasons, 1973-1975, and won an Emmy award for the best children's series. Afterwards, it was rerun in syndication. (RT 1096, 2021.)

Eileen watched the animated series with her grandchildren in the 1970's. (RT 1830-1831, 1853.) She told her daughter that Majel had a speaking part in it. (RT 1832, 1853, 2193.)

G. 1973: The Modification Proceedings.

In 1972-1973, Gene sought to reduce his alimony payments. (RT 455.) He provided Eileen and her new counsel, Samuel Picone, with all documents relevant to his income, including the contract for the animated "Star Trek" television series. (RT 888-891, 895, 900.) That contract revealed there were likely to be early profit payments from the animated series. (RT 1101-1102; JA 1079.)[7/]

At a hearing on October 4, 1973, Howard Barton testified for Paramount that the original "Star Trek" television series continued to show a deficit and would never show a profit. (RT 473-474, 905.) Gene and his accountant testified that Gene's income included $40,000 for one year's services on the animated "Star Trek" television series. (RT 899-900, 903-904.) The alimony was reduced for one year. (RT 455, 1693.)

7/ The animated television series in fact paid profits from 1975 to the 1980's. Norway ultimately received about $200,000. (RT 2024, 2026.)

Eileen was present at all hearings, sitting at counsel table with Picone. (RT 906, 1602.)[8/] At no time did either of them contend Eileen's profit participation interest in "Star Trek" acquired in the 1969 divorce included an interest in the animated television series. (RT 1103, 3431, 4622.)

H. 1975-1978: "Star Trek"'s Popularity Grows, And Gene Enters Into New Agreements With Paramount.

By 1975, the efforts of Gene, Majel, and loyal "Star Trek" fans were beginning to pay off. Paramount wanted to do something based on "Star Trek," and finally decided on a big-budget feature film. (RT 2194-2195.) In 1976, Paramount and Gene (through Norway) contracted to develop and produce the first Star Trek movie. (JA 1118; RT 2053.) Gene went to work for Paramount full time. (RT 2195.)

In 1978, Paramount and Norway entered into a new agreement amending their prior contracts of 1965, 1973, 1976 and 1977. (JA 1097.) The new agreement ["the 1978 contract"] covered two subjects--the Star Trek movie, and proposed new Star Trek television programs, including a new Star Trek series. (RT 538, 4404.)[9/] According to Richard Zimbert, Paramount's General Counsel, Gene's participation in these projects was "an absolute and unequivocal requirement. . . . [T]o Paramount he was critical." (RT 2058.) Gene expressly acknowledged in writing that Paramount would not have entered into the agreement without his personal endorsement and approval. (JA 1113.)

Paramount soon went forward with the movie, but tabled the idea of a new television series. (RT 4272-4273.)

I. 1979: The First "Star Trek" Movie Is Released, And Five More Follow.

"Star Trek: The Motion Picture" opened in 1979. Its success led to five sequels--"The Wrath Of Khan" in 1982, "The Search For Spock" in 1984, "The Voyage Home" in 1986, "The Final Frontier" in 1989, and "The Undiscovered Country" in 1991. (RT 721.) All six featured the same characters and actors as the original television series. (RT 811.)

8/ Eileen testified at trial in this case that she had never seen the animated television series, never talked about it with anyone, never told anyone Majel had a voice part in it, and did not learn of its existence until her deposition in this case, i.e., after 1987. (RT 1501, 1603, 1651.)

9/ With respect to the original series, the 1965 agreement remained in effect. (JA 1104.)

Gene produced and co-wrote "Star Trek: The Motion Picture." (RT 737.) Under the 1976 and 1978 contracts, Gene's right to write or produce any sequels depended on his rendering services on the first movie. (JA 1131, 1099; RT 1986-1987.) Gene ultimately rendered services on all six movies, although the time he devoted to them diminished due to his involvement with other projects and, in 1991, declining health. (RT 737-742, 1129-1131, 2209.)

Eileen's testimony was conflicting. She both denied all knowledge of the "Star Trek" movies and also admitted she learned about them from newspaper ads. She denied any knowledge of Gene's involvement in the movies, and claimed not to have noticed the name "Gene Roddenberry" in the ads. (RT 1647, 1649-1650, 1660, 1662, 1664-1666, 4163-4164.) She claimed not to have seen any of the numerous articles that appeared between 1978 and 1985 about the movies, including those, often on the front pages of the View or Calendar sections of the Los Angeles Times, reporting their box office successes. (RT 2215-2220.) Eileen denied having seen a poster for the first "Star Trek" movie on the closet door in her granddaughter's room, although her granddaughter testified Eileen used that closet on her regular visits. (RT 1661, 1850-1852.)

Until the advent of this litigation, neither Eileen nor any of her lawyers ever asserted that the profit participation interest in "Star Trek" she acquired in the 1969 divorce decree was intended to include an interest in the movies. (RT 1126.)

J. 1984: "Star Trek," The Original Television Series, Generates Its First Profits Fifteen Years After Being Canceled.

In June, 1984, fifteen years after "Star Trek" was canceled, Norway received its first profit distribution from Paramount--approximately $850,000. (RT 3201.)

Despite the terms of the divorce decree, Gene believed a 50-50 division with Eileen was inequitable, given the decade and a half of work he (and Majel) had devoted to promoting "Star Trek." Gene asked his attorney Leonard Maizlish if there was any legal theory to justify paying Eileen less than 50 percent. Maizlish suggested the theory of "unjust enrichment," i.e., Eileen would be unjustly enriched if she and Gene received equal shares, because there was never any intention that Eileen should share in Gene's post-divorce efforts, and those efforts in promoting the failed series were a principal reason for its belated success. (RT 1375, 4712-4719.)

After discussing the matter with Maizlish, Gene decided to pay Eileen a full one-half share but also to inform her he believed he was entitled to compensation for his years of hard work. (RT

4722-4723.) He hoped to resolve the matter without litigation, since he did not want to jeopardize his relationship with his daughters or to have "any more wars" with his ex-wife. (RT 4721-4722.)

Thus, on February 5, 1985, Gene's accountant, Morton Kessler, sent Eileen a letter essentially dictated by Maizlish (RT 1427), noting that "a check in the amount of $425,676, which constitutes one-half of the gross monies received from Paramount in connection with the television series entitled 'Star Trek'" was enclosed. The letter stressed that Gene believed he was entitled to compensation for his personal efforts promoting "Star Trek" over the years, but that he authorized the payment "in the spirit of goodwill" with the hope a fairer distribution of profits could be arranged in the future. (JA 1046-1047.)

Eileen did not believe she was receiving half of the monies Norway received from Paramount. (RT 1715-1716.) On March 8, 1985, she responded to the letter, expressly reserving her rights to future disbursements "in connection with any of the Star Trek properties," and stating:

> "While the check received pleases me very much . . . I am very concerned at your statement that 'it is the view of all of Mr. Roddenberry's advisors that he is entitled to equitable consideration for his enhancement of the value of the television series through his personal activities.' ¶ The specific words 'equitable consideration' troubles me very much. . . . I would appreciate knowing just who you are referring to in respect to his 'advisors' so that my attorney may communicate with them directly."

Eileen's letter also requested an accounting statement of the gross proceeds received by Norway and the accrued interest. (JA 1049-1050; RT 3216-3218.)

After discussing the matter with Maizlish, Kessler responded to Eileen's March 8 letter on April 15, 1985:

> "The use of the words 'equitable consideration' is based on an opinion of all [Gene's] advisors . . . that Mr. Roddenberry is entitled to some sort of offset . . . . It is merely a request from Mr. Roddenberry and his advisors that we deal in good faith and fairness. We would hope that you would . . . consider meeting with us with your advisors to discuss it further." (JA 1051; RT 3221-3222, 663.)

In February and June, 1986, Norway received two more profit distributions from Paramount, of approximately $1,842,000 and $780,000. (RT 3224.) Once again, Gene, Maizlish and Kessler discussed deducting a portion of Eileen's share to compensate Gene for his extensive efforts promoting "Star Trek" from 1969 on. This time, Gene made the decision to pay Eileen, not one-half of the amounts received, but one-third, withholding one-sixth. (RT 670-672,

1421.)[10/] Accordingly, on August 29, 1986, Kessler sent Eileen a check with a letter stating: "I am pleased to advise you that Paramount Pictures has made a second distribution of profits from the television series 'Star Trek.' As per my prior correspondence please find a check in the amount of $614,156." (RT 3226; JA 1052.)

Kessler sent a similar letter to Eileen in January, 1987, with respect to the third profit distribution, enclosing a check for approximately $260,000. (RT 698, 3232; JA 1054.)[11/] Eileen sent copies of the check and letter to attorney Ken Scholtz, whom she claimed not to have hired until December, 1986. (RT 1725.)

In July, 1987, Maizlish fully informed Scholtz of the amounts being withheld. (RT 869; JA 1056.) Paramount had made a fourth distribution of profits to Norway in January, 1987, and, on July 23, 1987, Kessler sent Eileen a check for approximately $308,000, representing one-third of the $924,000 Norway had received. (RT 3238.) A fifth distribution was made to Norway in July, 1987, for approximately $945,000; Gene paid Eileen approximately $318,000 in September, 1987. (RT 3238-3239.)

Before trial began, Eileen had received almost $2,000,000 in profit distributions from the original television series; approximately $750,000 had been withheld by Gene.[12/]

K. 1986-1987: Gene (Norway) Contracts With Paramount To Create, Write and Produce A New Television Series, "Star Trek: The Next Generation."

1. The idea.

In 1986, Paramount decided the time was ripe for a new television series based on "Star Trek." (RT 3751.) The original series had developed a cult following in syndication, had been

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10/ Majel did not participate in this decision. (RT 673.)

11/ The second and third payments to Eileen form the basis of the fraud verdict and award of punitive damages. (RT 4033.)

12/ In June, 1988, the parties to this litigation stipulated that henceforward Paramount would pay Eileen directly one-third of the amount due Norway, and would deposit the difference between one-half and one-third (one-sixth) into court. (RT 935, 2241-2242; JA 228.) As of June, 1992, Paramount had paid approximately $1,300,000 into court. By that date, Eileen had received about $4,500,000 in profits from Paramount and Norway. (RT 2241-2242.)

In October, 1992, pursuant to stipulation, all monies paid into court were disbursed to Eileen, with interest. (JA 713.) By January, 1993, Eileen had received $7,745,000 in "Star Trek" profits. (RT 3078.) Distributions continue to be made every six months. (RT 5210.)

in a net profit position for two years, and had spawned three successful movies. (RT 3509-3510, 4281.)

Paramount submitted a proposal to Gene for a new Star Trek series, written by Paramount writers. (RT 2364.) It dealt with the carryings on of young space cadets at the Star Fleet Academy; Gene hated the idea, describing it as "Animal House" in space. (RT 1977, 3409.) At age 65, he was reluctant to get involved. (RT 3410.) Yet he wanted to ensure the quality of any new series. (RT 2367.) He also knew another successful series would enable him to provide a nest egg for his wife, son,[13/] and two daughters, and for his mother and sister, whom he helped support. (RT 1978.) Ultimately, Gene could not resist the challenge of "catch[ing] lightning in a bottle twice. . . ." (RT 745.)

Paramount was extremely pleased to have Gene on board, convinced a new series had the best chance of success if Gene were involved creatively and if he lent his unequivocal endorsement to the project. (RT 3753-3755, 4284-4285.) According to Mel Harris, President of the Television Group of Paramount Pictures from 1985 to 1991,

> "[O]ur earnest desire was that . . . Gene Roddenberry . . . would come in and create the new series because we respected his creativity and what he could bring to putting a stamp of the Roddenberry mystique on to a whole new set of characters in a whole different time in a whole different place." (RT 4271-4272, 4277.)

> "[O]n a scale of 10 I know I can get a 5, I can probably create a 7 but I'd really like to see if I couldn't go for a 10, and . . . all of us . . . felt more comfortable that we could accomplish that with the services of Gene." (RT 4286.)

The studio decided to take the difficult and unusual step of producing the new series for "first-run syndication," i.e., for initial exhibition on numerous local stations across the United States, rather than on a single network. (RT 3540.)[14/] To successfully market the new series, then, Paramount had to sell it to a large number of buyers throughout the country, rather than to just one. (RT 3587.) Paramount believed Gene's creative efforts and "marquee value" would greatly enhance these sales efforts. (RT 4283-4284.)

13/ Gene and Majel's son, Eugene Roddenberry, Jr., was born in 1974. (RT 2184.)

14/ Paramount believed the new series should have a full season (26 episodes). At more than a million dollars per hour, plus advertising and promotion, the first year was expected to cost forty million dollars. None of the networks was willing to commit to such an undertaking, so Paramount decided to do it alone. (RT 4282-4283.)

2. The contract.

Maizlish took the position that a new contract was necessary if Paramount wanted to acquire Gene's services. Paramount consented to renegotiate, and arrived at an agreement more favorable to Gene in every respect than the 1978 contract. (RT 3412.) It was, in industry terms, a typical "A-level deal," comparable to those enjoyed by other top television producers and writers. (RT 3600-3601, 4350, 4466, 4474.)

Despite Paramount's professed belief that the 1978 contract applied, the studio had a number of reasons for agreeing to negotiate a new contract. In 1986, Star Trek was much more popular and successful than it had been in 1978. Moreover, in 1986, unlike 1978, television writers and producers enjoyed a seller's market, and Paramount would have to compensate whomever it hired to replace Gene at greater than 1978 rates.[15/] (RT 4286-4287, 4290-4291.) And, as noted above, Paramount "felt that Gene Roddenberry was the absolute key to doing a 'Star Trek' program which would ensure success." (RT 3712, 3669 [testimony of Howard Barton, Paramount Vice-President and head counsel for its network television division].) Indeed, Paramount would not have negotiated a new contract if Gene had not obligated himself to perform services. (RT 4279.) Paramount was also motivated by the desire to acquire the right to the television exploitation of the Star Trek concept. (RT 3510.)[16/]

Under the terms of the agreement governing the new series ("the 1986 contract"), Gene agreed to perform a number of services, i.e., write a "bible" outlining the series, engage in publicity, write the pilot, executive produce the pilot, and executive produce all episodes of the series for the first year. Specific compensation was provided for each service. (RT 3496, 3498-3499; JA 811, 1082-1084.) After the first year, Gene could elect to be either Executive Producer or Executive Consultant (subject to annual increases) or to perform no services. (RT 3500; JA 1083.)

15/ As Mel Harris explained, "Across the United States and around the world there were hundreds of new television stations. There were new cable networks coming up and there was a voracious appetite, just everybody wanted more programming. In the face of that the demand for the services of writers and producers went up, so . . . those people's compensation levels went up enormously between 1978 or 1980 and 1985, 1986. . . ." (RT 4287.)

16/ However, Paramount executives themselves testified without dispute that they believed Paramount already owned that right. (RT 3768, 4273, 4453.)

In addition, Norway was to receive royalty payments[17] of $9,000 for the original run and first two reruns of each episode, and $9,000 for the next five reruns of each episode. (RT 3502; JA 811, 1084.) Norway would also receive legal/administrative fees of $5000 per episode. (JA 815, 1084.)

Furthermore, if Gene served as Executive Producer for at least 80 percent of all episodes in the first season, Norway would receive 35 percent of the adjusted gross profits derived from the series,[18] reducible by the shares of other profit participants to a floor of 30 percent. If Gene did not serve as Executive Producer for 80 percent of all episodes in the first season, Norway's profit participation would be reduced by 40 percent, i.e., to 21 percent (or a floor of 18 percent). (RT 3503, 3560, 4511; JA 812, 1084-1085.)

Finally, Norway was to receive advances against profits[19] under the same preconditions as profits, e.g., if Gene served as Executive Producer for 80 percent of all episodes in the first year. (RT 3504-3505; JA 1084-1085.)

3. Gene's efforts.

Gene served as Executive Producer for all episodes in the first year. He worked extremely hard, routinely putting in ten- to sixteen-hour days. (RT 3712, 3984, 4302-4303.)

Gene wrote the "bible," which set out the outline, history and direction of the new series and developed the characters. The bible was a "road map" for the writers; it contained "the words by which you are to be governed if you're going to write future scripts." (RT 4298-4300, 2011.)

17/ "Royalties" are often paid to the person who develops or creates a new series for the right to its use. (RT 4352.) Royalties are like patent payments made to an inventor for each invention sold. (RT 4296.) Royalties are not dependent on profits; they are paid whether or not profits are accrued. (RT 3962.)

18/ "Adjusted gross" is a very valuable form of profit participation--much more valuable than "net." (RT 3626.) It is reserved for top level talent. (RT 4356.) Adjusted gross profits are figured before deducting distribution fees; net profits are figured after deducting them. (RT 3920.) A series with high distribution fees may show an adjusted gross profit long before it shows a net profit--if it ever does. (RT 3639.) "TNG" had high distribution fees, in part because it was made for first-run syndication, i.e., it had to be sold in 175-200 different markets. (RT 4288.)

Under the 1965 and 1978 contracts with Paramount, Norway had net profit interests--of 26-2/3% and 25%, respectively. (RT 3502, 4289.)

19/ Advances against profits are paid for each episode produced and are not refundable if no profits are ever realized. If profits are eventually distributed, previous advances are deducted. (RT 3494, 3504-3505.) In the mid-1980's, because of the demand for top talent in the television industry, studios commonly agreed to pay advances against profits to such talent. (RT 4292-4293.)

Paramount was "enormously pleased" with the bible, as with the two-hour pilot, which Gene extensively rewrote. According to Mel Harris, the bible and pilot were

> "above and beyond what we expected. This was really a different world than anybody had ever seen before, and certainly for a television series it was a different world than anybody had ever seen before." (RT 4299-4300.)[20/]

Harris attributed the series' eventual phenomenal success to "what was put in this bible, that original outline and that original pilot . . . ." (Ibid.)

Gene was extensively and actively involved in every aspect of production. (RT 747-748, 3980.) He assembled the personnel, and he supervised casting, costumes and set design. (RT 3980-3983, 4300.)[21/] He wrote or rewrote at least half the scripts. (RT 3417, 738.) He strove to keep up staff morale during a writers' strike. (RT 3985.) He struggled with the younger writers over the tone and direction of the series--he was "working intellectually and mentally to hold [his] ground for a vision that [he] ha[d] created and the strain that was on Gene Roddenberry at that point to maintain this vision that he had created was quite high." (RT 4303.)[22/]

During the second year of production (1988-1989), Gene was still very actively involved in "TNG" (e.g., reading every draft of every script), but put in somewhat less time. (RT 748, 3762.) There were few casting decisions, since the main stars were already in place. (RT 3984, 4300.) By the third year, Gene was becoming increasingly confident in the team of writers and co-producers he had assembled and was able to delegate much of the work. (RT 748, 3983-3986, 4304.) He was 68 years old, and wanted to "get something more out of life than just work on a seven day a week basis." (RT 2210-2211.) He spent more time at his La Costa home, where he read the finalized scripts, and "phoned it in"--a common practice for an executive producer once

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20/ "TNG" takes place in the mid-24th century, 78 years after the original "Star Trek." Although it had no continuing characters (RT 622), and no continuing actors (RT 829), it shared some of the same elements, e.g., a spaceship with the same name (Enterprise). (RT 772.)

21/ Gene's approach was decidedly "hands-on." For example, "He would have the artist bring him the sketches and he would say, 'I want to have a bigger bridge, I want a wider screen. I would like to see two elevators, and can you draw that for me . . . .'" (RT 3982.) He consulted daily with the wardrobe director and "would go over and say, 'I think you should raise this or I think you should lower this . . . .'" (Ibid.)

22/ Mel Harris explained the reason for the tension with the other writers and Gene's extensive involvement in rewriting: "[W]e had a hard time keeping writers on the show. . . . [A] lot of the writers that were available [in 1986] were coming off of cop shows and . . . wanted to do bang-bang, shoot-'em-ups or car chases, let's have the space ship run around and . . . shoot the bad guys, and Gene had to go back in and rewrite many, many of the early scripts because they simply didn't fit the premises that were outlined in this bible." (RT 4302.)

a series is off the ground. (RT 3986, 4587.) By the fourth year, his health was declining, and he devoted little time to the series. (RT 3763, 3993.) Gene died shortly after the beginning of the fifth season, two days after his final visit to the set. (RT 3994, 4999.)

4. The success.

"TNG" went on the air in the fall of 1987. (RT 544.) It was a great success. (RT 4300.) By its sixth season (1992-1993), it had the highest ratings of any scripted show in first-run syndication. (RT 4305.) Paramount's Mel Harris explained, "In the period since 1987 no other program has been able to get anywhere near ['TNG'] . . . . It's primarily because of the program that was created. . . . [I]f this hadn't been created in the way that it was by Gene Roddenberry, it probably wouldn't be on the air today and it certainly wouldn't be performing as it is." (RT 4306.)

On January 21, 1993, Paramount declared "TNG" was in a profit position and announced an impending profit distribution. (RT 4448.) In February, pursuant to stipulation and without waiver of any rights, approximately $6.8 million from "TNG" was distributed to Norway and Eileen. (RT 6059.)

The success of "TNG" spawned another new series, "Star Trek: Deep Space Nine", which first aired in January, 1993, also in first-run syndication. (RT 3677.) Since "DS9" was a "generic spin-off" of "TNG," the terms of the 1986 contract applied, entitling Norway to various payments as well as a profit participation interest in the spin-off.[23/] (RT 3608.) Pursuant to the 1986 contract, Gene's death in October, 1991 had the effect of reducing, but not eliminating, certain of those amounts. (RT 3547-3548, 3822-3823.)[24/]

23/ The 1986 contract defined "generic spinoff" as "a series which contains as a continuing character one who first appeared in material written by GR and/or in a script written when GR was actually rendering services as Executive Producer. . . ." (JA 1090.)

24/ According to Howard Barton, Paramount's Vice President and counsel, "[I]t's not uncommon . . . when you hire a top talent, that not only does he get a grade A deal, but he also gets a participation in any spinoffs, which participation is somewhat reduced in the event that he doesn't perform services," as happened in the case of "DS9." (RT 3718.)

STATEMENT OF THE CASE

A. The Litigation: Eileen Seeks Fifty Percent Of Virtually Everything Connected With Star Trek, Whether Created Before Or After Her Divorce Eighteen Years Earlier.

On December 30, 1987, Eileen filed a complaint for damages and equitable relief against a number of defendants, including Gene, Norway, Maizlish, Kessler and Paramount. (JA 1.) The complaint alleged fraud and conversion in failing to pay Eileen a one-half share of the profits from "Star Trek." (JA 10, 15.) Soon after, in her deposition, Eileen took the position that the divorce judgment entitled her to a profit participation in anything and everything related to the Star Trek concept except fees Gene received from lectures. (JA 225.)

On December 19, 1989, Gene, Norway and Majel filed the operative second-amended cross-complaint. (JA 234.) They sought a declaration that the only profit interest Eileen acquired under the divorce decree was an interest "in profit participation income from the original Star Trek television series after payment of all appropriate expense, including just and reasonable compensation to cross-complainants for their work, labor, effort and expense and that she has no interest in any post-divorce creations." (JA 243.) Majel also asserted that Eileen's claims would adversely affect her community property interest. (JA 235.)

On May 24, 1990, Eileen, represented by new counsel, filed the first amended complaint, which added a number of defendants, including Majel, and causes of action, including declaratory relief. (JA 248.)[25/] The complaint alleged that the "'profit participation income from "Star-Trek"'" which Eileen acquired in the divorce "includes all profits and income that might thereafter be generated from Gene and Eileen's community property interest in 'Star-Trek' as it existed under the [pre-divorce] Contracts at the time of the [divorce] Judgment." (JA 253.) The complaint contained fourteen separate references to Eileen's interest in "Star Trek" as being half of 30 percent, or 15 percent. (Id. at ¶¶ 12, 33, 49, 67, 69, 71, 78, 92, 94, 966, 101.)

In December 1990, Eileen moved to amend her complaint further by deleting the specific percentage references. Her attorney claimed they were included by "mistake." The court held Eileen failed to show satisfactory evidence of mistake and denied the motion. (JA 297, 437; RT 102.)

25/ Eileen's new counsel filed a malpractice action against her prior counsel. (JA 421.)

Gene died on October 24, 1991. Majel is the executor of his will.

B. The Trial, Phase I: The Court Determines The Divorce Judgment Granted Eileen No Interest In "Star Trek" Movies, Cartoons, Or Merchandise, But Entitled Her To A Profit Participation Interest In The Original Television Series, "TNG" and "DS9."

Phase I of the trial began on May 11, 1992. (JA 913.) Eileen was represented by new counsel, Kaye, Scholer, Fierman, Hays & Handler. (Ibid.) The sole issue was "the extent and scope of the rights of plaintiff [Eileen] in Norway's profit participation income from Star Trek, arising as a result of" the divorce judgment. (JA 690.) Eileen took the position she "had an interest in every dollar that Mr. Roddenberry was making from Star Trek except for his lectures." (RT 1604, 1560-1561.) Defendants took the position Eileen was entitled to no more than half of Norway's profits from the original television series. (JA 567.)

After fifteen days of trial, the court issued its Statement Of Decision Re Phase I Of Bifurcated Trial. (JA 913, 689.) The court determined Eileen had (1) a "clear contract right" to half of Norway's "profit participation from the original TV series which was canceled in 1969," subject to any offsets that later might be shown to apply (JA 697-698 at ¶¶ 29-31); (2) no interest in any profit participation income from the cartoon series, the motion pictures, or merchandise (JA 698-701, 707-708 at ¶¶ 32-41, 63-66); and (3) "a profit participation interest in ["TNG"] and any other TV series that's a sequel" to it (JA 706, 701-706 at ¶¶ 58, 42-59).[26/]

26/ The latter interest was subject to a caveat: If Norway's increased profit participation was attributable to Gene's personal services, or to his taking less for services in order to receive more in profits, the court would, in Phase II, "allocate and retitle" the various payments to accord with the divorce judgment. Conversely, if the 1986 contract was so designed to reduce Norway's profits "to squeeze out plaintiff's interest," the court would likewise restructure the contract. (JA 706-707, ¶¶ 60-61.)

C. The Trial, Phase II.

Phase II began on January 11, 1993, and continued for 22 days. (JA 914.)[27/] Eileen was represented by new counsel, Jones, Day, Reavis & Pogue. (JA 915.)

1. The court finds no "monkey business" in the negotiation of the 1986 contract.

Before Phase II, Eileen was permitted to file a second amended complaint alleging fraud in the structuring of the 1986 contract. (JA 757, 758; RT 3020.) Her counsel contended Eileen "was shut out of the negotiations and that contract was structured in a way that she would get not a penny. . . ." (RT 2970.) As the court saw it, the issue at the heart of Phase II was "whether or not there was any monkey business in the negotiation of 'The Next Generation' contract" designed to deprive Eileen of her fair share. (RT 2780.)

At the close of evidence, the court granted defendants' motions for nonsuit and/or directed verdict on Eileen's claims for breach of fiduciary duty, conversion and interference with business relations, as well as on her claims for fraud and conspiracy to commit fraud with respect to defendants' structuring of the 1986 contract for "TNG." (JA 915.)[28/]

2. The court determines how Eileen's profits in "TNG" and "DS9" are to be calculated.

In an about-face from her position in Phase I and the allegations in the complaint, Eileen took the position she was not limited to the benefits she would have received under the pre-divorce contracts (i.e., an interest in net profits), but instead was entitled to the improved benefits negotiated by Gene in the 1986 contract (e.g., an interest in adjusted gross profits). In addition to profit participation payments, Eileen also claimed half of the payments made to Norway for advances against profits, for royalties, for Gene's services in the last three years of his life, and for the "no services" payments made after Gene's death. (JA 683-684.)

27/ Kessler, Gene's accountant, who was sued for fraud, settled with Eileen prior to Phase II. (RT 3084; JA 915.) In approving the settlement, the court found that all his "activity was ministerial, that he did what he was told." (RT 3096.) Paramount, too, was dismissed as a defendant. (JA 915.)

28/ The court found, "There is no substantial evidence . . . to support any of the claims of fraud with respect to these negotiations. . . . There's no evidence that there was an artificial structuring of the contract to the plaintiff's disadvantage or that plaintiff was entitled to participate in the negotiations." (RT 5166.)

Defendants took the position that if Eileen were (erroneously) to be awarded profits from "TNG" and other future television series, they should be calculated on the basis of the contracts in existence at the time of the divorce, not the 1986 contract. Defendants also contended Eileen had no interest in advances against profits, royalties, income for Gene's services, and the "no services" payments. (JA 660.)

In its Statement Of Decision Re Phase II Of Bifurcated Trial, the court found (1) Eileen's profit participation was not limited to the terms of the pre-divorce contracts; she was entitled to share in the improved terms of the 1986 contract (JA 807, ¶ 6); (2) the 1986 contract provides for payment for the use of the Star Trek concept (belonging to Norway); for Gene's services (belonging to Gene); and for profit participation (belonging to Eileen and Gene) (JA 806, 808, 810 at ¶¶ 4, 7, 11); (3) Eileen was entitled to a one-half share of the receipts based on profits, but not services (JA 808 at ¶ 11); (4) all payments for services rendered by Gene and for royalties are not considered profit participation and thus are not to be shared with Eileen (JA 811-812 at ¶¶ 13, 14); (5) of the items labeled "profit participation" and "advances against profits," 40 percent is attributable to Gene's services, so Eileen is entitled to 30 percent (half of 60 percent) of those amounts (JA 813 at ¶ 18); (6) the "no services" payments are a form of profit participation, entitling Eileen to a one-half share (JA 815-816 at ¶ 24); (7) Eileen was entitled to share in the profits from videocassettes of episodes of all television series (JA 816-817 at ¶ 26), from "The Cage Retrospective" and "The 25th Anniversary Special" (JA 818-820 at ¶¶ 30, 31), but not in the profits from music (JA 816 at ¶ 25), from "The Cage" videocassette (JA 818 at ¶ 28) or from "Leonard Nimoy's Star Trek Memories" (JA 818 at ¶ 29); (8) interest on payments dealing with the original series is calculated at 7 percent (JA 821 at ¶ 36); and (9) interest on payments dealing with subsequent series is calculated at 10 percent (JA 822 at ¶ 38).

3. The jury determines Gene, Norway and Maizlish committed fraud in withholding part of Eileen's profits from the original television series, and awards punitive damages against Norway.

The sole jury issue was whether withholding portions of the second and third profit distributions on the original "Star Trek" series constituted a fraud.[29/] The jury found fraud against Norway and the Estate; conspiracy to commit fraud against Maizlish and the Estate; and

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29/ Eileen withdrew her claims for breach of contract and breach of the covenant of good faith and fair dealing. (RT 5123.)

oppression, fraud or malice on the part of Norway, but not Maizlish. (JA 916) By a vote of 9-3, the jury awarded punitive damages against Norway in the amount of $900,000. (Ibid.)

Judgment was entered on March 24, 1993. (Ibid.) A supplemental final judgment was entered on May 14, 1993. (JA 913.)[30/] Appellants filed a timely notice of appeal. (JA 846, 926.) Eileen filed a notice of cross-appeal. (JA 907.)

LEGAL DISCUSSION

I.

THE TRIAL COURT ERRED IN CONCLUDING THAT "STAR TREK" AS USED IN THE 1969 DIVORCE DECREE WAS INTENDED TO REFER, NOT ONLY TO THE THEN-EXISTING FAILED TELEVISION SERIES, BUT ALSO TO FUTURE TELEVISION SERIES AND SPECIALS CREATED MANY YEARS LATER, AFTER "STAR TREK" HAD ACHIEVED A PHENOMENAL AND UNANTICIPATED SUCCESS.

A. Introduction.

The basic issue in any breach of contract case is determining the meaning of the contract. The fundamental governing principle is to interpret the contact so as to implement the intent of the parties. (Pacific Gas & E. Co. v. G.W. Thomas Drayage etc. Co. (1968) 69 Cal.2d 33, 38.) Where contract language is reasonably susceptible to more than one meaning, intent may be discerned from extrinsic evidence. (Id. at 37.) A stipulated judgment of divorce is interpreted like any other contract. (Flynn v. Flynn (1954) 42 Cal.2d 55, 60; In re Marriage of Trearse (1987) 195 Cal.App.3d 1189, 1192.)

The stipulated judgment stated that Eileen transferred to Gene her interest "in Norway Corporation, excluding any profit participation interest in 'Star-Trek'" (JA 1038-1039 at ¶ 7(c)), and that Gene transferred to Eileen, a "one-half interest in all future profit participation income from 'Star Trek' to which [Eileen] and/or [Gene] are entitled" (JA 1039 at ¶ 8(c)). In this litigation, Eileen contended the term "Star Trek" was intended to refer to all future exploitations of the Star Trek concept. Gene claimed it was intended to refer only to the original television series in existence in 1969, when the parties divorced.

30/ The cross-complaint of Majel, Norway and the Estate was dismissed. (JA 921; RT 6204.)

The court concluded the term "Star Trek" was intended to include future television series and two specials.[31/] However, that determination is wholly unsupported by substantial evidence. As we demonstrate, the undisputed evidence established the parties did not intend new television programs to be included in Eileen's profit interest, and there was no substantial evidence they did so intend.

B. The Only Substantial Evidence Established The Divorce Decree Was Not Intended To Give Eileen An Interest In Future Television Series.

1. The language of the contract.

The first place to look for evidence of the parties' intent is the language of the contract. (Healy Tibbitts Constr. Co. v. Employers' Surplus Lines Ins. Co. (1977) 72 Cal.App.3d 741, 748.) Here, the decree grants Eileen an interest in "future profit participation income from 'Star Trek' to which the [parties] are entitled." (JA 1039 at ¶ 8c; emphasis added.)

The use of the present tense ("are entitled") is strong indication Gene and Eileen were thinking of the profit participation rights they were entitled to in 1969, i.e., from the completed series, not of any profit participation rights they might become entitled to in the future. "Future" refers to "income," not future television programs. (See pp. 35-36, below.)

2. Evidence of surrounding circumstances.

In determining the intent of parties to a contract, "the court may look to the circumstances surrounding the making of the agreement, including the object, nature, and subject matter of the writing, and thereby 'place itself' for this purpose in the same situation in which the parties found themselves at the time of contracting." (Dunne & Gaston v. Keltner (1975) 50 Cal.App.3d 560, 564; Civ. Code § 1647; Code Civ. Proc. § 1860.) "The intent of the parties is to be ascertained as of the time the contract was made. . . . Subsequent unforeseen events cannot be allowed to control in arriving at that intent." (Thomas v. Buttress & McClellan, Inc. (1956) 141 Cal.App.2d 812, 816; Civ. Code § 1636.)

The evidence of the circumstances surrounding the execution of the 1969 divorce agreement demonstrated clearly that the "Star Trek" profit participation in which Eileen was intended to share

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31/ The court correctly found "Star Trek" was not intended to include future "Star Trek" animated television series, movies, or merchandise.

referred to the television series that had already been produced, and not to future exploitations, such as future television series.

a. In their 1969 agreement, the parties described Eileen's interest in "Star Trek" as half of 30 percent, a figure they believed referred to the original television series.

In July, 1969, the parties believed Norway's profit interest in the original television series was 30 percent. (RT 1007-1008; see fn. 6, p. 6, above.) Accordingly, when Eileen's attorney recorded the parties' stipulation into the record, he read the second sentence of paragraph 8(c) as follows: "'[Gene] will require the source of such funds to pay [Eileen's] share (one-half of 30 percent-15 percent) without deduction or offset of any kind directly to plaintiff.'" (JA 1005-1006; emphasis added.)

The 30 percent figure plainly was intended to refer only to the original television series, since Norway had different interests in potential movies and other projects.[32/] The figure reflected the parties' belief as to the existing contractual interests of other profit participants in the original series. The parties' use of "half of 30 percent" to define Eileen's interest was strong evidence that the only thing they intended to cover in 1969 was the original series, not future series, in which Norway's specific profit interest could not possibly be predicted with any precision.

b. In the 1969 divorce negotiations, the only profit participation discussed was in the existing television series.

During the three days of intense negotiations among Gene, Eileen, and their counsel and accountants in July, 1969, the only profit participation interest discussed was that in the existing but defunct "Star Trek" television series. There was no discussion about profits in potential movies, or spin-offs, or merchandise or any future exploitations. (RT 389-390, 1046, 1804-1805.) As accountant Singer put it, it was agreed that Gene's future work and creations were "to be all retained by Gene." (RT 1805.)

32/ For example, Norway's profit interest in movies was either five or ten percent, depending on whether Gene rendered services (RT 1026, 1305; JA 963 at ¶ 16, JA 948 at ¶ 14(i)); in "planned" or "generic" spin-offs, it could range from zero to 50 percent, depending on the interests of other profit participants (RT 1028-1029; JA 963 at ¶ 17, JA 944-945 at ¶ 12); in "showcase spin-offs," it could range from five to ten percent (ibid.).

The trial court properly determined that "the only subject discussed in the courthouse was profit participation in the TV series. . . . [O]therwise the transfer of all interest in Norway to Mr. Roddenberry was contemplated in those discussions." (JA 699 at ¶ 35.)

The fact that the only profit participation interest discussed in the parties' negotiations related to the existing television series is additional compelling, undisputed evidence of what they intended by their words, "profit participation income from 'Star Trek.'" (Cf. Woodbine v. Van Horn (1946) 29 Cal.2d 95, 104 [parties' conversations and declarations during negotiations indicate intent].) The parties intended to grant Eileen an interest in profit participation income that might be generated by the existing series; they had no intent to grant her anything else.

c. In their 1969 agreement, the parties expressly rejected language which would have given Eileen an unlimited interest in income generated by "Star Trek."

Critical undisputed evidence demonstrating the parties intended the phrase "profit participation interest in 'Star Trek'" to be interpreted narrowly was the fact they expressly rejected a broader expression of Eileen's interest in an earlier draft. A rough draft had carved out for Eileen "any income directly or indirectly generated by 'Star-Trek,' whether in the form of royalties, rerun fees, profit participation, or otherwise." (JA 699-700, 708 at ¶¶ 36-37, 66; emphasis added.)

Gene rejected the proposal. Instead, as the court found, the only part of Norway excluded from the general grant of Norway to Gene was "any profit participation interest in 'Star Trek,' period." (JA 699-700.)

To interpret "profit participation interest in 'Star Trek'" so broadly as to mean "profit participation interest in 'TNG'" directly contradicts the parties' intent. To award Eileen the broader profits is to award her "income directly or indirectly generated by 'Star Trek'"--precisely what the parties intended not to do in 1969. Gene and Eileen's rejection of the broader language speaks directly to their 1969 intent to narrowly limit Eileen's profit participation to the original series. (Cf. City of Stockton v. Stockton Plaza Corp. (1968) 261 Cal.App.2d 639, 643 [prior drafts of document are admissible to show omission of earlier language in final draft was intentional].)

d. Eileen's divorce attorney declared the divorce judgment was intended to provide Eileen with an interest in income attributable to Gene's past services only.

Eileen's divorce attorney, Jerome Edelman, testified at the present trial, but had little recollection of the events that transpired in 1969, 23 years earlier. (RT 1329-1362.) However, in 1970, he had a clear memory of what the parties and their counsel intended by their 1969 agreement. In a 1970 proceeding, Eileen was represented by new counsel, and she submitted Edelman's sworn declaration, which stated:

> "It was my intention, and . . . . the intention of Messrs. Maizlish, Singer and Serlin, that plaintiff participate in one-half (1/2) of all of the income from Star Trek, so long as that income was earned on account of services already performed as distinguished from income for services to be performed, in which plaintiff was not to participate. It was [our] intention . . . that the language we used in the Stipulation, which language was later incorporated in the Interlocutory Decree of Divorce, would accomplish an even division of income from Star Trek, attributable to past services." (JA 1072-1073; RT 1342; emphases added.)[33/]

Edelman's declaration makes clear the parties intended to grant Eileen a profit interest in income attributable to "services already performed" (e.g., on the original "Star Trek"), not "services to be performed" (e.g., on "TNG").

e. The parties could not have intended to grant Eileen an interest in "TNG" because its appearance 18 years after the original "Star Trek" was unprecedented in television history.

As shown, the circumstances surrounding the execution of the divorce decree conclusively established Gene and Eileen did not intend to grant Eileen a profit participation interest in "TNG." Here, we point out they could not have so intended, because "TNG" was a phenomenon unique in television history.

No other failed television series had ever been "continued" (to use the court's word) after an 18-year hiatus--not as a "spin-off," but as some other entity--with a similar name and some other similar elements, but with all new characters, all new actors, based on a new pilot and set many

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33/ Edelman's declaration was submitted in connection with Eileen's 1970 attempt to revise the divorce agreement to obtain a share of the royalties from the "Star Trek" television series. Eileen's motion was denied. (See p. 7, above.) At trial in the present action, Eileen admitted Edelman was truthful in his declaration. (RT 1571-1572.)

decades after the original. (RT 2300-2301.) There simply was no precedent even to imagine that something like "TNG" could happen.

Obviously, people do not contemplate circumstances they cannot contemplate. To say that Gene and Eileen "intended" by the words "Star Trek" in 1969 to include "TNG" in 1987 and "DS9" in 1991 is to give them powers of prescience no human being enjoys.

3. Evidence of subsequent conduct.

The conduct of the parties after execution of a contract and before any controversy arises as to its effect is strong evidence of the meaning of the agreement. (Davies Machinery Col v. Pine Mountain Club, Inc. (1974) 39 Cal.App.3d 18, 26.) Our Supreme Court has explained:

> "This rule of practical construction is predicated on the common sense concept that 'actions speak louder than words.' Words are frequently but an imperfect medium to convey thought and intention. When the parties to a contract perform under it and demonstrate by their conduct that they knew what they were talking about the courts should enforce that intent." (Crestview Cemetery Assn. v. Dieden (1960) 54 Cal.2d 744, 754.)

Indeed, the parties' conduct subsequent to contracting is considered "the best indication of what the parties intended the writing to mean." (Law Rev. Comm. Comment following Code Civ. Proc. § 1856; emphasis added.)

As we demonstrate, the abundant evidence of Eileen's conduct between 1969 and 1987 left no doubt what her beliefs and intent were in 1969. During those two decades, she was well aware of the various exploitations of "Star Trek," (e.g., animated television series, movies, merchandise) but claimed no interest in them.

In the eyes of the law, Eileen's inaction was the best evidence of what she had contemplated in 1969 and what she had intended her words to mean in 1969. This evidence plainly demonstrated that until this litigation, Eileen had no belief that the 1969 decree was intended to give her anything other than a profit participation interest in the original "Star Trek" television series.

a. From 1973 on, Eileen was aware of the "Star Trek" animated television series and never, until this litigation, claimed a profit interest in it.

Gene's first post-divorce "Star Trek" creation was an Emmy-award winning animated television series for NBC, featuring the same principal characters as in the original live-action

television series. The animated series aired from 1973-1975 and ran in syndication afterward. (See p. 8, above.)

Eileen was present in court at an alimony hearing in 1973, where Gene and his accountant testified concerning Gene's income from the animated series. The contract for that series--which included provisions regarding profit participation--was given to her counsel. (See p. 8, above.) Moreover, during the 1970's Eileen watched the cartoon series with her grandchildren. (RT 1830-1831.) She told her daughter that Majel had a speaking part in the series. (RT 1832-1833, 1853.) Until this litigation, Eileen claimed no interest in the animated series.

At trial in this action, Eileen testified that the first time she learned about the animated series was during this litigation, and when she did learn about it, she thought she was entitled to half the profits. (RT 1501, 1502, 1603.) The trial judge disbelieved her testimony. (JA 700 at ¶ 39.)

b. From 1979 on, Eileen was aware of the "Star Trek" movies and never, until this litigation, claimed a profit interest in them.

Between 1979 and 1987, four "Star Trek" movies were released. Each featured the same actors as in the original television series. The films were heralded by large newspaper ads and numerous articles, especially concerning Gene's involvement in them and the records they were breaking at the box office. Until this litigation, Eileen claimed no interest in the movies. (See p. 10, above.)

At trial, Eileen gave conflicting testimony as to whether she knew about the "Star Trek" movies. (Compare RT 1660 [no knowledge in 1982] with RT 1662 [saw ad in 1979] and RT 1502 [when she saw ad, she thought she'd get half the profits].) She denied seeing a poster for the first "Star Trek" movie in her granddaughter's room. (See p. 10, above.) The trial court expressly found Eileen "was well aware of the 1979 motion picture release but made no claim or inquiry on this subject until 1985." (JA 701 at ¶ 41.)

c. From 1969 on, Eileen was aware of "Star Trek" merchandise and never, until this litigation, claimed a profit interest in it.

Eileen gave conflicting testimony regarding her awareness of "Star Trek" merchandise--a wide variety of items bearing the "Star Trek" name or replicating its characters or props. (RT 1653.) At one point she admitted she was "aware that there was merchandising of Star Trek memorabilia ongoing from the very inception of the concept." (RT 1502.) Indeed, items such as "Star Trek" dolls, posters, book bags, folders and T-shirts were displayed prominently in her granddaughter's room, where Eileen frequently visited. (RT 1849, 1853.) Yet, at another point, Eileen testified she "had no idea" that items such as toys, puzzles, calendars and other types of property connected with "Star Trek" had been produced and sold. (RT 1653-1654.)

The trial court found Eileen was not entitled to income from merchandising for a number of reasons, including her failure to demand a share until many years later. "This long lapse is strong supportive evidence of this interpretation of the divorce decree." (JA 708 at ¶ 66.)

d. In 1982, Eileen did not dispute the description of her profit participation interest as being solely in the original television series, when she had the chance to do so.

By 1982, Gene and Maizlish believed the "Star Trek" television series should have been showing a profit, or at least a smaller deficit, and considered suing Paramount for an accounting. (RT 2009.) Maizlish wrote to Eileen, seeking her participation. (RT 3432.) Eileen's response contained the following sentence: "'As you know, the court awarded me 50 percent of all profits derived from Star Trek properties. . . .'" (RT 1507-1508; JA 1043.)

Maizlish immediately wrote back, and clarified that "'your interest is solely in the profits from the TV films that were made prior to the divorce.'" (RT 1104; JA 1044.)

Eileen wrote again. She disputed a number of Maizlish's points, but not the point that her profit participation interest was in the original television series only. (RT 1676-1677; JA 1045.)

Thus, in 1982, Eileen did not dispute that her interest was "'solely in the profits from the TV films that were made prior to the divorce'"; she did not claim her interest was so broad as to include other exploitations created after the divorce. Indeed, her failure to object to Maizlish's statement was an adoptive admission. (Tibbet v. Sue (1899) 125 Cal. 544, 546; 1 Witkin, Cal.

Evidence § 651, p. 637 ["implied admission may result from silence in the face of another's declaration which would normally call for an answer"].)

In sum, then, all the substantial evidence points in one direction: the 1969 agreement was not intended to grant Eileen a profit participation interest in "TNG" or in anything other than the original series.

4. Eileen's 1992 testimony is not substantial evidence of her intent in 1969.

Eileen contended at trial that at the time of the divorce, she and Gene intended she should have a profit interest in all future exploitations of the Star Trek concept, i.e., in movies, merchandise, animated television programs and new live-action television series--no matter how long after the divorce they were created.

As shown, none of the extrinsic evidence supported this view. The only evidence Eileen offered was her trial testimony that she believed ever since 1969 that the divorce decree entitled her to "an interest in every dollar that Mr. Roddenberry was making from Star Trek except for his lectures." (RT 1604, 1560-1561.) However, since evidence of the undisclosed subjective intent of a party is irrelevant in ascertaining the meaning of words used in a contract (Mission Valley East, Inc. v. County of Kern (1981) 120 Cal.App.3d 89, 98), such self-serving statements cannot constitute substantial evidence of intent. (Tahoe National Bank v. Phillips (1971) 4 Cal.3d 11, 23 ["Irrelevant evidence cannot support a judgment"]; Kitchel v. Acree (1963) 216 Cal.App.2d 119, 124.)

Therefore, not only did the undisputed evidence establish Gene and Eileen did not intend that Eileen should share in profits from future television series, but there was no substantial evidence that they did so intend.

C. The Court's Conclusion That "TNG" Is A "Continuation" Of "Star Trek" Is Wholly Irrelevant To The Pivotal Issue Of The Parties' Intent--Whether, In 1969, They Intended To Grant Eileen A Profit Interest In Future Television Series.

The relationship between "Star Trek" and "TNG" was the subject of controversy at trial. Eileen contended "TNG" was simply a "continuation" of "Star Trek." Gene and Norway contended "TNG" was an entirely new series. (JA 701.)[34/]

The court found "TNG" is "a continuation of the same TV series." (JA 703-705 at ¶¶ 57, 48-56 [same production criteria, prologue, mission, format; similar spaceship, hardware].) Accordingly, the court concluded, "TNG" is "covered by the terms of the original divorce decree" (JA 706 at ¶ 57), and Eileen is entitled to a profit participation interest in "The Next Generation" and "any other TV series that's a sequel to [it]. . . ." (JA 706 at ¶ 58.)

By focusing so intently on the "continuation" issue, the court lost sight of the real issue--the parties' intent when they executed their divorce agreement--and the overwhelming evidence before the court of that intent. For to say a series created in 1987 is a "continuation" of one created in 1966 says nothing about what Eileen and Gene intended by the words "Star Trek" in 1969. As we have shown, the evidence demonstrated neither Eileen nor Gene could have or did even remotely contemplate that the canceled series, which showed a $5 million deficit, would succeed in syndication and that Gene would later develop a series of movies and additional television shows. The circumstances surrounding the divorce in 1969, the language of the decree, and the parties' subsequent conduct over many years demonstrated, without contradiction, that the only thing Eileen and Gene and their counsel had in mind in 1969 by "Star Trek" was the completed television series. They did not intend "Star Trek" to refer to a show such as "TNG."

34/ Both sides agreed "TNG" was not a "spin-off" of "Star Trek." There are two types of spin-offs--generic (or "natural"), and non-generic (or "planned," "planted," or "showcase"). A generic spin-off is one that evolves naturally from an existing series, and features one or more of the same characters. For example, the character Maude originally appeared regularly on "All In The Family," and then was spun-off into a new series, "Maude." (RT 560-561.)

In a non-generic spin-off, new characters are intentionally inserted into an episode of an existing series to launch a new series; there is no intent to use them in the existing series. (RT 561, 1905-1906.) For example, Joey Bishop was "showcased" on "The Andy Griffith Show," before launching "The Joey Bishop Show." (RT 1029-1030.)

"TNG" fit neither definition of a spin-off. (RT 562, 1905, 1909, 2274.)

The "continuation" issue was completely irrelevant to the pivotal issue--Gene and Eileen's intent in 1969.

II.

EVEN IF IT WERE NOT ERROR TO CONCLUDE THAT WHEN THE PARTIES DIVORCED IN 1969, THEY INTENDED TO GRANT EILEEN A PROFIT PARTICIPATION INTEREST IN FUTURE TELEVISION PROGRAMS CREATED DECADES LATER, IT WAS ERROR TO BASE EILEEN'S INTEREST ON A CONTRACT MADE IN 1986, WHEN GENE WAS ABLE TO COMMAND MUCH MORE FAVORABLE TERMS, RATHER THAN ON THE CONTRACTUAL RIGHTS ACQUIRED DURING THE MARRIAGE.

Phase I concluded with the court's determination that the 1969 divorce decree entitled Eileen to a profit interest in "TNG" and "DS9." Before and during Phase I, Eileen, her counsel, and expert witness took the position that if Eileen were found to have such an interest, it would be based on the community property rights she acquired during her marriage to Gene, i.e., on Norway's contractual rights as they existed in the pre-divorce contracts.

However, in Phase II, for the first time, Eileen's new counsel contended that Eileen's rights were not limited to those acquired during the marriage, but were governed by the 1986 contract between Norway and Paramount. (JA 683 ["The parties contemplated that Mr. Roddenberry would obtain the best possible terms for further 'Star Trek' exploitations that he negotiated, and Mrs. Roddenberry was to receive a one-half share of the profits obtained"; emphasis added].) The 1986 contract was more favorable to Norway in every respect than the 1965 contract. Perhaps the most dramatic improvement was in Norway's profit interest--35 percent of adjusted gross profits under the 1986 contract, compared with 26-2/3 percent of net profits under the 1965 contract.

Eileen's new position was completely inconsistent with California's community property system, the philosophy of which "is that a community interest can be acquired only during the time of the marriage. It [is] inconsistent with that philosophy to assign to any community interest the value of the postmarital efforts of either spouse." (In re Marriage of King (1983) 150 Cal.App.3d 304, 309.)

The court determined Eileen was entitled to the improved benefits of the 1986 contract. (JA 807 at ¶ 6.)[35/] As we now explain, the court's construction of the divorce decree is erroneous as a matter of law because it ignores a conclusive judicial admission in the complaint. Moreover, it violates the language of the agreement, the extrinsic evidence of intent, and all notions of fairness.[36/]

A. The Operative Complaint Contains A Binding Judicial Admission That The Parties Intended To Base Eileen's Profit Interest On Contractual Rights Acquired During Marriage.

Eileen's Phase I theory that her rights originated in the pre-divorce contracts was based squarely on the First Amended Complaint, which alleged that the "'profit participation income from "Star Trek"'" which Eileen received in the divorce decree

> "includes all profits and income that might thereafter be generated from Gene and Eileen's community property interest in 'Star-Trek' as it existed under the Contracts at the time of the Judgment." (JA 253 at ¶ 11; emphasis added.)

The "Contracts" referred to are the 1965 pre-divorce agreements between Norway and Desilu. (JA 250 at ¶ 6.) Under those contracts, as we have shown, Gene and Eileen's "community property interest in 'Star Trek'" included a share only of net profits, arrived at after deducting the studio's distribution costs and payments to other profit participants.[37/]

35/ The court's determination apparently was based on the mistaken belief that the "contract under which the pictures were made and which the money was paid is the operative contract." (RT 2656.) The "operative contract," of course, was the 1969 divorce agreement, and the operative inquiry was what the parties intended when they made that agreement.

The same faulty logic led the court to award Eileen a profit participation interest in two television specials, "The Cage Retrospective" and "The 25th Anniversary Special," which were produced under the 1986 contract. The court erroneously concluded they were "covered by the divorce decree. . . ." (JA 818-820 at ¶¶ 30-31; JA 917-918, 919-920 at ¶¶ 1(a), 4(d).)

36/ In addition, the court's construction of the divorce decree infringes on Majel's community property rights. In the 25 years between the time "Star Trek" first aired (1966) and Gene died (1991), Gene's marriage to Eileen occupied 3 years, and his marriage to Majel occupied 22 years. Majel had every right to believe that the compensation she and Gene received for dedicating their time and energies to Star Trek over nearly a quarter of a century was her community property, not Eileen's.

37/ Eileen's position was consistent during Phase I. Over and over she maintained that her entitlement to future profits was controlled by the pre-divorce contracts. (See, e.g., JA 1058 (Letter from Scholtz to Maizlish, Aug. 26, 1987) ["Eileen's position is the decree awarded her one-half of all future profits [from] all sources to the extent that such rights were owned by the

(continued...)

The allegation in paragraph 11 of the complaint is a judicial admission that Eileen believed--and intended the divorce decree to reflect--that if ever there were to be any "profit participation income from 'Star Trek,'" her receipts would be tied to whatever rights she had acquired during her marriage to Gene. Her right to profits was controlled by the 1965 contracts, not any contracts Gene might negotiate in the future.

As a judicial admission, paragraph 11 is a "conclusive concession of the truth of a matter which has the effect of removing it from the issues." (1 Witkin, Cal. Evidence (1986) § 644, p. 630.) The Supreme Court explained:

> "'When a trial is had by the Court without a jury, a fact admitted by the pleadings should be treated as "found." . . . Any finding adverse to the admitted facts drops from the record, and any legal conclusion which is not upheld by the admitted facts is erroneous.'" (Welch v. Alcott (1921) 185 Cal. 731, 754; Pinewood Investors v. City of Oxnard (1982) 133 Cal.App.3d 1030, 1035.)

The trial court's conclusion that Eileen's interest is not governed by the pre-divorce contracts directly contravenes her admission to the contrary. Since the court's conclusion is plainly erroneous, it cannot support the judgment.

A conclusive judicial admission needs no evidence to support it. Indeed, " [a]ny discussion of the evidence is . . . irrelevant and immaterial." (Braverman v. Rosenthal (1951) 102 Cal.App.2d 30, 33.) Nonetheless, we next discuss the evidence, which demonstrated without dispute that Gene and Eileen intended any receipts of profits from "Star Trek" to be governed by the parties' rights as they existed in the pre-divorce contracts.

37/(...continued)
community at the time of the divorce. . . ."]; JA 306 [Eileen's motion for reconsideration of denial of leave to amend complaint [Eileen "has always contended that the [pre-] 1969 contracts themselves would determine [her] interest and profit participation percentages"]; JA 605 (Eileen's trial brief) [divorce decree "explicitly granted Mrs. Roddenberry the same right to future profit participation income as the marital community was entitled before dissolution. . . ."]; RT 2514 (statement of Eileen's counsel) ["I believe [Eileen's] claim to profits has to be calculated under the predivorce contracts"].)

B. Neither The Language Of The Divorce Decree Nor Any Other Evidence Supported The Court's Bare Conclusion That The Parties Intended To Calculate Future Profits On The Basis Of Future Rights.

1. The decree refers to "future profit participation income" to which the parties "*are entitled*," indicating future income was intended to be calculated based on then-existing community property rights.

The court's sole reason for concluding that Eileen's profit interest was not limited to the terms of the pre-divorce contracts was this: "[T]he divorce decree . . . refers to one-half of 'all future profit participation income.' Profit participation is not tied to specific amounts, specific percentages, or specific contractual arrangements. If, as here, the series became spectacularly successful and a better contract was negotiated, [Eileen] was entitled to share in the success to the extent of enhanced profit participation." (JA 807.)

However, the court's truncated quote omits vital language from the divorce decree. The decree refers to "one-half interest in all future profit participation income from 'Star Trek' to which [Eileen and/or Gene] are entitled." (JA 1039 at ¶ 8(c).) Thus, while it is true profit participation is not tied to "specific amounts" or "specific percentages," it is tied to "specific contractual arrangements," i.e., the 1965 contract which specified the profit interest to which Eileen and Gene were entitled in 1969.

In ignoring the words "are entitled," the court violated basic tenets of contractual interpretation. Courts are required to examine and give effect, if possible, to every word in a written instrument. An interpretation which renders particular words surplusage is to be avoided. (Estate of Newmark (1977) 67 Cal.App.3d 350, 356.)

Moreover, special care should be given to the use of verb tenses. The present tense indicates the relevant circumstances are those in existence at the time of contracting, not in the past or future. (See, e.g., Johnson v. Southern Pacific R.R. Co. (1908) 154 Cal. 285, 290-291 [lease "clearly speaks in the present tense and as of the date of the lease" and thus cannot be construed to include subsequently acquired property]; cf. Piombo v. Board of Retirement (1989) 214 Cal.App.3d 329, 334 [statutory exclusion of retirement system members who "'are'" not in service applies to those not currently or presently in service]; Thurston v. County of Los Angeles (1953) 117 Cal.App.2d 618, 622 [construing present tense of verb to mean past tense "would be an obvious distortion of the plain language of the section"].)

If Eileen is entitled to any profit interest in "TNG" and its progeny (but see section I, above), her interest must be measured by what she and Gene were entitled to in 1969, and not by what Gene was able to acquire 18 years later.

2. There was no substantial evidence supporting the court's interpretation of the decree.

The court's determination that Eileen's profit interest in "TNG" was to be calculated on the basis of the 1986 contract necessarily rests on an implied finding that Gene and Eileen so intended in 1969. Yet there was a complete absence of evidence to support that finding.

Just as there was no substantial evidence that the parties intended to grant Eileen a profit interest in future television series, so was there no substantial evidence that, had they done so, they would have intended to base that interest on future contracts, not the ones existing in 1969. For example, in describing Eileen's interest as half of 30 percent, the parties could only have contemplated calculating Eileen's share on the basis of the existing contracts, because those were the only contracts to which that figure was relevant. And in the negotiations surrounding the 1969 decree, there was no discussion of basing future profits on future contracts.

Moreover, Eileen's subsequent statements and conduct--even during this litigation--provide unmistakable evidence of her belief that she is entitled to an interest in "TNG" profits based, not on the 1986 contract, but on contracts in existence during her marriage. She so pleaded in the operative complaint and so contended in a variety of pleadings. (See fn. 37, above.)

The record is utterly devoid of substantial evidence to justify basing Eileen's profit participation interest in "TNG" on the 1986 contract. If she is to receive such an interest at all, it must be based on the 1965 contracts.

C. There Was No Basis To Conclude That The Vastly Improved Benefits In The 1986 Contract Were Attributable To Anything Other Than Gene's Personal Services And The Sale Of Rights Which He Alone Owned.

At the end of Phase II, the trial court identified three separate items which bore on the calculation of Eileen's profits in "TNG": "payment for the rights to use the Star Trek concept, which belonged to Norway; payments for [Gene's] personal services, which belonged to him; and payments of profits from a television exhibition of the Star Trek program, which profits belong equally to the parties, Eileen and Eugene Roddenberry." (JA 806 at ¶ 4.)

With respect to profits (and advances against profits), the court determined Eileen was not entitled to any portion attributable to Gene's services, and further determined that portion to be 40 percent. (JA 813-814, 820 at ¶¶ 18, 19, 33.)[38/] Thus, the court awarded Eileen 30 percent (half of 60 percent) of the profits and advances from "TNG." (JA 919.)

The court reasoned (correctly) that community property principles prohibited Eileen from sharing in any amounts attributable to Gene's post-divorce services. (In Re Marriage of Rives (1982) 130 Cal.App.3d 138, 150 [community property interests may be acquired only during the marriage, and no value may be assigned to either spouse's post-marital efforts; Fam. Code § 771 (former Civ. Code § 5118) [spouse's post-separation "earnings and accumulations" are separate property of that spouse].)

However, the court seriously erred in two ways. First, the court failed to consider that Norway's entitlement to any interest in adjusted gross profits (even the reduced 21 percent--60 percent of 35 percent) was created by Gene's rendering services on "TNG" (e.g., writing the bible, assembling personnel, supervising casting, and helping to market the new series). (RT 4297-4298; JA 1083 at ¶ 1.)[39/] These services were of extreme importance to Paramount. (RT 4294.) Had Gene failed to perform them he likely would have been in material breach of the contract and not entitled to any of its improved benefits. (RT 4301-4302.)[40/]

Second, and more fundamentally, while the court correctly held that Eileen was not entitled to share in amounts attributable to Gene's post-marital services, the court mistakenly concluded the converse was necessarily true, i.e., that Eileen was entitled to share in amounts not strictly attributable to Gene's post-marital services.

38/ The court arrived at this figure because under the 1986 contract, Norway's percentage of adjusted gross profits was reduced by 40 percent (from 35 to 21 percent) if Gene failed to serve as Executive Producer for the first year of "TNG" or of any spin-off. (JA 813 at ¶ 18.)

39/ Mel Harris explained why many of the benefits of the 1986 contract hinged on Gene's efforts in launching "TNG"; "The creation of a television series is mostly determined by what happens from the first page written, the first set of cast that goes in, those first few episodes. . . . [E]stablishing that premise, establishing the story line, establishing the characters is inordinately important. After you get that accomplished . . . you can bring in [other] writers. . . . If we didn't have [Gene] in the first year doing those kinds of things, there might not be a number two year. . . . What was most important was getting year one." (RT 4294-4295.)

40/ As noted earlier, the uncontroverted evidence from Paramount executives was that if Gene had been unwilling to render services, Paramount would not have negotiated a new contract and would have stood on the 1978 contract, which provides for a net profit interest. (RT 4279.)

The proper resolution of this issue requires an understanding of what--besides Gene's services--accounted for the vast improvement in the profit participation terms of "TNG" contract, i.e., why could Norway command an interest in adjusted gross profits in 1986 for "TNG," when it could command only an interest in net profits in 1965 for the original series? The principal reason, according to Eileen's own expert, was that the right to exploit "Star Trek" was jointly owned by Norway and Paramount, the right was "extraordinarily valuable," and Paramount was willing to give up a great deal to acquire it to make "TNG." (RT 3507-3508, 3537.)[41/]

However, as the court correctly found, Norway's jointly-held right to exploit the Star Trek concept was one of the bundle of rights transferred to Gene in the divorce. (JA 1038-1039 at ¶¶ 7, 8; JA 692 at ¶¶ 5, 6; JA 806 at ¶¶ 2, 4.) Consequently, Eileen was not entitled to benefit when its value skyrocketed years later.

Another factor--besides Gene's services--cited for the improved profit participation terms in the 1986 contract was Paramount's desire that the public associate Gene's name with the new series. Paramount wanted to be able to tell potential buyers that Gene was behind the new series, and "he wouldn't put his name next to anything that wasn't the real stuff." (RT 3540, 3755.) Conversely, if Gene were to disavow the series, sales efforts would be seriously hurt. (RT 3540-3541.) Thus, Paramount was willing to offer Gene very favorable terms, in part, because his name, association and endorsement were of great value to the studio. (RT 3588.)

A person's right to control the commercial exploitation of his name (right of publicity) is legally protected. (Lugosi v. Universal Pictures (1979) 25 Cal.3d 813, 819, 824; Civ. Code § 3344 [living persons]; cf. Civ. Code § 990, subd. (d)(1) [right to use deceased person's name, if not assigned or devised before death, belongs to (current) surviving spouse and issue].) The right to benefit from the use of Gene Roddenberry's name, association and endorsement belonged to him in 1986, and compensation he received for allowing another to exercise that right inured to him, not the wife he divorced 20 years earlier.

The court's determination that Eileen was entitled to share in whatever portion of the improved benefits in the 1986 contract that were not strictly attributable to Gene's personal services

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41/ The expert explained: "Paramount did not own the rights by themselves to enable them to go forward and produce 'The Next Generation' series. They . . . had to acquire those rights. Those rights . . . were jointly held by Norway and . . . Paramount. . . . In 1965, '66 . . ., 'Star Trek' was a new untried property. By 1986 . . . it had grown into a phenomenon. Everybody knew 'Star Trek,' everybody knows 'Star Trek' who watches television. So it increased enormously in value over the 20-odd years." (RT 3508.)

is unsupported by law or substantial evidence. Those benefits were consideration paid to Gene for rights belonging to him, not Eileen. If these rights were community property, they were the community property of Gene's marriage to Majel, not Eileen. There was no conceivable basis to conclude otherwise.

III.

THE TRIAL COURT ERRED IN CHARACTERIZING AS "PROFIT PARTICIPATION" ITEMS THAT PLAINLY WERE NOT PROFIT PARTICIPATION.

Although the divorce decree gave Eileen an interest only in Norway's "profit participation income from 'Star Trek,'" leaving the rest of Norway to Gene, the trial court awarded her far more than profit participation.

The 1986 contract provided for a number of payments to Norway in addition to profits, and independent of any receipt of profits--compensation for Gene's services, royalties, and advances against profits. (JA 811-812, 1082-1086.) The court ruled that in determining Eileen's profit interest, it was not limited to the item in the 1986 contract labeled "profits." If the evidence showed there was any attempt to structure the contract to reduce Eileen's profit interest (e.g., if "all the money is put up front leaving no profit participation"), the court would "allocate and retitle, if necessary, the various payments to accord with the provisions of the basic stipulated judgment." (JA 706 at ¶ 60, 61.)

The court found there was no attempt to structure the contract to harm Eileen's interest (no "monkey business"). (RT 5166.) Still, the court did "allocate and retitle" various non-profit items to give Eileen an interest in items never contemplated as profit participation under the operative 1969 divorce stipulation. As we explain, there was absolutely no basis in the evidence or the law to undertake such a reallocation for Eileen's benefit.

A. The "No Services" Payments Are Not Profit Participation.

Under the headings "Services" and "Compensation," the 1986 contract required Gene to provide various services, including to act as "Executive Producer of the pilot and all episodes produced for the 1st Production Year. . . ." (JA 1082.) If he performed the first year, in subsequent years he could elect to be Executive Producer (at $60,000 per episode), Executive

Consultant (at $35,000 per episode) or to provide no services. (JA 1083-1084.) If his failure to provide such later services was a result of disability or death, Norway was entitled to a payment of $7500 per episode. (RT 4296-4297; JA 1084 at ¶ 2(f).)[42/]

Although the court found "the matter is not entirely free from doubt," it nonetheless ruled the "no services" payments were "a form of profit participation" in which Eileen was entitled to share. (JA 816 at ¶ 24.) This was patent error.

The "no services" payments were entirely dependent on Gene's having performed services during the first year of the contract and continuously after that. Thus, they were a form of deferred compensation for earlier services. They had nothing to do with profitability; like all the other items of compensation for services, they were guaranteed irrespective of profitability. Simply because they required no current services on Gene's part did not mean Eileen was entitled to share in them. (Cf. Garfein v. Garfein (1971) 16 Cal.App.3d 155, 159 [post-separation payments to movie-star wife under "play or pay" contract were "earnings" and, thus, her separate property, even if wife was not called upon to furnish any services].)

The "no services" payments were akin to a disability or life insurance policy, intended to benefit Gene or his heirs in the event he was unable to work, in exchange for his valuable services during the first year. This provision obviously was not intended to benefit the woman Gene divorced years earlier. In fact, the divorce decree required Gene to maintain life insurance irrevocably designating Eileen as the primary beneficiary. (JA 1039-1040 at ¶ 9.) There was no claim that he did not do so. Eileen should not be permitted to circumvent the decree by labelling a "profit" what is essentially compensation for personal services in the form of an insurance benefit to which Eileen had no conceivable entitlement.[43/]

42/ Since Gene's death in 1991, Norway has been paid the "no services" fee of $7500 per episode for both "TNG" and "DS9." (RT 3256, 3546-3547.)

43/ Awarding Eileen a share of the "no services" payments underscores the grossly unfair effect of the judgment on Majel's community property rights. Majel was Gene's wife when Gene contracted for those payments (1986), when he did the work required to receive them (1986-1991), and when the payments were eventually made (1991). As payments for Gene's services, they were Majel's community property, not Eileen's. (Cf. Fam. Code § 760 [property acquired during marriage presumed to be community property].)

B. "Advances Against Profits" Are Not Profit Participation.

One of the benefits Norway was to (and did) receive if Gene rendered services on "TNG," was "participation in profits" and "advances against said participation." (JA 812, 1084 at ¶ 4.) As noted earlier, advances against profits are payments made to a profit participant whether or not profits are ever realized. If profits are realized, the advances are credited against them. If profits are not realized, the advances are not refundable. (See fn. 19.) Like the "no services" payments, advances were conditioned on Gene's having performed services on "TNG," and thus were a form of compensation for services, at least until they became profits.

In the 1980's, advances were demanded by top-level talent to avoid having to wait the years it might take for profits to develop. (RT 4292-4293.) Gene was 65 years old when he created "TNG." Not only was it possible he would not live long enough to see profits on his new series, sadly, that is exactly what happened. For four years he poured his last energies into the new series, and was compensated, in part, by advances. Profits were declared a year and a half after his death.[44/]

The court found the advances were to be treated the same as profit participation. (JA 814 at ¶ 22.) The court simply reasoned that an advance against a thing (e.g., salary) is the same as the thing--only the timing is different. (Id. at ¶ 21.)

The court was clearly wrong, at least with respect to advances against profits in the entertainment industry. There, the "thing" may never come to be. And if it does not, the advance nevertheless may be retained. An advance against salary is quite different; the salary is guaranteed if the work is performed. Normally, if an employee receives an salary advance and promptly quits, the advance is repayable to the employer. (Maggio, Inc. v. Neal (1987) 196 Cal.App.3d 745, 749 [salary advances were "loans due and payable when the employee left the company"].)

Like the "no services" fees, advances are far more like royalties than like profit participation. Under the 1986 contract, both advances and royalties are tied to the production of each episode; both provide higher payments for multiple runs of an episode. (Compare JA 1085 at ¶ 4(b) with JA 1084 at ¶ 3.) In contrast, profits are entirely speculative; one does not know if or when they will ever materialize.

44/ Thus, granting Eileen a share of the advances against profits for "TNG" has no practical effect except to award her a large amount of interest. However, the grant of advances against profits to Eileen for "DS9" is significant, since that series is not in a profit position. (RT 3823.)

As this court has recognized, guaranteed payments to an entertainer "in the form of nonreturnable advances" are quite different from payments contingent on prospective sales "which could amount to nothing." (MCA Records, Inc. v. Newton-John (1979) 90 Cal.App.3d 18, 23.)[45/] While advances can become profits, it is by no means certain they will do so. The court erred in equating the two.

C. "Legal/Administrative" Fees Are Not Profit Participation.

Listed under the heading "Per Program Royalty/Royalty Residuals/And Legal Administrative Fees" is the item, "Legal/Administrative Fees: $5000 per one-hour episode, no increases in subsequent year(s). The Legal/Administrative fees are advances against profits." (RT 4514-4516; JA 1084.) The court found these fees "of a mixed character"--a contribution to Norway's overhead and advances on profits--but held the latter aspect predominated. (JA 815 at ¶ 23.) Once again, the court erred.

As an advance against profits, the legal/administrative payments should be treated the same as any other advance; as just explained, advances against profits are not profits. They are a form of compensation for services, at least until profits are realized.

IV.

THE COURT ERRED IN HOLDING EILEEN WAS ENTITLED TO RECOVER INTEREST AT THE RATE OF TEN PERCENT ON RECEIPTS FROM "TNG," "DS9" AND TWO TELEVISION SPECIALS.

The court determined that payments due Eileen from "TNG," "DS9" and two television specials ("The Cage Retrospective" and "The 25th Anniversary Special") were subject to interest at 10 percent.[46/] (JA 822, 918.) The court based its conclusion on Civil Code section 3289(b), which declares:

45/ Ironically, Newton-John was authored by Justice Fleming, the trial judge in this case.

46/ The court also determined, correctly, that the interest rate on payments due Eileen for the original "Star Trek" series was the legal rate, seven percent. (JA 821; May Dept. Stores Co. v. City of Los Angeles (1988) 204 Cal.App.3d 1368, 1378.)

> "If a contract entered into after January 1, 1986, does not stipulate a legal rate of interest, the obligation shall bear interest at a rate of 10 percent per annum after a breach."

The court saw the operative contract as the Norway/Paramount agreement for "TNG," which was entered into after January 1, 1986, and reasoned the 10 percent rate applied. (JA 822.)

This was plain error. Gene's obligation to share profits with Eileen stemmed from their 1969 divorce decree. If, as the court held, "TNG" was simply a "continuation" of the original series, then the source of Eileen's profit participation interest in "TNG" could only have been the 1969 decree, not the 1986 contract.

It is important to note that section 3289(b) applies only when a contract entered into after January 1, 1986 is breached. The 1986 Norway/Paramount contract was never breached. Under the court's own reasoning, the only contract which ever arguably could have been breached was the 1969 divorce agreement, which the court read to entitle Eileen to an interest in profits from "continuations" of "Star Trek."

If any interest is due Eileen on receipts from "TNG," "DS9" and the two specials, it must be calculated at the rate of seven, not 10, percent.

V.

THE PUNITIVE DAMAGE AWARD IS ERRONEOUS AS A MATTER OF LAW, AND MUST BE REVERSED.

Eileen claimed that defendants committed fraud in the course of withholding a portion of the second and third profit distribution payments. (RT 4034.) Those payments were sent to Eileen in August, 1986 and January, 1987; by July, 1987, defendants had fully disclosed the withholdings to Eileen. (RT 4033, JA 1056.) The jury found fraud and awarded $900,000 in punitive damages against Norway. The award is unsupportable for two separate reasons, as we now explain.

A. It Was Error To Deny Defendants' Motion For Nonsuit, Since There Was No Evidence Of Fraud, The Underlying Cause Of Action.

The elements of actionable fraud are (1) misrepresentation (false representation, concealment or nondisclosure); (2) knowledge of falsity; (3) intent to induce reliance; (4) justifiable reliance; and (5) resulting damages. (Molko v. Holy Spirit Assn. (1988) 46 Cal.3d 1092, 1108.)

All elements must be present; the absence of any one is fatal to recovery. (Gonsalves v. Hodgson (1951) 38 Cal.2d 91, 100-101.)

Although the fraud theory was not clearly articulated, it appeared to be based on Eileen's claim that "'Maizlish and Kessler deceived plaintiff by causing letters to be sent suggesting that plaintiff was receiving her proper share when, in fact, she was not.'" (RT 2972.) Even assuming there was substantial evidence to satisfy the "misrepresentation" aspect of the tort,[47/] there decidedly was no substantial evidence of reliance or damages. Defendants moved for nonsuit on that basis, but the motion was denied. (RT 5167-5168.) The court was plainly mistaken. Nonsuit should have been granted.

1. There was no substantial evidence of reliance.

To prove the required element of reliance, there must be substantial evidence the plaintiff believed the truth of the misrepresentation and, based on that belief, altered his or her position. (Okun v. Morton (1988) 203 Cal.App.3d 805, 828.) Neither reliance prong was met here.

First, there was no substantial evidence that upon receiving the second and third distribution checks, Eileen believed she was receiving half the profits Norway received from Paramount. Even when she did receive one-half (the first distribution), she did not believe it. (RT 1715-1716.) In Phase I she adamantly insisted she had "no idea" whether she was receiving a one-half share of the second and third distributions. (RT 1527, 1725.) Although she attempted to change her testimony in Phase II (RT 4018, 4020), when confronted with her earlier contrary testimony at trial and deposition, she admitted, "At times I disbelieved and at times I believed. I didn't know." (RT 4047; 4049 ["I believed and I disbelieved. I would have really believed if I had seen some

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47/ This evidence was exceedingly slim. The letter accompanying the first distribution check had stated (correctly) that Eileen was being paid half the gross amount received by Norway. (JA 1046.) The letter also stated Gene believed he was entitled to some "equitable compensation" for the years of effort and expenses he put into the series, but authorized the enclosed payment "in a spirit of good will with the hope that an arrangement can be reached . . . with regard to a fairer distribution of profits." (Ibid.) Eileen did not believe she was receiving one-half the amount received by Norway, and responded with a letter expressing her concern about the "equitable consideration" Gene sought and requesting an accounting. (JA 1049.)

The letters accompanying the second and third checks--the subject of the fraud--simply stated, "'As per my prior correspondence please find a check in the amount of . . .,'" an amount which constituted a one-third share. (JA 1052, 1054.) Maizlish believed this language (in conjunction with the first letter and his knowledge of the animosity surrounding the divorce proceedings) was a clear signal to Eileen that she was not receiving a one-half share. (RT 4736-4737.)

accounting"]; 4051.) One who suspects another might not be telling the truth has no right to rely on the other's statements. (Cameron v. Cameron (1948) 88 Cal.App.2d 585, 594.)

Although the court expressly found there was no substantial evidence of reliance (RT 2695), the court permitted the fraud action to proceed based on the mistaken belief that reliance was not required.[48/] (RT 2983 ["fraud was carried out and reliance is unnecessary when acts of that sort are done"]; 3028 [rejecting argument that "failure to deliver a person a proper share isn't fraud if the person is suspicious"].)

Second, even if there had been substantial evidence that Eileen believed she was receiving a full half share, there was no evidence she changed her position based on that belief. One who does not alter her position in reliance on the defendant's statements cannot state a cause of action for fraud. (Hepe v. Paknad (1988) 199 Cal.App.3d 412, 420.)

2. There was no substantial evidence of reliance-caused damages.

To recover for fraud, the plaintiff must have suffered damages caused by reliance on the misrepresentation. (Younan v. Equifax Inc. (1980) 111 Cal.App.3d 498, 513.) Here, Eileen was required to show damages caused by believing she was getting less than her full share of the second and third distributions and by changing her position accordingly. She made no such showing.

Rejecting vigorous defense arguments that Eileen had failed to prove fraud damages, the court found, "[T]he evidence is that she was $750,000 out-of-pocket, and there were delays of six months or longer in receiving what she did receive." (RT 5167.)

However, the amounts defendants withheld from Eileen do not constitute fraud damages because they were not caused by any reliance on her part. A damage award for fraud will be reversed where the injury is not caused by the misrepresentation. (Gray v. Don Miller & Associates, Inc. (1984) 35 Cal.3d 498, 504; Las Palmas Associates v. Las Palmas Center Associates (1991) 235 Cal.App.3d 1220, 1252; Helm v. K.O.G. Alarm Co. (1992) 4 Cal.App.4th 194, 204 [nonsuit proper; no causal nexus between reliance on alleged misrepresentation and plaintiff's losses].)

So it was here. Between June, 1984 and July, 1987, Norway received five profit participation payments for the original series totaling approximately $5,300,000. Between February, 1985 and September, 1987, defendants paid Eileen approximately $1,925,000 of that

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48/ This was the position urged by Eileen's new counsel in Phase II. (RT 2955-2956.)

sum, withholding approximately $750,000. By July 1987, Eileen was fully aware of the total amount being withheld. In October, 1992, defendants, by voluntary stipulation, fully paid Eileen all monies due her, with interest from the date of receipt by Norway. (JA 713.) Although there was a period of a year and a half when Eileen had not been expressly informed that amounts were being withheld, she suffered no independent damages as a result. Thus, Eileen's sole damages were contract damages. They were caused by failing to receive the full amount the court found was due under the divorce decree; they were not caused by any reliance on any misrepresentation made by defendants.[49/]

If Gene breached the parties' divorce agreement by withholding money to which Eileen was entitled, then there should be--and there was--liability only for those amounts, with interest. An analogous situation arose in Downer v. Bramet (1984) 152 Cal.App.3d 837. There, a divorced wife claimed that years earlier, her ex-husband had concealed an interest in a ranch received from his employer after they had separated but before they had executed the marital settlement agreement. She asserted the ranch interest was community property; the husband claimed it was a separate property gift. The wife sued for a determination of her interest and for fraud. The court granted a nonsuit on the fraud cause of action, and the Court of Appeal affirmed, in an opinion by Justice Kaufman (later of the California Supreme Court):

> "The existence of actual damages is an essential element of a cause of action for damages for fraud. . . . Here, even assuming former husband's intentional concealment of the ranch interest at the time of [divorce], former wife has suffered no resulting injury. If the ranch interest is ultimately determined to have been community property in whole or part, former wife will be entitled to her share. . . ." (Id. at 844.)

The trial court's conversion of what was at base a breach of contract action into a tort action, so as to permit punitive damages, is barred not only by law, but also by public policy. In a recent decision holding a party may not be held liable in tort for conspiracy to breach its own contract, our Supreme Court broadly expounded on the significant differences between contract and tort law and the importance of keeping them separate. (Applied Equipment Corp. v. Litton Saudi

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49/ Indeed, the court--on its own motion--instructed the jury that defendants' conduct was "essentially [a] breach of contract, that is, failure to pay sums owed under the provisions of the divorce decree. Because with one exception, the measure of actual damages in this case for breach of contract is the same as the measure of damages for fraud, that is, recovery of the money and recovery of interest, recovery by the plaintiff has already been assured and there is no need for you to duplicate that determination." (RT 5522-5523.)

Arabia Ltd. (1994) 7 Cal.4th 503.) While the defendant's motive may be significant in tort law, it is utterly irrelevant in contract law:

> "A party may breach a contract . . . because of personal, racial, or ethnic animus, or for other nefarious or unethical reasons. . . . [T]he contracting party has done nothing more socially opprobrious than to fall short in meeting a contractual commitment. Only contract damages are due." (Id. at 517; emphasis added.)

The court emphasized that "a party to a contract owes no tort duty to refrain from interference with its performance. . . ." (Id. at 514.) Therefore, the contracting party "cannot be bootstrapped into tort liability by the pejorative plea of conspiracy." (Ibid.)

According to Eileen, she and Gene had a contract which obligated Gene to pay her one-half of future profits. However, Gene had no tort duty to refrain from breaching that contract. If he chose to breach the contract--and, as the Supreme Court has explained, that was his choice--he was liable for contract damages only. To paraphrase the Supreme Court, he cannot be bootstrapped into tort liability by the pejorative plea of fraud.

B. Probate Code Section 573 Bars Punitive Damages Against A Corporation Owned By The Estate Of A Decedent Who Was Its Alter Ego.

Norway was a personal loan-out corporation. (See fn. 2.) At all times after the divorce Gene owned Norway's stock. (RT 2958-2959.) The trial court concluded, based on undisputed evidence, that Norway was Gene's alter ego. (RT 2977-2978 [finding that "Norway was merely the vehicle in the alter ego of Roddenberry and that he ran it for his purposes and that basically nobody else was interested in it, and that it was not a separate independent corporation"]; JA 806 at ¶ 2; see also RT 3312 ["Norway was a substitute for Mr. Roddenberry and they were interchangeable" (Kessler)].) Upon Gene's death, Norway's stock passed to his estate. (RT 3292.)

It is axiomatic that punitive damages are not recoverable against a decedent or his estate. ([Former] Prob. Code § 573, subd. (b);[50/] Bancroft-Whitney Co. v. Glen (1966) 64 Cal.2d 327, 357.) Where, as here, the decedent was the owner and president of a personal loan-out

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50/ "In an action brought under this section against a personal representative, all damages may be awarded which might have been recovered against the decedent had the decedent lived except damages awardable under Section 3294 of the Civil Code or other damages imposed primarily for the sake of example and by way of punishing the defendant."

Probate Code section 573 has been repealed and replaced with Code of Civil Procedure section 377.42, which is substantially similar. The new provision applies only to actions commenced after January 1, 1993. (Code Civ. Proc. § 377.43.) Therefore, the former provision applies here.

corporation, which he controlled to such extent as to be its alter ego, section 573 bars punitive damages against the corporation as well as the estate.

This conclusion follows from an examination of the Legislature's intent in enacting section 573. Of course, the cardinal rule of statutory construction is to "'ascertain the intent of the Legislature so as to effectuate the purpose of the law.'" (Central Pathology Service Medical Clinic, Inc. v. Superior Court (1992) 3 Cal.4th 181, 186.) In determining legislative intent, statutes should be interpreted to avoid absurd or unfair results. (Id. at 191.)

The Legislature made its intent crystal clear when it enacted section 573:

> "[Punitive damages] are, in effect, a form of civil punishment of the wrongdoing defendant. When such a defendant is deceased, awarding exemplary damages against his estate cannot serve this purpose and merely results in a windfall for the plaintiff or the plaintiff's estate."

(Recommendation and Study Relating To Survival of Actions (1961) 3 Cal.L.Revision Comm'n Reports F-1, F-7.)

Section 573 reflected longstanding California law. As the Supreme Court explained:

> "Since the purpose of punitive damages is to punish the wrongdoer for his acts, accompanied by evil motive, and to deter him from the commission of like wrongs in the future, the reason for such damages ceases to exist with his death. It is true that the infliction of punishment serves as a deterrent to the commission of future wrongs by others as well as by the wrongdoer, but punitive damages by way of example to others should be imposed only on actual wrongdoers." (Evans v. Gibson (1934) 220 Cal. 476, 490; emphasis added.)

(See also, California State Auto. Assn. Inter-Ins. Bureau v. Carter (1985) 164 Cal.App.3d 257, 261-262 [purpose of punitive damages is not served by passing liability on to one who was not a wrongdoer; "Punishment is effected if the wrongdoer himself must pay"].)

Construing section 573 to permit punitive damages to be inflicted on an alter ego corporation of a deceased defendant directly contravenes the intent of the Legislature, which intended to insure that the "sting" of punitive damages is felt only by actual wrongdoers. Norway's liability for punitive damages was wholly derivative, based entirely on acts attributed to Gene.[51/] Indeed, the letters to Eileen containing the purported misrepresentations were written on behalf of Gene, not Norway; Norway is not even mentioned. (JA 1046, 1052, 1054.)

51/ The jury found Maizlish guilty of conspiracy to commit fraud, but it assessed no punitive damages against him. (JA 916.) Maizlish died on September 7, 1994. (Los Angeles Times, Sept. 8, 1994, Sec. A, p. 22.)

Gene is dead. Norway's present shareholder (the estate) is immune from punitive damages as a matter of law. Norway's president (Majel-RT 3087) had nothing to do with the conduct on which the fraud judgment is based (RT 673). To punish Norway is to punish innocent persons, in direct violation of the intent of section 573.[52/]

Eileen should not be permitted to circumvent the express intent of section 573 by collecting punitive damages from Norway. The trial court erred, as a matter of law, in permitting the award. The punitive damages judgment must be reversed.

52/ The award also raises serious constitutional concerns. Due process requires that punishment not be imposed without wrongful conduct, and must be commensurate with the wrongful conduct. (See Graham v. Connor (1989) 490 U.S. 386, 109 S.Ct. 1865, 1871, fn. 10; Bell v. Wolfish (1979) 441 U.S. 520, 535-539, 99 S.Ct. 1861, 1871-1874, 1872 fn. 16; Pacific Mut. Life Ins. Co. v. Haslip (1991) 499 U.S. 1, 59, 111 S.Ct. at 1065, dis. opn. of O'Connor, J.)

CONCLUSION

For all the compelling reasons demonstrated above, this court should reverse the judgment against (1) defendants Norway Corporation and Majel Roddenberry as Executor and against (2) cross-complainants Norway Corporation, Majel Roddenberry as Executor, and Majel Roddenberry as an individual, and order the trial court to enter judgment in favor of defendants and cross-complainants.

Dated: September 30, 1994

Respectfully submitted,

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