SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

WILLIAM S. NYE a/k/a BILL NYE, an individual; JAMES MCKENNA, an individual; ERREN GOTTLIEB, an individual; ABLESOFT, INC., a Pennsylvania corporation f/k/a RABBIT EARS PRODUCTIONS, INC; CASCADE PUBLIC MEDIA d/b/a KCTS-TV, a Washington public benefit corporation, Plaintiffs, v. THE WALT DISNEY COMPANY, a Delaware corporation; BUENA VISTA TELEVISION, LLC, a California limited liability company f/k/a BUENA VISTA TELEVISION, INC., Defendants	Case No.: BC673736 RULING AFTER EVID. CODE SEC. 402 HEARING RE: INTERPRETATION OF AGREEMENT AT BIFURCATED ACCOUNTING TRIAL Date: December 14-17, 2020 Dept.: 20

Over four days, on the above-referenced dates, the Court heard remotely (pursuant to stipulation) an evidentiary hearing, under Evidence Code sec. 402, as well as Opening Statements of counsel; Hamrick & Evans, by A. Raymond Hamrick, on behalf of plaintiffs William S. Nye, aka Bill Nye, et al. (together referred to herein as "Nye"), and Mitchell, Silberberg & Knupp, by Lucia E. Coyoca, on behalf of defendants Buena Vista Television ("BVT"), et al (together referred to herein as "Defendants"). After hearing the evidence, the

Court took the issue referenced below under submission, as of January 8, 2021, by when the parties were to file their Closing Arguments in lieu of oral argument. The Court has considered the testimony of the witnesses, the Opening Statements and Closing Arguments, the briefing prior to the hearing, as well as taken note of its prior ruling, filed October 28, 2020, in advance of this hearing (allowing for the provisional admission of extrinsic evidence concerning the parties' differing views as to how to define "video device,)" as well as the Court's earlier rulings and other prior proceedings herein.[1] The Court now finds and rules:

1. INTRODUCTION

The parties' dispute here concerns principally what is included within "gross receipts," as defined in the March 31, 1993 Agreement ("the Agreement") resulting from exploitation by BVT of the series Bill Nye The Science Guy ("the Series"). On the one hand, Nye contends that the income derived from a "Video Device" – one of the ways in which "Gross Receipts" are calculated – does not include sales from streaming revenues arising from subscription video on demand ("SVOD") (principally, income from Netflix) or electronic sell through ("EST") (such as iTunes – allowing for downloading of specific programming) as those are not "similar to a video cassette or video disc." On the other hand, BVT contends that SVOD and EST revenues *are* "similar" to a video cassette or video disc.[2] The SVOD / EST revenues did not exist in 1993 because there was no such streaming technology at that time.

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[1] This hearing is preliminary to the Court hearing Nye's cause of action in his fourth amended complaint for an accounting. By order filed July 7, 2020, this Court bifurcated the accounting cause of action and further ruled that it was necessary to first decide how to interpret the Agreement before the Court heard any testimony.

[2] The foregoing issue is of significance because under the Agreement if the SVOD/EST revenues are a from a "Video Device" then this would allow BVT to have permissibly contributed 20% of that income towards Gross Receipts (after payment of an 80% royalty to its associate), as provided for under the Agreement (which is what BVT has been doing), whereas if they are not video device income, then Nye contends BVT has been improperly accounting for these sums and that 100% of this income should have been applied to gross receipts. In turn,

In its October 28, 2020 ruling, the Court found:

"…sec. 10.5.A(ii) [is] susceptible to two different meanings: On the one hand, a Video Device may be referring solely to physical devices, as Nye contends, and that this would allegedly preclude SVOD/EST distribution. On the other hand, SVOD/EST distribution may be 'similar' to a video cassette or video disc, even if it is not by way of a physical device, as BVT contends."

The Court went on to state:

"SVOD/EST distribution has certain attributes that may be similar to a video disc or cassette; for example…in terms of the consumer deciding when and how to use: It has certain attributes that are different: In particular, SVOD/EST provide content over the internet. A video cassette or disc are not internet based. Left undiscussed at this stage is whether transmission of the digital file over the internet makes SVOD/EST different to a cassette or disc that contains the digital file…. Where therefore it is at least possible that SVOD/EST may be similar in some respects but not in all respects, in view of the evolution in technology, it cannot be said that there is only one way to analyze any similarity or difference that the Court can itself now decide the issue without giving the parties an opportunity to put on evidence that is relevant to this issue. Testimony is required to determine whether SVOD/EST is a Video Device for purposes of the Agreement."

In the same ruling, the Court also stated:

"Specifically, if the relevant provisions of the Agreement were not susceptible to two different interpretations, then the Court itself would decide the interpretation issue without need to hear testimony by relying instead just on the plain terms of the contract under Civil Code sec. 1639. (*Wolf v. Walt Disney Pictures* (2008) 162 Cal.App.4th 1107, 1126) On the other hand, if the Agreement was susceptible to different meanings, then the Court would receive the benefit of extrinsic evidence. (*Id.*) For this reason, the Court [ultimately scheduled an Evidence Code sec. 402 hearing in advance of the trial of the]… accounting cause of action for December 14, 2020 (by when the Presiding Judge's COVID -19 Order allowed for oral testimony). After hearing that testimony…the Court would decide whether interpretation of the Agreement turned on the credibility of conflicting testimony. If not, the Court would decide the issue. If it did, then the Court would need to decide if the accounting cause of action could continue to be bifurcated or whether a determination needed to be heard by a jury where that might impact the non-equitable causes of action Nye had also pled. (*Id.* at 1134.)"

Further, as will be proved relevant below, the Court noted further:

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under sec. 10 of the Agreement, the parties are each to receive 50% of Net Profits. (The term "Net Profits" is defined as "those receipts remaining from gross receipts after deduction" of certain specified deductions in a particular order, which the witnesses referred to at the hearing as the "waterfall.")

"Even if the Court were to ultimately find that Nye is correct that BVT's treatment of income was improper, this does not necessarily mean also that 100% of revenues go to Gross Receipts. Under sec. 10.5.B, Defendants may still be entitled to first offset their expenses in manufacturing or otherwise making possible the devices whereby Netflix in turn distributes the series to the public – in the same way is done under [sec.] A. For example, sec. B indicates that costs can be recouped and that this section may be applicable if [sec.] A is not applicable. Similarly, under 10.5.A (i), if a non-affiliated distributor handled distribution, that distributor would recoup its costs prior to payment of its net proceeds to Gross Receipts. 10.5.A (ii) likewise seemingly contemplates such recoupment of costs by way of only 20% of income going to gross receipts.

The Court questions the plausibility of Nye's argument that the parties intended BVT would merely be compensated by way of a receiving half of the Gross Receipts; for all types of revenues Defendants, affiliates or third persons first deduct their expenses prior to distribution of net funds to Gross Receipts. Indeed, though Nye now disavows the prior assertion that this sort of distribution is like pay-tv or other subsidiary rights, under sec. 10.5.B, that there are differing percentages for sharing of profits depending on the exploitation in question (i.e., 35% for domestic syndication versus 40% for foreign television) lends support for the proposition that 100% would not go to Gross Receipts. It must be reasonably assumed that BVOD or any other company involved would only provide a distribution service if it was compensated to do so. Hence, BVT argues in the alternative that if SVOD/EST is not similar to a Video Device that there would be a 30% distribution fee as in worldwide pay tv and cable.

The Court is not now making any findings in this regard; however, given the Court is by this ruling now allowing extrinsic evidence, explanation of how these sections fit into how the Court should ultimately interpret the Agreement as far as distribution fees may be useful."

At the conclusion of this 402 hearing, Nye argued that the extrinsic evidence that the Court had earlier ruled was necessary to interpret the Agreement was in conflict; thereby requiring the issue of whether SVOD and EST are a "video device" be submitted to a jury. By contrast, BVT argued the evidence was not in conflict, even if the inferences to be drawn from the testimony differed. Thus, BVT argued the Court should itself interpret the Agreement. As discussed below, the Court finds the evidence was in conflict. The Court cannot separate out determinations of credibility, or the weight to give testimony, from determining which contention to accept as valid. Nonetheless, the Court does not also find that interpretation of the Agreement "turns on" the credibility of the conflicting testimony. Even assuming a jury were to find Nye's argument valid, the Court now finds as a matter of law that this contention is inconsistent with other terms of the Agreement. Therefore, in now interpreting the Agreement,

the Court rejects Nye's reading of the Agreement. The Court excludes the proferred extrinsic evidence from the future trials.

2. RELEVANT TERMS OF THE AGREEMENT

In making this further ruling, reference to the relevant terms of the Agreement is necessary.

> "Video Device" is defined as an "audio visual cassette, video disc or any similar device embodying the Series." (Agr. ¶ 10.1)

"BVT's distribution fees: Thirty-Five Percent (35%) domestic syndication, excluding pay television and cable television; Forty Percent (40%) foreign television, excluding foreign pay television and cable television; Ten Percent (10%) U.S. network (ABC, CBS, NBC); Twenty-Five Percent (25%) domestic merchandising; Thirty-Five Percent (35%) foreign merchandising; Thirty Percent (30%) worldwide pay television and cable television; None for worldwide audio visual cassette, video disc or any similar device embodying the Series (Video Devices); Twenty-Five Percent (25%) administration of music; Twenty-Five Percent (25%) worldwide non-theatrical exhibition, publishing, Interactive media, educational, sound recordings, commercial tie-ins, and other subsidiary rights not set forth above." (*Id.* at ¶ 10.1.) (Emphasis added)

"Gross Receipts" are defined generally as "all sums actually received by, or credited to, BVT from all sources from the exploitation of rights to the Series …." There are, however, two exceptions to that definition. Paragraphs 10.5.A and 10.5.B define Gross Receipts for other specific types of revenue.

For revenue derived from Video Device distribution, Paragraph 10.5.A defines Gross Receipts as:

> Gross Receipts from Video Device exploitation shall be defined as (i) all royalties received by BVT from and as accounted thereto by any unaffiliated third party from the manufacture and distribution of Video Devices, less direct royalties paid to third parties or ii) to the extent BVT granted to its affiliated companies the right to manufacture and distribute such Video Devices, a royalty in an amount equal to

Twenty Percent (20%) of the sums actually received by such affiliated company (less taxes, credits and returns) from its distribution thereof. (Emphasis added)

Paragraph 10.5.B (referred to by Nye as a catch-all provision), defines Gross Receipts for a variety of other types of revenues:

> Gross Receipts from the exploitation of merchandising, pay, foreign and cable television, administration of music, non-theatrical, publishing, interactive media, educational, sound recordings, commercials tie-ins and all other subsidiary rights not set forth in this paragraph or subparagraph A. above, shall be defined as i) all royalties received by BVT from and as accounted thereto by any unaffiliated third party who is licensed to manufacture and distribute rights, less direct third party royalties and all BVT or affiliated companies costs associated with producing the product or service including but not limited to advertising, promotion, manufacturing or distribution expenses or ii) to the extent BVT grants to its affiliated companies the right to manufacture and distribute such products, all sums from all sources, to BVT and its affiliated companies excluding retail sales (but including the wholesale selling price paid by a retailer), less refundable security deposits, refundable advances, other refundable sums received but not yet earned or forfeited and amounts received and thereafter refunded and all costs associated with producing the product or service including but not limited to advertising, promotion, manufacturing and distribution expenses.

The deductions are BVT's distribution fees, out of pocket advertising, promotion and distribution expenses, interest, development and production costs, and Net Profit participations paid to third parties. (Agr. ¶ 10.1.)

In deciding whether 10.5.A (ii) is susceptible to differing meanings, as concerns this revenue, the Court needs to look at the totality of the Agreement and ensure that either such reading also comports with other provisions of the Agreement so as not to make those provisions irrelevant. Most relevant in this regard is the language in sec. 1 of the Agreement which indicates that BVT's rights to exploit the Series applies not just to the technology then existing but also to any future technology still to be developed.[3]

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[3] As discussed in its October 28 ruling, whether such clause is present has been important to courts that looked at prior comparable technological development when considering if contracts related to movies shown at theatres applied also to video cassettes recorders. If there was no such clause, at least under New York law, then this would impact whether extrinsic evidence would be allowed. *Cohen v. Paramount Pictures Corp.*, 845 F.2d 851 (9th Cir. 1988)

3. CRITICAL TESTIMONY AT THE HEARING

Steven Sills, a long-time entertainment industry accountant with experience in auditing numerous profit participation agreements, like the Agreement, provided an expert opinion, at Nye's request, that these terms had specialized meanings and any "similar" device would have been a physical object like a VHS tape or DVD; not SVOD or EST.

David Tenzer, a long-time transactional lawyer in the entertainment industry, with experience in negotiating numerous profit participation agreements, like the Agreement, and who has testified previously as an expert in other accounting disputes, also provided an expert opinion, at Nye's request, that any similar device would again have meant a physical object; not EST or SVOD. He testified further that the custom and practice in the industry at the time was to have understood "manufacturing" in the Agreement to refer to physical objects, like a VHS tape or disc, that was then distributed to consumers. He refuted the notion that "manufacturing" could be now read to mean creation of a digital file.

Both Sills and Tenzer also testified that Apple and or Netflix were the parties that "distributed" the Series; not BVT or its affiliate company, Buena Vista Video On Demand ("BVVOD"). They also testified to the significant expenses involved in the manufacture of the plastic containers and accompanying boxes that encompassed the Series and related distribution costs. It was explained that it was due to these built in major expenses that studios received a royalty fee that would cover them (and hence the reason for the 80% royalty in the Agreement.) By contrast, Sills testified that the creation of one master file for mass distribution – without the attendant manufacturing and distribution costs for a physical object - was a relatively speaking far less expensive process.

Finally, both Sills and Tenzer testified that BVT should have reported all the income it received from the Series as part of "gross receipts," under the catch all provision in sec. 10 of the Agreement, and that then any net profits would have then been divided equally between Nye and BVT; i.e., instead of the 20% of income that BVT would have received from its affiliate

BVVOD (after BVVOD received the 80% royalty.)[4] Tenzer concluded that BVT was not authorized under the Agreement to have allowed its affiliate company BVVOD to receive a 80% royalty.

Nye testified that when the issue of a video device arose in connection with negotiating the Agreement in 1993 it was in the context of discussion of physical devices, such as whether the show would be on a VHS tape or Betamax. He understood the term "video device" to refer to a physical object like a VHS tape or disc that would be distributed to consumers. He contended that a digital file for streaming over the internet was not a device that was "manufactured" – as that term is used in the Agreement. Thus, he testified there was no discussion in 1993 of SVOD, EST or the like (as there could not have been since they did not then exist.) Significantly, BVT did not present any testimony to rebut Nye.[5]

Unlike Sills and Tenzer, Philip Schuman, an expert hired by BVT (also with significant long-standing industry experience as a transactional business lawyer and studio executive), testified that a video device does not have to be a physical object.[6] His written report, received into evidence as Ex. 1068, goes to some length explaining why Sills' opinion is without merit. In turn, Schuman opined that manufacturing does include the production of a streaming mechanism that allows for SVOD / EST and that the royalty fee is not necessarily tied to the costs of manufacturing. Further, Schuman reiterated BVT's position herein that SVOD / EST are part of an evolution of technology that continues the same consumer home video experience

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[4] Sills also testified to the current custom and practice with respect to SVOD and EST income and the degree to which the industry no longer followed the high royalty to cover manufacturing costs. He contended that if certain studios did so it was allegedly based upon more specific language than that used in the Agreement.

[5] Nye's testimony was therefore largely unrefuted. This had the consequence that his credibility was not at issue for purposes of creating a conflict that might then be for a jury to determine.

[6] Nye attacked Schuman's credibility by asserting, among other things, that he was not in the industry as of the exact date of the Agreement (though he was few years later) and that he candidly acknowledged that he hoped he might be able to do more work for Disney in the future.

as a video cassette or disc whereby the consumer chooses what, when and how he or she views the content, as contrasted to the television model whereby the station determines what and when it will broadcast a show – in which decision the consumer plays no direct part.

Michael Patterson, an in-house Disney lawyer and Vice-President of Business Affairs, testified that it was not necessary to include the 'not now known or hereinafter invented' language in the video device provision where it was already set forth in an earlier part of the Agreement and therefore did not need to be repeated.

Jennifer Praw, a Disney accountant who handles residuals on profit participation agreements, testified that it had been the practice at Disney since the start of her employment to treat SVOD / EST as home video, in the same manner as for a video cassette or disc. She also testified that there is no distribution fee that would be deducted for revenue earned from sales of Video Devices because a royalty is already paid to its affiliate before payment of the 20% of income received from BVT's affiliate, BVVOD. However, as Nye pointed out, she could not point to any specific authorization – other than custom at Disney – for how Disney determined that SVOD / EST should be treated as video device income.

Christopher Stefanidis, a Disney Vice-President of digital distribution operations, testified regarding the technology and work that goes into preparing a master file and the requirements of licensees such as Netflix. However, as Nye also pointed out, he did not quantify the costs to BVT of this process or give any indication whether such costs were de minimis compared to the costs of manufacturing and distributing video cassettes or discs.

4. DISCUSSION

A. APPLICABLE LAW FOR AN EVID. CODE SEC. 402 HEARING IN REGARD TO INTERPRETATION OF AN AGREEMENT

In *Wolf v. Walt Disney Pictures, etc.* (2008) 162 Cal.App.4th 1107, the Court of Appeal reversed a trial court order that had submitted to a jury claims for breach of contract, declaratory

relief and an accounting based on alleged unreported revenue by Disney from a movie it produced. In holding that the Court itself should have interpreted the disputed terms in the agreement, the Court set forth a procedure to follow:

> When the meaning of the words used in a contract is disputed, the trial court engages in a three-step process. First, it provisionally receives any proffered extrinsic evidence that is relevant to prove a meaning to which the language of the instrument is reasonably susceptible. [(*Pacific Gas & Electric Co. v. G.W. Thomas Drayage & Rigging* (1968) 69 Cal.2d 33, 37; *Dore v. Arnold Worldwide, Inc.* (2006) 39 Cal.4th 384, 391.)] If, in light of the extrinsic evidence, the language is reasonably susceptible to the interpretation urged, the extrinsic evidence is then admitted to aid the court in its role in interpreting the contract. [(*Pacific Gas & Electric* at pp. 39-40; *Wolf v. Superior Court* (2004) 114 Cal.App.4th 1343, 1350-51.)] When there is no material conflict in the extrinsic evidence, the trial court interprets the contract as a matter of law. [(*City of Hope Nat. Medical Center v. Genentech, Inc.* (2008) 43 Cal.4th 375, 395 (interpretation of written instrument solely a judicial function "when it is based on the words of the instrument alone, when there is no conflict in the extrinsic evidence, or a determination was made based on incompetent evidence"); *Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 865-866.)] This is true even when conflicting inferences may be drawn from the undisputed extrinsic evidence [(*Garcia v. Truck Ins. Exchange* (1984) 36 Cal.3d 426, 439; *Parsons, supra,* at p. 866 fn. 2)] or that extrinsic evidence renders the contract terms susceptible to more than one reasonable interpretation. [(*Parsons, supra,* at p. 865; *New Haven Unified School Dist. v. Taco Bell Corp.* (1994) 24 Cal.App.4th 1473, 1483.)] If, however, there is a conflict in the extrinsic evidence, the factual conflict is to be resolved by the jury. [(*City of Hope Nat. Medical Center, supra,* at p. 395 ("when, as here, ascertaining the intent of the parties at the time the contract was executed depends on the credibility of extrinsic evidence, that credibility determination and the interpretation of the contract are questions of fact that may properly be resolved by the jury"); *Warner Constr. Corp. v. City of Los Angeles* (1970) 2 Cal.3d 285, 291 (it is a "'judicial function to interpret a written instrument unless the interpretation turns upon the credibility of extrinsic evidence'"); *Pacific Gas & Electric, supra,* at pp. 39-40 (same).)]

(*Id.*, 162 Cal.App.4th at 1126-1127.) In turn, the *Wolf* Court went to also state other related principles a trial court should follow in interpreting an agreement:

> "Of course, that extrinsic evidence may reveal an ambiguity subjecting a contract to more than one reasonable interpretation does not mean resolution of that ambiguity is necessarily a jury question. Absent a conflict in the evidence, the interpretation of the contract remains a matter of law (citations omitted.)" (*Id.* at 1134.)[7]

[7] See also *Parsons v. Bristol Dev. Co.* (1965) 62 Cal.2d 861, 866, n.2: "[I]t is only when conflicting inferences arise from conflicting evidence, not from uncontroverted evidence," that interpretation involves a question of fact that would need to be resolved by a jury.

"Absent such a conflict, the interpretation of the meaning of the term 'Purchaser' was properly a judicial function; and the court erred in submitting this question to the jury. (See *Dore v. Arnold Worldwide, Inc., supra,* 39 Cal.4th at p. 391 [(absent conflicting extrinsic evidence, question of contract interpretation is judicial function)]; *Parsons,* at pp. 865-866 [(same)].)" (*Id.* at 1134.)

The Court follows those principles here:

As referenced above, first, the Court determined initially whether the Court needed to hear any extrinsic evidence at all to interpret the Agreement. By its ruling filed October 28, 2020, the Court found Nye was entitled to present extrinsic evidence to support its view that the language was reasonably susceptible to two different interpretations.

Second, in this "402" hearing, the Court provisionally received extrinsic evidence that was relevant to proving those different interpretations.

Third, as discussed below, the Court now finds that there is conflicting evidence turning on its credibility as to the meaning of a "video device." However, after consideration of that evidence, as the Court was required to do, the Court does not find that interpretation of the Agreement "turns on" the conflicting extrinsic evidence. Even assuming a jury were to find Nye's construction of a video device was more convincing than that of BVT, that construction of the Agreement is incompatible with other terms of the Agreement – and therefore is not a reading of the Agreement to which it is reasonably susceptible. As a result, the Court denies, under Evidence Code sec. 402, the admission of extrinsic evidence to support Nye's interpretation of a "video device" at the upcoming trial of the accounting cause of action.[8]

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[8] One differentiating aspect of this case from *Wolf* is that the issue of interpretation of the Agreement is in the context of a trial of an accounting cause of action – in which there is no right to jury in any event. This however does not impel a different result than in *Wolf.* To the contrary, if it was error for a court to have submitted to a jury an analogous issue of interpretation of an agreement in the context of a cause of action as to which there was a right to a jury, it would make even less sense to submit to a jury an issue as to which there was no right to jury in the first place. By ruling filed July 7, 2020, this Court bifurcated the accounting cause of action in order that it would proceed prior to the causes of action for damages – as to which Nye did have a right to a jury.

Turning to the substantive issue of the incompatibility of Nye's reading of the Agreement with its other terms, the Court is mindful of the following relevant out of state and Federal authorities, even if they are not binding. More significantly, they do not appear to conflict with general principles of California law – that is seemingly silent on the points below.

In *Cohen v. Paramount Pictures Corp.*, 845 F.2d 851 (9th Cir. 1988), the Court found distribution of a film by VCR (that was not in use when the agreement was entered into), as opposed to by way of theatrical or television release, to be a different form of distribution than that contemplated in the agreement. Significantly, however, the agreement did not have a "by any means or methods now or hereafter known" clause. Therefore, where here there is such a clause, that a new use was not considered similar in *Cohen* is of little weight.

By contrast, in *Tele-Pac, Inc. v. Grainger*, 570 N.Y.S.2d 521 (1991), the New York Court of Appeal (its highest court), addressed the same new use issue (VCR distribution) as in *Cohen* where there was like here a clause in the agreement "for broadcast by television or any other similar device now known or hereafter to be made known." Significantly, however, the Court rejected the use of extrinsic evidence - or after the fact course of conduct or later belief as to what the agreement meant - as the issue was one of law the court could decide based solely on the plain reading of the agreement. This plain reading would have allowed the new use as similar based on the above-referenced clause.

In *Welles v. Turner Entm't Co.*, 503 F.3d 728 (9th Cir. 2007) the court allowed extrinsic evidence related to home video rights where the agreement was ambiguous and looked to "the meaning that reasonable persons in the positions of the parties would have attached had they thought about the matter." *Id.* As explained by the court:

> "[F]aced with what may be . . . a failure to anticipate the future situation which arose, a court is faced not so much with the function of interpreting language as the parties intended, for their intention was incomplete, but of construing the language to accord with what would have been the intention and the honorable agreement of the parties if their attention had been drawn to the possible events as they actually were to occur."

Welles, 503 F.3d at 734–35 (citation omitted) Significantly, the court found the new use was not included where it would have made a term in the agreement related to "television rights" superfluous. These considerations are again relevant here where after now hearing extrinsic evidence the Court must take account of the Agreement contemplating future types of distribution—the Court cannot reach a conclusion which renders that language superfluous.

In *HarperCollins Publishers LLC v. Open Rd. Integrated Media, LLP*, 7 F. Supp. 3d 363 (S.D.N.Y. 2014), the court addressed the right to distribute an e-book that was not in use as of the 1971 agreement. That court also provided useful guidance:

> "[I]n new use cases, the words of the contract may take on even greater significance than in a standard contract action in which the Court could review contemporaneous extrinsic evidence to elucidate the intent of the parties. … *Bartsch* describes the problem more bluntly: 'With Bartsch dead, his grantors apparently so, and the Warner Brothers lawyer understandably having no recollection of the negotiation, any effort to reconstruct what the parties actually intended nearly forty years ago is doomed to failure.' 391 F.2d at 155. Moreover, by their very nature, new use cases create a significant obstacle to the use of extrinsic evidence. An inquiry into the parties' intent 'is not likely to be helpful when the subject of the inquiry is something the parties were not thinking about.' *Boosey*, 145 F.3d at 487–88. Likewise, extrinsic evidence of the parties' course of dealing or industry practice is likely irrelevant, 'because the use in question was, by hypothesis, new, and could not have been the subject of prior negotiations or established practice.' *Id.* at 488."

HarperCollins, 7 F. Supp.3d at 371. The court also noted courts "considered the 'foreseeability' of the new use at the time of contracting" in interpreting the agreements. *Id.* The court concluded e-book technology "comprises a later-invented version of the very 'computer, computer-stored, mechanical or other electronic means' provided by Paragraph 20." *Id.* at 372. The court found e-books to be a permissible extension of "book form," just as television broadcast of a movie and the videocassette constituted a lawful extension of the motion picture form in *Bartsch* and *Boosey*. *Id.* at 373. Again, these considerations are applicable here where BVT is arguing SVOD/ EST are part of an evolution of technology contemplated by the broad definition of video device.

In *Boosey & Hawkes Music Publishers, Ltd. v. Walt Disney Co.*, 145 F.3d 481 (2d Cir. 1998), the Second Circuit again addressed use of a music in a film to be used on a video cassette and noted there were two approaches used by courts. First, as in *Cohen* and *Tele-Pac*, a grant of rights "includes only such uses as fall within the unambiguous core meaning of the term (e.g., exhibition of motion picture film in motion picture theaters) and exclude any uses that lie within the ambiguous penumbra." *Boosey & Hawkes*, 145 F.3d at 486. Under the second approach articulated in *Bartsch*, the key factor is whether the use can be reasonably construed to fall within the scope of the initial license. *Id.* The *Boosey* court adopted this second approach, noting the rule correctly focuses on the language of the contract. "If the contract is more reasonably read to convey one meaning, the party benefitted by that reading should be able to rely on it; the party seeking exception or deviation from the meaning reasonably conveyed by the words of the contract should bear the burden of negotiating for language that would express the limitation or deviation. This principle favors neither licensors nor licensees. It follows simply from the words of the contract." *Boosey & Hawkes*, 145 F.3d at 487.

Notably, the Second Circuit emphasized that extrinsic evidence rarely is useful in new use cases:

> "Although contract interpretation normally requires inquiry into the intent of the contracting parties, intent is not likely to be helpful when the subject of the inquiry is something the parties were not thinking about. See Nimmer, § 10.10[B] at 10–90 (noting that usually 'there simply was no intent at all at the time of execution with respect to ... whether the grant includes a new use developed at a later time'). Nor is extrinsic evidence such as past dealings or industry custom likely to illuminate the intent of the parties, because the use in question was, by hypothesis, new, and could not have been the subject of prior negotiations or established practice. … Moreover, many years after formation of the contract, it may well be impossible to consult the principals or retrieve documentary evidence to ascertain the parties' intent, if any, with respect to new uses. On the other hand, the parties or assignees of the contract should be entitled to rely on the words of the contract. Especially where, as here, evidence probative of intent is likely to be both scant and unreliable, the burden of justifying a departure from the most reasonable reading of the contract should fall on the party advocating the departure."

Boosey & Hawkes, 145 F.3d at 487–88 (citation omitted).

In sum, it is apparent that while extrinsic evidence can be provisionally received to substantiate an interpretation, ultimately such evidence is unlikely to be probative in new use cases (such as this one) to interpret the Agreement or to offer critical insight into which interpretation of an agreement should prevail.

B. THE DEGREE OF SIMILARITY BETWEEN SVOD AND EST TO A VIDEO CASSETTE OR VIDEO DISC IS DEBATABLE

The Court finds, based on the evidence presented at this 402 hearing, that there is a factual conflict related to whether SVOD/EST are "video devices." As discussed below, each side's respective experts provided competing opinions on the foregoing question that were premised at least in part upon different views of the custom in the industry as to how to classify SVOD and EST income. On the one hand, Sills and Tenzer both testified similarly that the industry treated SVOD and EST revenue as distinct from video cassette or disc income in interpreting profit participation agreements that were entered into prior to the advent of SVOD and EST.[9] On the other hand, Schuman (as well as Patterson and Praw as percipient witnesses with expertise on this issue) testified similarly that the industry (and Disney (BVT) in particular) treated SVOD and EST revenue as a form of home video revenue.

The Court therefore cannot hold as a matter of law that SVOD and EST are sufficiently similar to a video cassette or disc that they are a "video device."[10] Even if there are some similarities in "core function" between SVOD and EST, on the one hand, and video cassettes or discs, on the other hand, the Court was provided no basis to conclude that "core function" was the applicable test for determining similarity.

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[9] For example, they testified to some studios allegedly now classifying SVOD / EST income so that 100% of income was added to gross profits without an 80% royalty first going to the studio distribution arm (e.g., BVVOD).

[10] Indeed, the Court ruled already that whether SVOD and EST are video devices is potentially susceptible to differing interpretations. The evidence presented does not now make the Court believe it was in error previously in reaching that initial conclusion – at least as that issue alone.

The Court acknowledges that BVT argued the Court should determine similarity based upon "core functionality." Schuman and Patterson stated they viewed similarity in the sense of a "consumer experience" that SVOD and EST were just another variety of "home video" by means of which the consumer determines when and/or how to use the content. "Home video" would stand in contrast to "linear" or scheduled access to the content by way of the television or cable company deciding when was the applicable time for the consumer to view the content.[11] However, classifying methods of content distribution this way effectively ignores the

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[11] For example, internet technology may have effectively made irrelevant this historic way of comparing means of distribution. Though BVT emphasized how streaming is the same model as a video cassette or disc (in allowing the consumer to decide when or how to view the content, as opposed to television), that argument is by now probably an outdated way of looking at television (as Schuman himself implicitly acknowledged in stating that was the distinction "certainly in those days"). Television can also be recorded by a device and shown when convenient to the consumer. By contrast, though SVOD and EST may allow the consumer to choose when he or she wants to view the content, the ability to do so may still depend on when the licensee (Netflix) permits. This would stand in contrast to the consumer owning the content forever if the cassette or disc was purchased. In sum, the "core functionality" theory may not take account of the significant exceptions to the underlying distinction. Ultimately, this dichotomy may not hold up under scrutiny.

Using the "functional view" also would seemingly not factor in the many other issues that now play a significant part in the rationale for the means of distribution set forth in 1993 in the Agreement: It is also common knowledge that broadcast or even cable television have a diminishing share of the media industry, with content conveyed sometimes without even any intervening distributor (e.g., Twitter).

Moreover, BVT's related argument that the royalty is not tied to the costs of manufacturing was not persuasive. Even if there was not a direct correlation of exact costs with the royalty, it is unreasonable to assume that there was not some connection inferred by agreement to a royalty. Even BVT acknowledged that the 20% royalty was based upon the high costs associated with the construction and distribution of the containers for cassettes and DVD's. Further, there was testimony that though those high costs have gone down, there was some evidence that at least some studios no longer charge a royalty for this reason.

If there was no connection, this would support Nye's argument that it would have been improper for BVVOD to obtain a royalty. Nye argued other provisions of the Agreement already provided for costs to be paid pursuant to the "waterfall" concept about which the witnesses testified. In turn, BVT and Nye were then to equally share net profits. This argument of BVT may therefore be inconsistent with other terms of the Agreement – just as is Nye's argument about video devices.

fundamental way that the internet has changed how distribution may have been viewed in 1993. SVOD and EST are new means of distribution based upon use of the internet – which was not conceived of in 1993. Internet distribution means physical devices are no longer required for each customer. Instead, only one master version is needed for each licensee – which can then be made available for viewing by potentially millions of people without the additional cost that would come with manufacturing millions of cassettes or discs. While the testimony was not materially in dispute that SVOD / EST distribution can also be treated as part of an evolution in home video technology (i.e., where formerly Netflix provided shows through DVD by mail, now it does so through streaming), to say these methods of distribution are "similar" discounts the underlying differences, including the ease with which the consumer can now access content and the patent reduction of distribution costs.[12]

Thus, it appears the advent of internet distribution changed the economics of distribution which would underpin the parties' negotiation of any distribution agreement. Though the Court did not hear testimony as to the specific costs of manufacturing physical discs or cassettes versus manufacturing one master copy that is then provided to a licensee (Netflix or Apple), the testimony the Court *did* receive made it apparent that the costs involved would likely be very different. While BVT's evidence supported the inference that creation of a master copy requires investment of time to meet the licensee requirements, Nye also noted correctly that BVT's

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[12] Hence, it is understandable that Nye would have testified he did not contemplate the type of distribution manifest in SVOD and EST. Indeed, BVT did not offer any evidence to dispute what Nye testified concerning the parties' then understanding. Thus, at least on this issue, it was undisputed that each party had a different understanding.

On the other hand, though Nye argues the Court should disregard BVT's subjective understanding where this was not communicated to him, the same might also be said as to Nye's subjective understanding of the Agreement.

Ultimately, the Court does not find that either party communicated their respective understandings in this regard at the relevant time where they would have had no reason to do so given there was then no technology in existence that would have led them to have such discussion. Therefore, the testimony in this regard is irrelevant and does not create a material conflict in the evidence - even if there are conflicting views about how to interpret those facts. (*Wolf, supra*, 162 Cal.App.4th at 1357)

evidence did not provide specific dollar figures for the cost of creating the master copy. Nye contends such costs would have been de minimis. Whatever the exact costs may be, it is still apparent that there was conflicting evidence as to the applicable costs that would have been the basis for the Agreement.

There is also conflicting evidence on the issue of whether a video device is required to be a physical device. On the one hand, there is no physicality requirement stated explicitly in the Agreement. BVT therefore argued this was evidence there was no such requirement. On the other hand, the Court nonetheless ruled previously that the Agreement was potentially susceptible to an interpretation that impliedly required a physical device. Nye put on at least some testimony to corroborate that interpretation—specifically, Sills' testimony that some in the industry understood this alleged "technical term" that way. Whether or not the Court was convinced by that testimony, the evidence is still in conflict. In addition, Nye testified this was how he understood the term. The Court found Nye credible, and as noted *supra* at fn. 5, Nye's testimony was largely unrefuted and his credibility was not put at issue.[13]

Furthermore, even if the Court accepted BVT's argument that the foundational facts that were the basis for the experts' different opinions were not in dispute, the validity of both sides' expert's opinions still necessarily depended upon determining what weight to give each witness's testimony.[14] Determining the weight to give testimony is necessarily the result of evaluating credibility. Each side attacked the *credibility* of the other side's expert(s).[15] Though the Court did

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[13] Nye was candid about why this issue was important to him - the money. He indicated that he had not recognized BVT and affiliate would end up with effectively 90% of income from the Series whereas he would receive only 10%. However surprising that may have been, it is not a legal basis to interpret the Agreement in a way inconsistent with its terms.

[14] Though the Court is a gatekeeper to exclude expert opinions that lack a reasonable basis, under *Sargon Enterprises v. Univ. So. Cal.* (2012) 55 Cal.4th 747, 772, here the Court could not reach that far – even if it did have doubts, for example, as to the level of foundation for Tenzer's opinion testimony.

[15] See Hoffstadt, *Pants on Fire: How appellate courts review credibility findings*, Los Angeles Daily Journal, January 12, 2021 ("Credibility determinations are not monolithic; they

not find anything about each of the experts' motives, character for truth and veracity or demeanor that created any credibility issue warranting jury determination, the Court did find that there were still issues as to the *content* of their testimony that went to credibility.

Here, at least some of the attacks went to the factual foundation for their opinions:

-Whether Schuman was in the industry at the relevant time.[16]

-Why Sills had reached different conclusions at different times in this litigation.[17]

- Whether Tenzer had sufficient underlying involvement in the underlying issue to be able to have personal knowledge of the industry view. (Tenzer was unable to state what other studios did as far as reporting though on direct examination he contended he knew what the standards were in the industry.)

-Whether the experts were just articulating what the lawyers were arguing based on merely reading the terms in the Agreement in a way that favored the client as opposed to any underlying knowledge of industry practice.

The Court therefore cannot escape the conclusion that the evidence would be in conflict if similarity is the sole issue. The credibility of that evidence would be relevant to determine which

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are more like a molecule than an atom insofar as they can be broken down into smaller components. Specifically, witness credibility can be undermined (or buttressed) by (1) the content of the witness' testimony, (2) the witness's motive(s), (3) the witness' character for truth and veracity, and/or (4) the witness' demeanor. *Content* refers to the substance of the witness' testimony, and whether it is contradicted (or corroborated) by other evidence presented to the trier of fact, by the witness' prior statements, and by deficiencies in the witness' capacity to perceive, recollect or communicate.")

[16] This is not to say that not having then been in the industry precludes his testimony. See *Howard Entertainment v. Kudrow* (2012) 208 Cal.App.4th 1102, 1116 However, this fact is still relevant to the weight of his testimony.

[17] In *Badie v. Bank of America* (1998) 67 Cal.App.4th 779, the Court proceeded to interpret an agreement, notwithstanding that the expert had testified initially one way and later another way. However, it did so where the testimony was otherwise "uncontradicted." Here, as indicated above, the testimony was in conflict.

view to accept.[18] If "similarity" was the sole issue, Nye might therefore be correct that a jury would have needed to determine which party's conflicting evidence was more valid.[19] (See *Med Ops. Mgm't v. Nat'l Health Labs* (1986) 176 Cal.App.3d 886, 891 (a question of fact requiring a jury arises when the foundational extrinsic evidence is in conflict)) The Court rejects BVT's argument that there is no conflicting evidence.

C. NYE'S READING OF *VIDEO DEVICE*, EVEN ASSUMING IT WERE TO PREVAIL, IS INCONSISTENT WITH OTHER TERMS OF THE AGREEMENT

However, whether SVOD / EST are video devices does not "turn on" the foregoing credibility issues arising from the conflict in the evidence. A jury is needed only if the Court's interpretation of the Agreement "turns on" that issue. (See, e.g., the authorities relied upon by Nye himself on pp. 22-23 of his Closing Argument: *City of Hope Nat'l Med. Ctr. V. Genentech* (2008) 43 Cal.4th 375, 395-396, *Warner Constr. Corp. v. City of Los Angeles* (1970) 2 Cal.3d 285, 289.) This is because, as discussed below, even if a jury were to conclude Nye was correct on the issue of similarity, that reading of the Agreement is inconsistent as a matter of law with other relevant terms of the Agreement.

The following provisions guide that interpretation:

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[18] Therefore, this case is different to *Oceanside 84 Ltd v. Fid. Fed. Bank* (1997) 56 Cal.App.4th 1441, 1451 where though as here the issue of contract interpretation depended on the credibility of experts concerning practice and custom in the industry, here there were the above-referenced conflicting factual assertions.

[19] This is not to suggest that a jury would necessarily agree with Nye's view: For example, BVT put on evidence to suggest that even with internet distribution there were still physical devices like a Roku or Apple TV box - thereby undercutting Nye's argument that SVOD / EST do not also have a similar physical component to make them operable. In turn, BVT might still argue that the software that would be inside a smart tv screen is in some sense still a physical device - even if not a separate device. That the software is not in a separate appliance would not seem to be material where Schuman testified that even VCR and DVD devices were sometimes built into a television set. Tenzer also acknowledged this point. In any event, the Court does not decide whether SVOD / EST are "similar" to a video cassette or disc.

Civil Code sec. 1641, which provides: "...[t]he whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other."

Civil Code sec. 1643, which provides: "A contract must receive such an interpretation as will make it lawful, operative, definite, *reasonable*, and capable of being carried into effect, if it can be done without violating the intention of the parties." (Italics added.)

Civil Code sec. 1647, which provides: "A contract may be explained by reference to the circumstances under which it was made, and the matter to which it relates."

Civil Code sec. 1652, which provides: "Repugnancy in a contract must be reconciled, if possible, by such an interpretation as will give some effect to the repugnant clauses, subordinate to the general intent and purpose of the whole contract."

The Court reaches the conclusion that the Agreement is not reasonably susceptible to Nye's view of it for the following reasons:

First, Nye's reading would mean that neither BVT nor BVVOD would receive any compensation for distribution.[20] All other means of distribution provide BVT a distribution fee for doing so under sec. 10.1 of the Agreement. There is only not a fee for video devices under 10.1 because its affiliate BVVOD would instead receive an 80% royalty.[21] Therefore, as Praw

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[20] Reading out SVOD / EST from "video device" would be repugnant to the general intent of the Agreement that BVT and or its affiliate receive a fee for the services they were providing, contrary to Civil Code sec. 1652. Similarly, taking out SVOD / EST from the context whereby all the other means by which BVT was distributing the Series and for which it was receiving a fee would be inconsistent with the circumstances under which the Agreement was executed, contrary to Civil Code sec. 1647.

[21] Nye was ultimately not to offer any evidence to support the contention that BVVOD was not entitled to a royalty. It was undisputed that BVVOD was the licensor of the Series and that the platforms like Netflix were the licensees. BVVOD was entitled to license the Series pursuant to an implied license from BVT. BVT and BVVOD were in the business of business-to-business distribution whereas Netflix was in the business of business-consumer distribution.

acknowledged in her testimony, BVT does not also require a distribution fee. Even Nye's expert, Sills, concurred that BVT would be entitled to some fee.[22]

However, if SVOD / EST were not treated as a video device, then BVT's affiliate would also not receive any royalty – which is an unreasonable construction of the Agreement. Indeed, Tenzer acknowledged on cross-examination that BVT was not receiving a distribution fee because it was already receiving a royalty. Hence, again, if BVVOD were not now to receive a royalty, BVT would not receive a distribution fee either. Sec. 10.1 of the Agreement provides that there are no distribution fees for video devices. Tenzer also acknowledged that BVT should receive one or the other (in arguing that it should not receive both). Schuman also made the same point: that if SVOD and EST were not home video, then BVT would be entitled to some fee. However, under Nye's view, there would then be no fee at all as none was provided in the Agreement – which is inconsistent with its receiving a distribution fee under the Agreement for all other means of distribution of the Series.

Finally, consistent therewith, Praw testified BVT was not reimbursed its costs of distribution because those were compensated by way of its receiving the royalty. Thus, under Nye's view, not only would BVT not receive its distribution fee but it would not be able to recover the costs associated with that distribution by way of the windfall – likewise not making any sense.[23]

Receiving half of net profits is not the same as a distribution fee because there might not have been any net profits. Profits necessarily would depend on the success of the Series compared to costs – which are incurred before knowing whether there will be profits. BVT could

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What conflicting inferences may have existed arose from overuse of the term "distribution" to describe different activities under that umbrella.

[22] Sills argued that BVT was essentially double dipping by BVVOD receiving an 80% royalty and then BVT receiving 50% of net profits. However, as discussed below, this argument is flawed as the parties did not know that there would be profits when they entered into the Agreement.

[23] For this reason, Nye's suggested alternatives as to how BVT would be compensated have been unclear; taking several different positions during this litigation.

not have known that the Series would ultimately be successful. Looking at that issue now in retrospect where the Series has proved to be successful is not the relevant analysis.

It is also not reasonable to infer that the party with the bargaining power - as all agreed BVT had - would only provide for its compensation if the show proved to be successful. After all, Nye testified to BVT having invested significant sums at the outset towards ongoing production of the Series.

The Court advised the parties it was concerned about this issue in footnote 4 of the October 28 ruling. However, Nye did not put on any evidence or make any argument to address it. Indeed, significantly, Nye argues only that BVT erroneously included this income as coming from a video device; Nye conveniently does not indicate how this income should have been reported.[24]

That the Court would have concern about the viability of Nye's position should also have come as no surprise given that Nye himself had taken different positions about what position to take related to the consequences of his position. Whatever the strength conceptually of Nye's argument about the similarity of SVOD / EST to a video cassette or video disc, it still does not fit within the parameters of the Agreement – that is what the Court is now concerned with. Indeed, as indicated, his own expert seemed to concur in the Court's view.

In short, Nye's interpretation is not "reasonable," as required by Civil Code sec. 1643. "Extrinsic evidence is 'admissible to interpret the instrument, but not to give it a meaning to which it is not reasonably susceptible' [citations], and it is the instrument itself that must be given effect. [Citations.] It is therefore solely a judicial function to interpret a written instrument *unless the interpretation turns upon the credibility of extrinsic evidence*." (*Parsons, supra*, 62 Cal.2d at 865, italics added.)

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[24] Again, if SVOD and EST are not video devices, Nye offers no other category of distribution which would make any more sense that they should fall under. They do not fit in any of the other categories of distribution in sec. 10.1. They also do not fall under the alleged catch-all sub-provision therein because that refers to "subsidiary rights" (i.e., related to merchandising) and SVOD and EST do not fall within that classification.

Second, Nye's reading of "video device" is inconsistent with the provision of the Agreement contemplating then unknown means of distribution.[25] To limit "video device" solely to then existing physical devices would be inconsistent with that other term, contrary to Civil Code sec. 1641. As Nye acknowledges, "contractual language must be interpreted in a manner which gives force and effect to every provision, and not in a way that renders some clauses nugatory, inoperative or meaningless," citing *Ratcliff Architects v. Vanir Constr. Mgm't.* (2001) 88 Cal.App.4th 595, 602.

Moreover, as Patterson testified, there was no reason to repeat that language in the section pertaining to video devices.[26] Sec. 10.1 does not limit the devices to the exact ones referenced but also to ones that are similar. Finally, reading the Agreement the way Nye would is inconsistent with California law that Nye himself relies upon that requires contractual provisions to be read together. This would render superfluous the provision subjecting then-unknown uses to the terms of the Agreement. Doing so is a judicial function; not for a jury.

Third, Nye's argument is premised on an overly restrictive reading of the term "manufacturing" in the Agreement. The Court heard no conflicting evidence related to whether construction of SVOD / EST technology was not "manufacturing" any more than duplication of boxes or packaging of cassettes or discs are manufacturing. Stefanidis testified to how a master

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[25] There is no question here that BVT had the right to exploit the series through streaming technology. The issue is rather what the consideration should be for doing so. Where future technology was contemplated, it would make sense that the provisions related to payment should also govern future technology. The issue is whether those provisions do so. Again, Nye contends that they do not. In turn, BVT contends the language in 10.5.A (ii) in the Agreement does cover streaming revenues.

[26] Tenzer testified, however, this future use language should have been repeated in that paragraph. However, ordinarily experts cannot testify to interpretation of an agreement. (See *In re Tobacco Cases I* (2010) 186 Cal.App.4th 42, 51; *DVD Copy Control Ass'n v. Kaleidescape* (2009) 176 Cal.App.4th 697, 715) Even if he were permitted to do so, the Court rejects any need for future uses of the show to be again included in defining video device.

device is manufactured and then distributed to a digital platform. This testimony was not rebutted; no other testimony was offered on this subject either. No expert opinion testimony was provided that the term "manufacturing" could not be broadly defined to include what BVT does, consistent with how defined broadly in the dictionary. Moreover, as BVT argued, even a video cassette and video disc are manufactured differently. There was no reason not to conclude therefore that the use of the term "manufactured" in the Agreement precluded SVOD / EST as encompassed within a "video device" - as Nye had argued.

Fourth, the Court does not find useful Nye's invocation of the doctrine of *ejusedem generis* in support of his argument of how to interpret the Agreement, or that where general words follow specific words, the general words are construed to embrace only those things similar in nature to those enumerated by the specific words, citing to *Mountain Air Enterprises v. Sundowner Towers* (2017) 3 Cal.5th 744, 754. Though this doctrine is consistent with how the Court had ruled in allowing extrinsic evidence, all this does for Nye now is to be able to argue that BVT's reading of "video device" is too broad; it does not get him past the finish line to be able to take this issue to a jury because it does not answer the Court's separate concerns set forth above that exist independent of how Schuman (on behalf of BVT) believed a broad reading of "video device" was appropriate.

Finally, Nye's view is also inconsistent with the *new use* cases discussed above; namely, that parties should be entitled to rely on an agreement that is intended to govern a future use even if the future use is not specifically identified. (*Boosey & Hawkes*, supra, 145 F.3d at 487) In that context, extrinsic evidence is not particularly useful to as to what the parties would have then intended (i.e., Nye testimony) where necessarily they would not have been discussing something that did not then exist. (*HarperCollins*, supra, 7 F. Supp.3d at 371) The foregoing is consistent with basic California law in interpreting a contract: Civil Code sec. 1639 provides: "[w]hen a

contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible."

Therefore, the Court now excludes from introduction at trial under Evid. Code sec. 402 the proffered extrinsic evidence it provisionally received during this hearing. After consideration of the extrinsic evidence, the Court finds the Agreement is not reasonably susceptible to Nye's reading of SVOD and EST as not falling within the definition of "video device."

5. CONCLUSION

For these reasons, the Court finds that whether EST / SVOD are a video device is not an issue that is required to be heard by a jury. The Court interprets the Agreement as including EST / SVOD within the definition of "video device." As a result, the trial of the accounting cause of action the Court previously bifurcated (as to which this Evid. Code sec. 402 hearing was held beforehand) can now proceed based on the Court's determination of these preliminary facts and ensuing interpretation of the Agreement.[27]

DATED: February 2, 2021

DAVID J. COWAN
Judge of the Superior Court

[27] Since the foregoing hearing was not part of the trial, there is nothing to prohibit one bench officer conducting this hearing and another conducting the trial – as will be necessary: The undersigned was assigned to a different department, as of January 4, 2021, but committed to issuing this ruling based on the hearing held before his re-assignment.