SUPERIOR COURT OF CALIFORNIA

CITY AND COUNTY OF SAN FRANCISCO

DEPARTMENT NUMBER 503

Estate of ALEXANDER "SKIP" SPENCE, by Omar Spence, its Administrator; JAMES ROBERT MOSLEY, by Margaret M. Mosley, his Guardian Ad Litem; DONALD J. STEVENSON; PETER LEWIS; and JERRY A. MILLER,

Plaintiffs,

v.

MATTHEW KATZ, d.b.a. After You Publishing Co., San Francisco Sound, and Does 1 through 40, inclusive;,

Defendant.

CASE NO. 614321 (300175)

STATEMENT OF DECISION

Trial commenced on March 28, 2005 in the above-entitled matter before The Honorable A. James Robertson, II sitting without a jury, a jury having been expressly waived. Glendon W. Miskel appeared as counsel for the Plaintiffs of the Estate of Alexander "Skip" Spence, by Omar Spence, its Administrator; James Robert Mosley, by Margaret M. Mosley, his Guardian Ad Litem; Donald J. Stevenson; and Peter Lewis. Matthew Katz appeared *in pro per* as counsel for

the Defendant Matthew Katz, d.b.a. After You Publishing Company, San Francisco Sound, and Does 1 through 40.

The trial lasted for 5 days: March 28, March 29, March 30, April 4, and April 5, 2005. Opening arguments were conducted on March 28, 2005. After oral and documentary evidence was introduced, the Plaintiffs rested on April 5. In the afternoon of April 5, the Defense rested. Due to time constraints, closing arguments were submitted in writing. The Plaintiffs' closing argument was filed on April 18, 2005 and the Defendant's was filed on April 27, 2005.

On May 11, 2005, in a conference call with both parties regarding their statements of decisions, the court ordered the parties to prepare and submit a chronology of facts by May 20. In a subsequent conference call in chambers on May 25, the parties agreed to the central issues and contentions of this case as stipulated by this court. On June 8, the court ordered each party to submit additional supplemental briefs covering the events that took place in the 1980's.

This court issued a Tentative Decision on June 22, 2005, to which the parties had a chance to respond. Both parties filed Corrections and Exceptions to the Tentative Decision. These Corrections have been taken under consideration in this final Statement of Decision.

The Plaintiffs' filed their Corrections on June 30, 2005. This document contained requests for the following: nine factual corrections, on the grounds that there was not either support or clear support in the record for the stated facts; ten suggested language corrections; four factual clarifications, to avoid future confusion; and 2 substantive legal changes. The court has considered these matters, and as is set forth in this decision as follows, the court grants the Plaintiffs' factual corrections, language corrections, and clarifications.

The Plaintiffs' first substantive request is for the court to order the Defendant to "immediately pay the sum of $24,817.19," because Mr. Katz admits to owing this amount. The court grants this request in substance. The Plaintiffs' request for attorney's fees is denied on the

grounds that the Management Agreement containing the attorney's fees clause is void, and therefore, the Plaintiffs are not entitled to recover fees under that agreement.

The Defendant filed a "Bill of Exceptions and Particulars" on July 2, 2005. This document contained requests to supplement the court's factual findings and requests for different legal findings and clarifications.

The court has considered these matters and rules on the Defendant's requests as follows. Exception #1 is denied, on the grounds that there is sufficient evidence that the Defendant was sent notices of rescission in the 1960's. Exceptions # 2-7 are granted, as they serve to clarify specific facts and contentions. Exceptions #8-11 are denied and this court stands by its rulings on these issues as stated in the tentative decision. The Labor Commissioner did void all contracts between the Plaintiffs and the Defendant, and the Plaintiffs own the band's name. Exception #12 is denied, on the grounds that there was no valid contract between Mr. Mosley and Mr. Katz. Exception #13 and Proposed Amendment #1 are granted because they help clarify the court's ruling.

As to the Defendant's request for particulars, the court wants its decision to be as clear as possible. However, due to the scope of this trial, many of the Defendant's requests cannot be granted. As to Particular #2, the Defendant is not the publisher of "Mosley Grape" because there was no valid written agreement between the parties. As to Particular #3, the Defendant may not recover his recording costs for the album "Heart." First, evidence of such costs was never properly introduced into evidence and the court has no proof as to what Katz's purported costs relate to. More significantly, the court cannot grant Katz's request to recover recording costs in the absence of a written agreement. Recovering recording costs from the Plaintiffs' share of the royalties must be agreed upon in advance, and no agreement between the parties was ever reached on this issue.

As to the ownership of the artwork in connection with "Heart" and "Mosley Grape," this court cannot decide this issue on the grounds that it was never properly raised in the proceedings. This was neither raised in the Defendant's briefs nor was it raised at trial. Furthermore, the court cannot rule on the status and whereabouts of the interpleaded funds because this was also never properly presented to the court. The 2000 settlement agreement between Mr. Katz and Peter Lewis was likewise never an issue in this trial, and this court is in no position to rule on the status of this settlement. As to the Defendants other requests for clarification, they are granted and are found in the final decision below.

I. STATEMENT OF FACTS

This case arises from a complicated thirty-nine year history regarding the relationship between manager/music publisher Matthew Katz and the musical group known as "Moby Grape," which attained some prominence in the 1960's. In terms of what this court needs to determine, this relationship involved ten distinct factual time periods.

1. *"Moby Grape" was formed and the band retained Matthew Katz as their Manager*

Beginning in 1966, Plaintiffs Spence, Mosley, Stevenson, Lewis, and Miller came together to form the musical group "Moby Grape." Reporter's Transcript 541: 19-20. These five band members began discussing forming the band in July 1966, and at this time, former "Jefferson Airplane" manager Matthew Katz expressed his interest in managing them. RT 139: 14-28. Mr. Katz had numerous phone calls and meetings with the musicians. Mr. Katz also assisted in the audition process. RT 121: 7-12. Finally, the five Plaintiffs met in Mr. Katz's office, played music together for the first time as one group and soon after decided to form Moby Grape, with Matthew Katz as their manager. RT 239: 16-21. Skip Spence, a guitarist and songwriter for Moby Grape, was the former drummer for Jefferson Airplane but left that band after their first album was released. Guitarist for Moby Grape, Jerry Miller, and drummer, Don

Stevenson, both previously played together with "The Frantics," a rock group from the Northwest. RT 137: 6-9. Guitarist Peter Lewis and bassist Bob Mosley played in different various Southern California bands before joining Moby Grape. RT 245: 21-28. These five musicians all came together, under the guidance of Katz, and began rehearsing almost immediately.

Mr. Katz, initially, acted like a father figure to the band members, providing them with shelter, money, and guidance. RT 127: 15-26, RT 139: 24-28, 140: 1-3. After only a few weeks of rehearsals, they began to perform at a former ferryboat in Sausalito, The Ark, under the name "Moby Grape." RT 243: 2-28.

2. *Moby Grape Performed Nationwide, Formalized its Relationship with Matthew Katz, Signed a Recording Contract with CBS, and Gained Widespread Recognition*

After several weeks of performing at The Ark, excitement began to grow around Moby Grape. Sometime during these performances, Matthew Katz presented the band with formal management contracts, which gave him the right to act as their manager. RT 356: 2-4. Management and Publishing Agreements were signed in September and October 1966. On October 10, 1966, all five members signed an Addendum to the Management Agreements, which gave Katz ownership of the name Moby Grape. RT 247: 26-28. On October 28, 1966, the band was showcased at California Hall.

On February 7, 1967, Moby Grape, while still under the management of Katz, negotiated and signed a recording contract with CBS Records, with whom they recorded their first album. RT 144: 3-24. This recording agreement provided that the Plaintiffs would render services at CBS's recording studios for the purpose of making phonograph records. CBS agreed to pay the individual band members certain compensation, including royalties for their records. After Moby Grape left The Ark, they performed at other venues like the Fillmore West, in April 1967.

RT 208: 2-8. On June 6, 1967, "Moby Grape," was released, and to celebrate their first album, CBS showcased Moby Grape at the Avalon Ballroom on June 7. RT 206: 13-27.

During this time, Moby Grape achieved its highest level of success and recognition. They toured all over the country, appearing at the Monterey Pop Festival on June 16-17 and later going on tour with "The Mamas and the Papas." RT 168: 17-27.

3. ***Tension Between Moby Grape Members and Matthew Katz Began to Grow***

The tours in the summer of 1967 highlighted the growing tension between the members of Moby Grape and their manager, Matthew Katz. RT 251: 12-16. Katz accompanied the band on its tour through the East, which had been arranged by Columbia. He undertook the responsibility of making all of the band's travel arrangements. Scheduling mix-ups and mistakes resulted in Moby Grape's continual failure to meet the schedule previously established by Columbia Records. The group arrived late for many engagements, while missing other engagements completely. This created ill will within the broadcast industry towards Moby Grape, and the band felt that Katz was responsible. RT 253: 2-26. By the time the band returned home to California after the tour, they had stopped talking to Katz.

4. ***The Group Members Elected to Leave Katz, Who CBS Quickly Replaced***

In September 1967, Moby Grape went to New York for a recording session, and at that time, gave written notice to Katz that he was no longer the manager of Moby Grape. The band formally rescinded all contracts that they had with Matthew Katz. Plaintiff's Exhibits 24-26.

After Moby Grape left Katz, David Rubinson produced the band's second album, with Michael Gruber acting as their manager. RT 358: 3-7. At a later point, Rubinson himself became Moby Grape's manager. In 1968, following the recording of the album "Wow/Jam," the original members of Moby Grape began to part ways. Spence was admitted to Bellevue

Hospital, in New York City, where he was treated for schizophrenia, while Mosley joined the Marine Corps in 1969. RT 46: 20-22.

5. *Katz Attempted to Enforce his Ownership Rights Through Judicial Means*

Over the next few years, Matthew Katz, believing that he owned the name Moby Grape, sought temporary restraining orders and injunctive relief in order to stop the Plaintiffs from publicly performing under the name "Moby Grape." RT 257: 11-26, RT 260: 1-28. Although these judicial actions began in the late 1960's, they continued through the 1990's.

6. *The Original Members of Moby Grape, Acting Through Legal Counsel Selected and Paid for by CBS, Appeared Before the Labor Commissioner*

In the late 1960's, CBS employed Mr. Ready and Mr. Thumann from O'Melveny and Meyers to represent the original members of Moby Grape. These lawyers took the band's case to the Labor Commissioner. RT 462: 1-9. On February 25, 1970, the California Labor Commissioner determined that the contracts between Plaintiffs and Katz were void due to Katz's violations of the California Labor Code; Katz was not properly licensed. RT 151: 2-28. On March 5, 1970, Katz appealed that ruling to the San Francisco Superior Court, and between March 5, 1970 to early 1973, that appeal lay dormant. RT 361: 5-14.

On June 12, 2002, the San Francisco Superior Court granted a request to dismiss Mr. Katz's appeal of the 1970 ruling by the Labor Commissioner for failure to bring that case to trial within five years. The Plaintiffs moved to confirm the determination and award of the Labor Commissioner, which the court granted on September 30, 2002. The court entered judgment and the Defendant filed a timely appeal. On October 10, 2003, the Court of Appeals affirmed the decision confirming the determination and award of the Labor Commissioner, stating that all 1966 contracts between Katz and the Plaintiffs were void. RT 367: 1-5.

7. ***Plaintiffs Entered into a Settlement Agreement with Katz***

In August 1973, an attorney working for the second manager of Moby Grape executed stipulated settlements on the claims between Katz and respondents. Respondents neither signed the agreement nor attended the settlement conference. *See* Appellate Decision in 614321, Pls. Ex. 2. The terms of this Settlement Agreement, in part, were such that Katz received complete ownership of thirteen of Moby Grape's earlier songs and ownership of the name Moby Grape in exchange for the relinquishment of his rights to moneys withheld by CBS or owing from the band as reimbursement. RT 145: 1-7, RT 365: 4-10.

Following the execution of the 1973 Settlement Agreement, and until it was set aside by the court in 1995, Katz exercised control over the Plaintiffs' name and songs. On February 21, 1979, during the time the Settlement Agreement was in effect, Katz entered into another stipulated settlement with CBS Records in a case involving interest in the band "It's a Beautiful Day." RT 388: 7-9. Even though Moby Grape was not a party to that lawsuit, Katz and CBS agreed that Katz could sell the recordings that Moby Grape had made for CBS under their February 7, 1967 recording contract. A portion of the consideration received in settlement from CBS in 1979 might not have been in the form of the license to release Moby Grape albums had the 1973 Settlement not occurred.

8. ***Katz Continued to Market the Records Originally Created in the 1960's and Moby Grape's Original Members Continued to Struggle***

Over the next years, Katz, acting under the 1973 Settlement Agreement, continued to sell Moby Grape records. Additionally, Katz had other musicians perform as "Moby Grape," since the Settlement Agreement gave him unconditional rights to the band's name. RT 254: 25-26.

During this same time period, the original band members suffered great instability. Although the band members sporadically united to do various recordings and tours, they

essentially broke up in 1969, following Mosley's departure for the Marine Corps. Additionally, Mosley and Spence fell on dark times, which continued through to the following decades. After Mosley was put on disability leave from the Marine Corps for schizophrenia, he could not hold any steady job and eventually became homeless. RT 46: 20-22. Spence, also suffering from paranoid schizophrenia, became a ward of the state and ended up in a trailer. RT 215: 1-4.

9. ***Katz Instigated the Recording of Two New Moby Grape Albums in the 1980's***

Matthew Katz began to take efforts in the 1980's to reunite the original Moby Grape. RT 148: 7-11. Katz later gave Mosley a place to stay in a Malibu hotel while they were recording the new albums. Katz then contacted Jerry Miller who was very reluctant about the reunion. After this, Katz attempted to reach Skip Spence.

Miller only worked on one song. In 1983, the album "Heart" was recorded and in 1984 and 1987 the band toured with Katz's "Looking for Your Long Lost Mind" revue. RT 199: 16-26. In 1988, Katz recorded the album "Mosley Grape," on which only Bob Mosley performed. RT 199: 16-28.

Despite extensive negotiations during this time period, a written contract was never formed between Katz and all of the band members. However, Katz orally agreed to pay the musicians reasonable royalties. RT 389: 14-28.

10. ***In 1995, the 1973 Settlement Agreement Between Katz and the Plaintiffs was Voided***

On January 10, 1994, all of the original Moby Grape members filed a declaratory relief action in San Francisco against Katz in order to set aside the 1973 Settlement Agreement. On October 23, 1995, the Honorable David Garcia of the San Francisco Superior Court granted summary judgment against Katz and granted the band's motion to set aside the 1973 Settlement Agreement, to which Katz appealed. RT 365: 11-16. On October 30, 1997, the Court of

Appeals affirmed the judgment against Katz, declaring the Settlement Agreement voidable and thereby permanently setting it aside. RT 366: 10-17.

After the Court of Appeal's decision, Plaintiffs made many requests that Defendant Katz account for and pay any royalties or other monies received by Katz pursuant to the Settlement Agreement. Katz paid the Plaintiffs some money for the period between 1995 and 2000, but not the full amount. RT 389: 14-28.

On April 16, 1999 former Moby Grape member Skip Spence died at age 53. RT 213: 24-28.

After thirty-nine years of turmoil and disputes, the court is left to sort out this complex story. This court now wants to resolve all issues so as to provide certainty and clarity to all involved parties.

II. ISSUES

In the present case, there are six principal issues as stipulated by this court and agreed upon by each party:

1. Who has title to the recordings, performances, and songs created by "Moby Grape" prior to 1973?;
2. Who has title to the recordings, performances, and songs created by "Moby Grape" or by any of its individual members between 1983 (the "Heart" Album) to 1988 (the "Mosley Grape" Album)?;
3. Assuming the Defendant does not have title to the recordings, performances, and songs between 1966 to 1973, what amount of royalties, if any, are owed by the Defendant to the Plaintiffs?;
4. Assuming the Defendant does not have title to the recordings, performances, and songs between 1983 to 1988, what amount of royalties, if any, does the Defendant owe to the Plaintiffs?;
5. Did the Defendant commit the torts of breach of fiduciary duty, elder abuse, breach of contract, conversion, or intentional infliction of emotional distress as to any member of the group?; and
6. Assuming the Defendant did commit such breaches, what damages, if any, including punitive damages, are owed by the Defendant?

III. PARTIES' CONTENTIONS

Under each of these principal issues, each party has a list of specific contentions.

Issue 1: *Ownership between 1966 to 1973*

Both parties agree that absent an agreement, express or implied, the original performer/author owns the recordings, performances or songs. In this case there were agreements that gave the ownership rights and publishing rights in the performances and songs by Moby Grape, pursuant to the contract terms, to Mr. Katz.

The Plaintiffs contend that these agreements are void, are therefore unenforceable, and that the original performers, the members of Moby Grape, have ownership of their work during this time period. The Plaintiffs further contend that they are entitled to attorney's fees and costs since this action arises out of the Katz management contract and relationship, and this management agreement includes an attorney's fees clause. The Defendant contends that he came up with the name, that it was his business practice to own the names of the bands he managed, and that the members of Moby Grape orally agreed that he would be the owner of the name Moby Grape.

The status of the 1973 Settlement Agreement also falls under this first general issue. The Plaintiffs contend that the Settlement Agreement was declared voidable by the Court of Appeals, and that that decision took away any ownership interests which were given to Mr. Katz in the 1973 agreement. The Defendant contends that since the 1973 Settlement Agreement was voidable, it was effective until it was expressly declared void. Furthermore, the Defendant contends that the Settlement Agreement was effective until October 23, 1995 and therefore he is entitled to the royalties generated between 1973 to 1995.

The ownership of the name "Moby Grape" is also under contention. The Plaintiffs contend that because the 1966 Addendum, which gave Mr. Katz the rights to the band's name,

was declared void by the Labor Commissioner and Court of Appeals, the members of the band own the name "Moby Grape." The Defendant contends that because of his trademark applications, his business practices, and his continuous use of the name "Moby Grape," that he owns the rights to this name.

Issue 2: *Ownership between 1983 to 1988*

The same general proposition of law – that the performer has ownership absent an agreement stating otherwise – applies to this second issue. The Plaintiffs contend that there were no agreements or contracts, neither express nor implied, that gave the Defendant ownership rights for the albums made in 1983 and 1988. They further contend that the Defendant should pay the Plaintiffs royalties on these albums at a reasonable rate and that the Defendant should now be enjoined from selling these two albums. The Defendant contends that there were oral agreements giving him ownership rights. The Defendant also contends that he had a written contract with Mr. Mosley, regarding the album "Mosley Grape," giving Mr. Katz ownership rights to this album.

Issue 3: *Money Owed by the Defendant for Music Made by Plaintiffs between 1966 to 1973*

Assuming Mr. Katz does not have ownership over Moby Grape's music during these years, the Plaintiffs contend that the Defendant should fully account for and pay the amount of money owed by the Defendant. Assuming Mr. Katz does not have ownership rights during these years, the Defendant contends that he does owe royalties for sales made after 1999.

Issue 4: *Money Owed by Defendant for the 1983 and 1988 Albums*

Assuming Mr. Katz does not have ownership rights in the 1983 and 1988 albums, the Plaintiffs claim that the Defendant has a duty to fully account for any money generated by these albums and they claim that the Defendant has a duty to stop selling these two albums. The Plaintiffs further contend that Katz has a duty to immediately pay the sum of $24,817.19, as Katz

admitted that he owed this amount to the Plaintiffs. Assuming Mr. Katz does not have ownership rights in these albums, the Defendant contends that he will tell the court how much money was generated from these albums, taking into account the money that he has already paid to the Plaintiffs.

Issue 5: *Torts Committed by the Defendant*

The Plaintiffs contend that the Defendant's failure to pay royalties to the Plaintiffs when they were in a compromised mental state and the Defendant's actions towards the Plaintiffs over the last forty years make him liable in tort. The Defendant contends that he committed no torts towards the Plaintiffs. He states that he went to a lot of trouble in helping the Plaintiffs out and he contends that the amount of royalties he withheld was so minimal that it could not have significantly harmed the Plaintiffs. The Defendant also argues that because the 1966 management contracts were declared void *ab intio*, he could not be in breach of these contracts.

Issue 6: *Torts Damages*

Assuming the Defendant did commit torts, the Plaintiffs contend that the Defendant owes a substantial amount of damages as a result of his torts. The Defendant contends that the amount of royalties he withheld is so minimal that this should be taken into account when assessing his damages.

IV. RULINGS/DISCUSSION

1. The Plaintiffs Have Title in Their Music Created Between 1966 to 1973

a. *General Proposition of Law*

This court follows the legal principle that absent an agreement, either express or implied, all ownership rights relating to musical performances, recordings, and songs initially vest to the original performers and creators. This court finds that all agreements between the Plaintiffs and the Defendant prior to 1973 *as to these Plaintiffs and these Defendants* are void, and therefore the original performers, the Plaintiffs, have the ownership rights related to their recordings, performances, and songs created prior to 1973. This ruling does not affect either party's contracts with Sony or any other individuals not a party to this suit.

b. *The September 8, 1966 Personal Management Agreement is Void*

This court finds that the September 8, 1966 personal management contract is void because the Labor Commissioner expressly stated that the personal management contract was void in his February 25, 1970 Determination and Award. On October 17, 2002, the San Francisco Superior Court confirmed the Labor Commissioner's Determination and Award and entered judgment thereon, which was later affirmed by the Court of Appeals on October 10, 2003. This court has an obligation to give *res judicata* effect to the prior decisions of the Labor Commissioner, San Francisco Superior Court, and the Court of Appeals with respect to this issue.

c. *The Plaintiffs are Not Entitled to Attorney's Fees and Costs Under the 1966 Management Agreement*

The attorney's fees clause in the 1966 Management Agreement does not entitle the Plaintiffs to recover attorney's fees or costs in this case because that agreement is void ab intio. In general, parties cannot recover under clauses that are present in voided contracts.

d. *The October 10, 1966 Addendum to the Personal Management Agreement is Void*

This court points out that as an addendum, the October 10, 1966 Addendum was a part of the Personal Management Agreement. This Addendum is void because the Labor Commissioner, in his February 25, 1970 Determination and Award, expressly voided Mr. Katz's Management Agreement with the Plaintiffs. Therefore, this issue has already been decided by the Labor Commissioner, San Francisco Superior Court, and the Court of Appeals and it is this court's obligation to afford *res judicata* effect to these prior decisions.

e. *The Publishing Agreements between the Plaintiffs and Defendant are Void*

This court finds that the 1966 Publishing Agreements between the Plaintiffs and Defendant are void. This decision is based partly upon the determination that the Labor Commissioner voided all contracts between the parties, including the Publishing Agreements. After You Publishing Co. was specifically named in the Labor Commissioner's Award, which helps to demonstrate that the Publishing Agreements were at issue in the Labor Commissioner's Determination. The Labor Commissioner ruled that the contracts "between petitioners and respondent Matthew Katz, doing business are Matthew Katz Productions and After You Publishing Company, are void...and that the petitioners are not liable to respondent for any sums spent by respondent infurtherance of petitioner's musical careers." 2/25/70 Labor Commissioner Determination and Award, Exhibit 4, p.2. The Labor Commissioner had the authority to make decisions regarding defendant's publishing agreements with all of these Plaintiffs.

This court finds, however, that regardless of the Labor Commissioner's determination, the 1966 Publishing agreements are void due to the Defendant's declination to account for and pay royalties to the Plaintiffs after 1999. This action created an implied rescission of the publishing contracts.

Because of this determination, the Defendant was not the publisher for the music on "Bird on a Washboard" and "Wow/Grape Jam," and he must now rebate to the Plaintiff's all of the publisher's share of royalties earned on sales after 1995.

f. *Since the 1966 Addendum is Void, the Defendant cannot Claim any Ownership Rights in the Name "Moby Grape."*

The court finds that because the Personal Management Agreements, the Addendum to the Personal Management Agreements, and the Publishing Agreements are void, Defendant Katz cannot claim any rights under any of these contracts, including rights in the name "Moby Grape." The court gives weight to Mr. Thumann's testimony that the band's name was a central issue in the Labor Commissioner's proceedings. However, the Labor Commissioner did not have to rule directly on the status of the ownership of the name; voiding the addendum was sufficient.

This court additionally finds that Mr. Katz has not established ownership of the name "Moby Grape" by any alternative means. Mr. Katz's trademark registrations have expired and his recent trademark applications are just applications, which do not establish ownership. This court, moreover, finds that the Defendants' regular business practice in regards to owning bands' names is not relevant in this case, since the Addendum was declared void. Furthermore, this court finds the testimony of Peter Lewis and Robert Mosley to be credible. They both testified that Skip Spence originated the band's name, "Moby Grape."

When the band was formed in 1966, the name "Moby Grape" was owned collectively by the band members. Mr. Katz, in order to get the ownership rights in the name, had to get all the band members to sign the 1966 Addendum. Once this Addendum was declared void *ab intio*, the name "Moby Grape" was owned either by the original performers or any third party with whom

they had an agreement. Since no other valid agreements regarding ownership of the band's name exist, the Plaintiffs, as the original performers, own the name "Moby Grape."

g. *The 1973 Settlement Agreement is Voidable*

This court finds that the 1973 Settlement Agreement is voidable. This decision is based on this court's obligation to afford *res judicata* effect on this issue. On October 25, 1995, the San Francisco Superior Court granted Plaintiffs' Motion to Set Aside/Motion for Summary Judgment setting aside the 1973 Settlement Agreement. Judgment was entered thereon on November 20, 1995. On October 30, 1997, the Court of Appeals upheld that decision, and this court is bound by that judgment.

It is this court's decision that the 1973 Settlement Agreement was declared void in 1995, and any rights which were given to Mr. Katz in that agreement were terminated at that time. Mr. Katz is not entitled to any benefits that he received under this agreement after this time. The determination of the court that the 1973 Settlement Agreement was "voidable" not "void" does not entitle the Defendant to keep for himself the Plaintiffs' royalties and other income derived from this settlement after it was voided in 1995. Plaintiffs are entitled to the royalties and other income received by the Defendant, after 1995, as a result of the 1973 Settlement Agreement.

h. *This Court Retains Jurisdiction Over This Matter*

As a court of equity, this court will maintain jurisdiction over ownership issues regarding the music made between 1966 to 1973. This court maintains jurisdiction to at a later date, depending on the nature and complexity of the arrangements Mr. Katz has made with record companies regarding this music, to declare Matthew Katz a constructive trustee of these albums and songs. The Defendant would be able to continue with his arrangements to sell the Plaintiff's music from these years, as long as these arrangements are fair to the Plaintiff's. The Plaintiffs would maintain title in these songs and albums, while the Defendant would act as a constructive

trustee who could continue to manage the sales of their music. This court maintains jurisdiction to rule on this, pursuant to the accounting statement that will be provided by the Defendant.

2. **The Defendant has an Implied Nonexclusive License in the 1983 and 1988 Albums, While the Plaintiffs Maintain Title to These Albums**

a. *The Defendant has an Implied Nonexclusive License in the 1983 "Heart" Album*

This court reiterates that absent an agreement, the original creator owns all performances, recordings, and songs. Additionally, Section 204 of the Federal Copyright Act invalidates a purported transfer of ownership *unless it is in writing*. 17 U.S.C. §204(a) (1988). This court finds that there was no agreement in writing that transferred ownership of this album to Mr. Katz, and therefore the Plaintiffs, as the original creators of the music, retain title to the "Heart" album.

However, it would be grossly unjust to give Mr. Katz nothing for his work on this album. He actively pursued the original members of Moby Grape, reunited them, helped them record the album, marketed the music, sold copies of the album, and arranged for Moby Grape to go on tour in the 1980's.

The facts in the record show that the conduct of the parties in the early 1980's created in Mr. Katz an implied nonexclusive license to the "Heart" album. Under the Federal Copyright Act, there is a narrow exception to the writing requirement; §101 expressly states that a "nonexclusive license" does not have to be in writing. 17 U.S.C. §101 (1988). Furthermore, "a nonexclusive license maybe granted orally, or may even be implied from conduct." 3 M. Nimmer & D. Nimmer, *Nimmer on Copyright* §10.03[A], at 10-36 (1989). The Ninth Circuit has held that such a license is implied through conduct when the original author "created a work at [another person's] request and handed it over, intending that [the other person] copy and

distribute it." *Effects Associates, Inc. v. Cohen*, 908 F.2d 555, 558 (9th Cir. 1990). That is exactly what happened in the present case. Mr. Katz instigated getting the Plaintiffs together, asked them to create a new album, and then copied and distributed the music. The Plaintiffs must have understood that Katz intended to sell their work.

The Plaintiff's grant of an implied nonexclusive license to the Defendant permitted Katz "to take any action consistent with copyright ownership." *Lulirama Ltd., Inc. v. Axcess Broadcast Services, Inc.*, 128 F.3d 872, 882 (5th Cir. 1997). Therefore, Katz was allowed to sell and distribute the "Heart" album. Furthermore, this nonexclusive license was and is irrevocable by the parties. Courts have held that absent a written agreement stating otherwise, a nonexclusive license that is created by *consideration* is a binding contract and is therefore irrevocable. *See Lulirama*. 128 F.3d at 882; *Effect Ass.*, 908 F.2d at 558. The members of Moby Grape granted Katz this license, and in return, received the promise of reasonable royalties. Therefore, this license was created with consideration. Moreover, an implied nonexclusive license is not rescinded when the employment ends, nor is it rescinded by the filing of a lawsuit. *See Rano v. Sipa Press, Inc.*, 987 F.2d 580, 586 (9th Cir. 1993); *Lulirama*, 128 F.3d at 883.

The Plaintiffs in the present case can only rescind this when there is a material breach of the implied licensing agreement. *Rani v. Sipa Press, Inc.*, 987 F.2d 580, 586 (9th Cir. 1993). The only time a breach will justify a rescission of a license is when the breach is "of so material and substantial a nature that [it] affects the very essence of the contract and ... the breach constitute[s] a total failure in the performance of the contract." *Id.* This court finds that Mr. Katz has not committed a breach of this nature. His failure to pay the Plaintiffs full royalties on the "Heart" album does not *yet* rise to a complete failure of performance. The Defendant's nonexclusive license is still effective.

This court additionally finds no evidence in the record to support the Plaintiffs' claim of coercion relating to these oral agreements. The creation of the "Heart" album was completely separate from the 1973 Settlement Agreement, and therefore, the voiding of the Settlement Agreement in 1995 had no effect on the implied nonexclusive license granted to the Defendant.

The court's finding of an implied nonexclusive license does not relieve the Defendant of his promise to pay the Plaintiffs reasonable royalties. During trial, Katz stated that a royalty of $1.00 for each album sold was reasonable. RT 448:19-22. Additionally, the statutory rate, which is the legally established fair rate for individual songs, is presently 8.5 cents per song. These two rates are reasonable and should be paid to the Plaintiffs by the Defendant. Mr. Katz is not the publisher of the music created on this album, and is not entitled to the publisher's share.

Neither party nor his/their assigns is to unreasonably interfere in the efforts of the other party to market and sell this album.

The Plaintiffs maintain title in the "Heart" album, they will receive reasonable royalties on this album, and they maintain all of their "bundle of rights" normally associated with copyright ownership. However, the Defendant's nonexclusive license gives him the right to copy, market, sell, and distribute this album.

b. *The Defendant has an Implied Nonexclusive License in the "Mosley Grape" Album*

This court finds that there was no valid written agreement that transferred ownership of the "Mosley Grape" album to the Defendant. The court cannot consider the contract between Mr. Katz and Bob Mosley since it was not properly submitted into evidence. Furthermore, the legality of the contract between Katz and Mosley is questionable, and Katz has not produced evidence to establish the validity of the contract. It follows then that Mr. Katz does not have title to this album.

However, this court finds that there was an implied nonexclusive license in the "Mosley Grape" album granted to the Defendant, which was created by the conduct of both parties. Bob Mosley created this album because of Mr. Katz's request and with the knowledge that Mr. Katz intended to copy and distribute this work. Furthermore, because this license agreement was created with consideration, the agreement is irrevocable by the parties.

The determination that a nonexclusive license exists, however, does not relieve the Defendant of his obligations to fully account and pay the royalties that he owes to Bob Mosley. The Defendant has a duty to pay Mosley $1.00 for each album plus the statutory rate per song. Mr. Katz is not the publisher of the music contained on "Mosley Grape."

Neither party nor his/their assigns is to unreasonably interfere in the efforts of the other party to market and sell this album.

c. *This Court Maintains Jurisdiction to, at a Later Time, Revoke the Defendant's Nonexclusive Licenses*

If the Defendant does not pay, and continues to not pay, the Plaintiffs' reasonable royalties on the "Heart" and "Mosley Grape" albums, the court maintains jurisdiction to revoke the Defendant's nonexclusive licenses.

The court also maintains jurisdiction to revoke the Defendant's licenses, at a later date, if he fails to account and pay the money owed to the Plaintiffs for the music created between 1966 to 1973.

If the Plaintiffs have objections to any accounting provided by the Defendant, the Defendant should be given sufficient notice of such objections. The Defendant has 30 days to cure the objections before the Plaintiffs may bring the matter before this court.

3. The Defendant has a Duty to Fully Account

This court compels the Defendant to provide a full and complete accounting statement, disclosing his sales of "Moby Grape" records and receipts of income to "Moby Grape" from all third parties. Although the court acknowledges the accounting submitted by the Defendant in his closing brief, Mr. Katz should include that information in his new accounting statement. This accounting statement should be prepared by Mr. Katz, who needs to file it under a declaration that the accounting was done under the penalty of perjury. Mr. Katz should include all relevant documents and receipts. The statement should include all profits earned as well as any money that the Defendant has already paid to the Plaintiffs. In future accounting statements, the Defendant is required to provide no more than annual accountings.

The accounting statement should include all of the following details.

1. The Defendant should set forth, for every song and album created by Moby Grape prior to 1973, the arrangements that the Defendant has made with various record companies relating to the selling of these albums.

2. The Defendant should set forth the amount of royalties owed to the Plaintiffs by the Defendant for the music created prior to 1973, calculated at the statutory rate. For every song and album, the Defendant needs to state what is owing to the Plaintiffs and what has been paid.

3. The Defendant should clearly lay out the amount of royalties owed to the Plaintiffs by the Defendant for the "Heart" album and the "Mosley Grape" album, calculated at the rate of $1.00 per album and 8.5 cents per song (or the current statutory rate). The Defendant owes the Plaintiffs royalties on these two albums from 1983 to the present.

4. The Defendant does not need to account for the time period when the 1973 Settlement Agreement was in effect, which was 1973 to 1995, with the exception of the "Heart" and "Mosley Grape" albums. Mr. Katz may keep these amounts earned in this time period since it was subject to the Settlement Agreement.

5. The Defendant needs to state *when* he will pay the balance, and this should be within a reasonable time period.

The Defendant has a duty to pay to the Plaintiffs the amount that he admits he owes, which is $24,817.19, within 60 business days. The accounting statement, including any additional sums that the Defendant owes, is due 15 business days later (75 days after this decision). The Plaintiffs then will have 30 days to respond with any objections to the accounting statement. The Defendant will then have 15 days to correct the statement. If conflicts still exist, the parties are required to meet and confer, either in person or by telephone, within 15 days of Defendant's corrections. Following these measures, the matter can then be referred to the court. At that time, each party must file a declaration that they have complied with the above statement requirements and took good faith measures to resolve the issue.

4. <u>The Defendant Did Not Commit Torts Towards The Plaintiffs</u>

a. *General Ruling*

This court finds that the Defendant's actions relating to the members of Moby Grape do not rise to tortious levels. The evidence in the record does not support the Plaintiffs' claims on this issue.

b. *There was No Breach of the Defendant's Fiduciary Duty*

Managers of musical groups are Fiduciaries and the Defendant admits that he had a fiduciary relationship with the Plaintiffs. Fiduciaries are required to act in the best interest of the parties that they represent. *American Airlines, Inc. v. Sheppard, Mullin, Richter & Hampton* 96 Cal. App. 4th 1017, 1034 (2002). Even after the termination of this relationship, the Defendant was still under a duty "not to take advantage of a still subsisting confidential relation created during the prior agency relation." Restatement (Second) of Agency §396 (1958). However, this court finds that the Defendant did not breach his fiduciary duties. There is no clear and convincing evidence in the record supporting a showing of fraud by the Defendant. Although the Defendant owes royalties that he wrongfully earned, the Defendant's actions were not malicious, fraudulent and oppressive, nor were they undertaken in a conscious disregard of Plaintiffs' property rights.

c. *There was No Breach of Contract*

The Defendant cannot breach a contract that was declared void *ab intio* because neither party had an obligation to perform the voided contract. This court finds that all contracts between Plaintiffs and Defendant from 1966-1967 are void and therefore, the Defendant has not committed a breach of contract. Although this finding does not relieve Mr. Katz of his duties to account for the royalties owed to the Plaintiffs, it does mean that he does not have to pay damages for breach of contract.

d. *The Defendant did not Commit Financial Abuse of Dependent Adults*

This tort requires a showing of bad faith or an intent to defraud. *See* Welf. & Inst. Code §15610.30. The Plaintiffs have not established Mr. Katz's intent to financially abuse Spence and Mosley, and there has been no showing establishing that the Defendant acted in bad faith. Even though bad faith is defined in the CA statute as a negligence standard ("should have known"), Mr. Katz's actions do not rise to a tortious level. The mere fact that Mr. Katz was wrong in

refraining from paying the Plaintiffs their royalties does not by itself establish financial abuse of dependent adults. W&I Code §15610.30(1) requires that the Defendant "retains real or personal property of an elder or dependent adult to a wrongful use or with intent to defraud." Welf. & Inst. Code §15610.30. §15610.30(2)(b) states that the Defendant has to retain the property in "bad faith." *Id.* This court does not find a strong enough showing of the Defendant's bad faith to justify a finding of financial abuse of dependent adults.

e. *There was No Intentional Infliction of Emotional Distress*

Intentional torts require a showing of intent or reckless disregard, not just action. *See Agarwal v. Johnson*, 25 Cal. 3d 932, 946 (1979). The Plaintiffs have not established that Mr. Katz *intended* to inflict emotional distress on them. This court finds no clear and convincing evidence showing Mr. Katz's bad faith, malice, vindictiveness, or intent to injure. 4-44 California Torts §44.01 states that "one who deliberately or recklessly inflicts severe emotional or mental suffering on another by means of outrageous conduct will be liable in tort for intentional infliction of emotional distress." 4-44 California Torts §44.01. This tort requires evidence demonstrating "behavior beyond the bounds of decency." *Fisher v. San Pedro Peninsula Hosp.* 214 Cal. App. 3d 590, 618 (1989). Furthermore, courts generally agree that conduct consisting of omissions or nonfeasance does not amount to this tort. *See Ricard v. Pac. Indem. Co.* 132 Cal. App. 3d 886, 894 (1982). In *Ricard*, an insurance worker failed to pay a proper claim to the plaintiff, yet the court did not find him liable for a tort because omissions do not amount to outrageous conduct. *Id.* Mr. Katz's refusal to account and pay royalties does not appear to go beyond the bounds of decency. There were complex circumstances surrounding this case and Mr. Katz's confusion over his ownership rights does not make him liable in tort.

f. *There was No Conversion*

The Second Restatement defines conversion as "an intentional exercise of dominion or control over a chattel which so seriously interferes with the right of another to control it that the actor may justly be required to pay the other the full value of the chattel." Restatement (Second) of Torts §222A (1965). Conversion is typically limited to instances where the Plaintiff has been completely and permanently deprived of his property. *Id.* The actions of the Defendant, Mr. Katz, were not malicious, fraudulent and oppressive, nor were they undertaken in a conscious disregard of the Plaintiffs' property rights. Once again, the Plaintiffs have not met their burden of establishing the Defendant's wrongful intent. The Defendant is not relieved of his obligation to account and pay the Plaintiffs the royalties that he wrongfully earned, but Mr. Katz is not liable for the tort of conversion.

g. *Therefore No Tort Damages, Including Punitive, are Awarded to the Plaintiffs*

The Defendant's actions towards the Plaintiffs do not make Mr. Katz liable in tort. Since the Defendant has not committed any torts towards the Plaintiffs, this court finds that no tort damages shall be awarded.

V. Conclusion

The court finds, based on the evidence presented at trial, the following:

1. *As to these Plaintiffs and the Defendants*: the Plaintiffs own the recordings, performances, and songs created by Moby Grape prior to 1973, and therefore, they are the only people who can continue to sell, market, or distribute this music (this does not affect Sony's contracts and ownership rights);
2. The Defendant has a duty to account and pay to the Plaintiffs all royalties, calculated at the contract rate as specified in the February 1967 recording contract, as modified in March 1967, entered into between CBS, Inc. and all of the parties to this case, on these albums created prior to 1973;
3. The Defendant has a duty to pay, within 60 business days, to the Plaintiffs

$24,817.19, while noting this in the accounting statement;

4. Both parties must comply with the court's timeline for filing accounting statements and objections;

5. The court maintains jurisdiction to, at a later date, declare the Defendant the constructive trustee of the albums created prior to 1973, thus allowing the Defendant to manage the sales of these albums in a way that is fair to the Plaintiffs;

6. The Plaintiffs own the name "Moby Grape;"

7. The Plaintiffs own the albums "Heart" and "Mosley Grape;"

8. The Defendant has an implied nonexclusive license in the albums "Heart" and "Mosley Grape," and he is accordingly entitled to continue to copy, sell, distribute, and market these two albums;

9. The Defendant has a duty to account and pay the Plaintiffs royalties generated on the "Heart" and "Mosley Grape" albums, and the rates of these royalties shall be $1.00 for each album and the statutory rate applicable to the time in which the sale was generated;

10. The court maintains jurisdiction to, at a later date, revoke the Defendant's nonexclusive licenses if he fails to pay the Plaintiffs their royalties on the "Heart" and "Mosley Grape" albums;

11. The court maintains jurisdiction to, at a later date, revoke the Defendant's nonexclusive licenses in the "Heart" and "Mosley Grape" albums if the Defendant fails to account and pay to the Plaintiffs all money owed from the music created prior to 1973;

12. The Defendant does not need to account (and he is entitled to keep the money earned) for the time period when the 1973 Settlement Agreement was in effect, which was 1973 to 1995, with the exception of the "Heart" and "Mosley Grape" albums; and

13. The Defendant did not commit any torts towards the Plaintiffs.

Accordingly, it is the determination of this Court that judgment be rendered on the issues as stated above.

Counsel for the Plaintiffs must prepare a final judgment, in accordance with the above decision, and present a copy of the judgment to the Defendant for his approval as to form.

DATED: July 20, 2005

A. JAMES ROBERTSON II
Judge of the Superior Court

Superior Court of California
City and County of San Francisco

Estate of ALEXANDER "SKIP" SPENCE, by Omar Spence, its Administrator; JAMES ROBERT MOSLEY, by Margaret M. Mosley, his Guardian Ad Litem; DONALD J. STEVENSON; PETER LEWIS; and JERRY A. MILLER,

Plaintiff(s)

vs.

MATTHEW KATZ, d.b.a. After You Publishing Co., San Francisco Sound, and Does 1 through 40, inclusive,

Defendant(s)

Case Number: 614321 (300175)

CERTIFICATE OF SERVICE BY MAIL
(CCP 1013a (4))

I, Carmen Li, a Deputy Clerk of the Superior Court of the City and County of San Francisco, certify that I am not a party to the within action.

On July 20, 2005 I served the attached STATEMENT OF DECISION by placing a copy thereof in a sealed envelope, addressed as follows:

GLENDON W. MISKEL, ESQ.
JOHNSON & MISKEL
2330 Marinship Way, Suite 230
Sausalito, CA 94965-2800

MR. MATTHEW KATZ,
29903 Harvester Road
Malibu, CA 90265

and, I then placed the sealed envelopes in the outgoing mail at 400 McAllister Street, San Francisco, CA. 94102 on the date indicated above for collection, attachment of required prepaid postage, and mailing on that date following standard court practices.

Dated: July 20, 2005

GORDON PARK-LI, Clerk

By: _____
Carmen Li, Deputy Clerk