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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

CITY OF ANAHEIM,

Petitioner,

v.

THE SUPERIOR COURT OF ORANGE
COUNTY,

Respondent;

ANGELS BASEBALL, A CALIFORNIA
LIMITED PARTNERSHIP,

Real Party in Interest.

G035159

(Super. Ct. No. 05CC01902)

OPINION

Original proceedings; petition for a writ of mandate to challenge an order of the Superior Court of Orange County, Peter J. Polos, Judge. Petition denied.

Sheppard, Mullin, Richter & Hampton, Andrew J. Guilford, Matthew J. Erwin, Jeffrey Blank; Rutan & Tucker, Michael Rubin, Todd Litfin, Andrew Ainsworth; and Jack L. White, City Attorney, for Petitioner.

Stephen, Oringer, Richman & Theodora, George J. Stephan, Robert M. Dato, Brian P. Barrow; Powell Goldstein, William B. Shearer, Jr., and William V. Custer for Real Party in Interest.

* * *

Petitioner City of Anaheim (Anaheim) sought a preliminary injunction enjoining real party in interest Angels Baseball, L.P. (ABLP) from changing the name of its baseball team from the Anaheim Angels to the Los Angeles Angels of Anaheim. The trial court denied the request, and Anaheim now seeks an extraordinary writ requiring the court to vacate its denial, and enter a new order granting the preliminary injunction.

Our review is narrowly limited to determining whether the court abused its discretion in denying the preliminary injunction. A court abuses its discretion when its decision is arbitrary, capricious and exceeds the bounds of reason, or ignores the uncontradicted evidence. The trial court's decision that Anaheim failed to demonstrate a likelihood of success on the merits, as we discuss below, was supported by substantial evidence and was well within the bounds of reason. We therefore deny the writ petition.

Because of our inquiry's narrow focus, however, our decision today does not declare any party the ultimate victor. Indeed, at trial, today's opinion places neither party ahead or behind in the count.

FACTUAL AND PROCEDURAL BACKGROUND

In 1960, Major League Baseball chartered a new American League team for Southern California, known as the "Los Angeles Angels" (Angels). In 1966, the team moved from Los Angeles to Anaheim and adopted the name "California Angels." In 1996, the Walt Disney Company, through its affiliate, Disney Baseball Enterprises, Inc., (Disney) purchased an interest in the Angels and assumed control over the management of the team. At that time, Disney entered into an agreement with Anaheim for the lease of Anaheim Stadium (Lease), where the Angels had played their home games for three decades. The Lease required the renovation of the stadium at an estimated cost of \$100

million, with Anaheim contributing \$20 million in cash and approximately \$10 million in revenues from outdoor advertising signs on the stadium premises. Disney assumed responsibility for the remainder of the renovation expenses.

Section 11(f) of the Lease provides: "Tenant will change the name of the Team to include the name 'Anaheim' therein, such change to be effective no later than the commencement of the 1997 Season." Disney promptly renamed the team the "Anaheim Angels."

In 2003, ABLP purchased the team for approximately \$180 million. Hoping to promote the Angels as a "major market" team, ABLP renamed the team the "Los Angeles Angels of Anaheim," effective January 2005. Two days later, Anaheim filed suit against ABLP seeking injunctive and declaratory relief, and damages for breach of the Lease and the implied covenant of good faith and fair dealing. The complaint included an ex parte application for a temporary restraining order (TRO). After a hearing, the trial court denied the TRO, but issued an order to show cause why a preliminary injunction should not issue. After the TRO hearing, the parties stipulated they would submit no further evidence concerning Anaheim's request for preliminary injunction, apart from evidence on whether the mediation privilege applied to the Lease negotiations.

After a hearing, the trial court denied Anaheim's request for a preliminary injunction, ruling Anaheim had demonstrated neither a likelihood of success on the merits nor irreparable injury.

JURISDICTION

Anaheim did not appeal the trial court's denial of its request for preliminary injunction, opting instead to file a petition for writ of mandate. Although Code of Civil Procedure section 904.1, subdivision (a), makes an order denying a preliminary injunction directly appealable, we may review such an order on a petition for writ of mandamus if an appeal would be an inadequate remedy. (*County of Butte v. Superior*

Court (1985) 176 Cal.App.3d 693, 697 [writ review granted where “delay inherent in the appeals process renders it inadequate”].)

Anaheim contends it will suffer irreparable injury if the team plays with its new name during the baseball season. Along these lines, Anaheim notes the team has represented it well as the Anaheim Angels over the past eight seasons, particularly after winning the World Series in 2002, and making the playoffs in 2004. Should the team start and play the 2005 season as the Los Angeles Angels of Anaheim, we are told, “the die threatens to be cast in the minds of baseball fans across the nation that Anaheim is a second-rate city not deserving of its past identification to a Major League team.” Anaheim alleges this conclusion will have lasting effect if entered in the sport’s record books.

We agree Anaheim has alleged facts demonstrating that appeal is an inadequate remedy at law.

STANDARD OF REVIEW

In deciding whether to issue a preliminary injunction, the trial court weighs two interrelated factors: the likelihood the moving party ultimately will prevail on the merits, and the relative interim harm the parties may suffer from the issuance or nonissuance of the injunction. (*Hunt v. Superior Court* (1999) 21 Cal.4th 984, 999.) Generally, the decision to grant or deny an application for preliminary injunction rests in the sound discretion of the trial court. (*Ibid.*) The exercise of that discretion will not be disturbed on appeal absent a showing that it has been abused. (*Ibid.*) Thus, the question we consider on review is whether the trial court abused its discretion in ruling on these two factors. Even if we determine the trial court abused its discretion as to one of the factors, we nevertheless may affirm the trial court’s order if we find no abuse of discretion as to the other. (*Cohen v. Board of Supervisors* (1985) 40 Cal.3d 277, 287.) A court has abused its discretion ““whenever it may be fairly said that in its exercise the court in a given case exceeded the bounds of reason or contravened the uncontradicted

evidence.’” (*Continental Baking Co. v. Katz* (1968) 68 Cal.2d 512, 527 (*Continental Baking*)).) Thus, we may set aside the trial court’s order only if it is arbitrary, capricious or entirely lacks evidentiary support; we may not overturn the order even where “we might feel inclined to take a different view from that of the court below” or the trial court’s legal justification is “fairly debatable.” (*Gonzales v. Nork* (1978) 20 Cal.3d 500, 507.)

Further, “the appellate court does not resolve conflicts in the evidence, reweigh the evidence, or assess the credibility of witnesses. [Citation.] “[T]he trial court is the judge of the credibility of the affidavits filed in support of the application for preliminary injunction and it is that court’s province to resolve conflicts.” [Citation.] Thus, even when presented by declaration, ‘if the evidence on the application is in conflict, we must interpret the facts in the light most favorable to the prevailing party and indulge in all reasonable inferences in support of the trial court’s order.’” (*Whyte v. Schlage Lock Co.* (2002) 101 Cal.App.4th 1443, 1450.) “Where the evidence before the trial court was in conflict, its factual determinations, whether express or implied, are reviewed for substantial evidence.” (*Sahlolbei v. Providence Healthcare, Inc.* (2003) 112 Cal.App.4th 1137, 1145.) We review the trial court’s decision de novo only where the probability of success factor depends upon a question of law rather than upon the introduction of evidence at a subsequent trial.¹ (*Efstratis v. First Northern Bank* (1997) 59 Cal.App.4th 667, 671.)

The issue of which party ultimately should prevail in this lawsuit is not before us. As our Supreme Court explained, “[t]he granting or denial of a preliminary injunction does not amount to an adjudication of the ultimate rights in controversy. It merely determines that the court, balancing the respective equities of the parties,

¹ Although no justification is given for applying a de novo standard of review, the concurring and dissenting opinion nevertheless does so implicitly by disregarding key evidence upon which the trial court could have justifiably relied in reaching its decision.

concludes that, pending a trial on the merits, the defendant should or that he should not be restrained from exercising the right claimed by him.” (*Continental Baking, supra*, 68 Cal.2d at p. 528.) “A preliminary injunction does not create a right, but merely undertakes to protect a right from unlawful or injurious interference.” (*Southern Christian Leadership Conference v. Al Malaikah Auditorium Co.* (1991) 230 Cal.App.3d 207, 223.) Similarly, our decision does not constitute a final adjudication of the ultimate rights in controversy, but merely decides whether the trial court abused its discretion based on the record before us. (*Shoemaker v. County of Los Angeles* (1995) 37 Cal.App.4th 618, 626.)

DISCUSSION

I

Substantial Evidence Supports the Trial Court’s Implied Finding ABLP Did Not Breach an Express Lease Provision

A. *Principles of Contract Interpretation*

“The basic goal of contract interpretation is to give effect to the parties’ mutual intent at the time of contracting. [Citations.] When a contract is reduced to writing, the parties’ intention is determined from the writing alone, if possible. [Citation.] ‘The words of a contract are to be understood in their ordinary and popular sense,’” with reference to the circumstances under which the agreement was made. (*Founding Members of the Newport Beach Country Club v. Newport Beach Country Club, Inc.* (2003) 109 Cal.App.4th 944, 955 (*Founding Members*)). The parties’ intent is ascertained from the contract as a whole, not from an isolated portion. (Civ. Code, § 1641; *Sy First Family Ltd. Partnership v. Cheung* (1999) 70 Cal.App.4th 1334, 1342.)

Nonetheless, “[e]xtrinsic evidence is admissible to prove a meaning to which the contract is reasonably susceptible. [Citations.] If the trial court decides, after receiving the extrinsic evidence, the language of the contract is reasonably susceptible to the interpretation urged, the evidence is admitted to aid in interpreting the contract.”

(*Founding Members, supra*, 109 Cal.App.4th at p. 955.) Where the extrinsic evidence admitted in aid of interpretation is not in conflict, the appellate court independently construes the contract. (*Ibid.*) However, if the extrinsic evidence is in conflict, thus requiring resolution of credibility issues, “any reasonable construction will be upheld if it is supported by substantial evidence.” (*Id.* at 956.)

B. *Express Language of the Contract*

We turn first to the express language of the Lease. The source of controversy is section 11(f) of the Lease, which states: “Tenant will change the name of the Team to include the name ‘Anaheim’ therein, such change to be effective no later than the commencement of the 1997 Season.” Anaheim contends section 11(f) expressly precludes the use of the words “Los Angeles” in the team name because the parties intended to promote Anaheim nationally as a “big league” city. Based solely on the express words of this provision, we disagree. As the trial court noted, the name Los Angeles Angels of Anaheim “technically” complies with the express Lease provisions. Section 11(f) simply requires the Angels to “include” Anaheim in the team name, and imposes no other restriction. “‘Include’ is ‘a term of enlargement rather than limitation.’ [Citations.] It has been so interpreted by the courts of this state for almost a century.” (*Loyola Marymount University v. Los Angeles Unified School Dist.* (1996) 45 Cal.App.4th 1256, 1262.) Thus, if the parties intended to designate Anaheim as the exclusive geographic component of the team name, use of the word “include” in section 11(f) was not an effective means to convey that intent.

In addition, an intention to give Anaheim national exposure cannot be divined from the bare terms of the Lease. Nothing in the Lease requires the team owner to use Anaheim’s name in its marketing or promotion of the team, and the only Lease provisions other than section 11(f) requiring use of the name “Anaheim” concern the stadium name and signage at the stadium. Under these provisions, the stadium name

must include “Anaheim” and signage shall display the name in a font size at least 75 percent of any sponsor’s name. Other than these restrictions, the Lease does not require a minimum size for stadium signs, or designate a particular location likely to be seen on televised broadcasts.

C. Custom and Usage

Anaheim argues that mere technical compliance with a contract provision does not necessarily mean ABLP did not breach the contract. Specifically, “[n]either law nor equity requires that every term and condition of an agreement be set forth in the contract. [Citations.] The usual and reasonable terms found in similar contracts can be looked to, unexpressed provisions of the contract may be inferred from the writing, external facts may be relied upon, and custom and usage may be resorted to in an effort to supply a deficiency if it does not alter or vary the terms of the agreement.” (*Denver D. Darling, Inc. v. Controlled Environments Construction, Inc.* (2001) 89 Cal.App.4th 1221, 1237.) The parties each argue evidence of custom and usage support their respective interpretations of the Lease.²

“Evidence of custom or standard practice is admissible to interpret the terms of a contract and to imply terms when no contrary intent is apparent from the other terms of the contract. [Citation.] Generally, when there is a custom in a certain industry, those engaged in that industry are deemed to have contracted in reference to that practice unless the contrary appears. [Citation.] The prevailing industry custom binds those engaged in the business even though there is no specific proof that the particular party to the litigation knew of the custom. [Citation.] The industry practice becomes a part of the

² The concurring and dissenting opinion performs a custom and usage analysis of section 11(f) under the guise of interpreting the word “name” based on its “ordinary and popular” meaning, perhaps out of recognition that the parties submitted little custom and usage evidence. (Conc. & dis. opn. *post*, at p. 6.) Regardless of the legal principle applied, substantial evidence exists demonstrating the parties understood at the time of contracting that Disney expressly preserved the option to give the team a nontraditional name.

contract, and the evidence of such custom is admissible to supply a missing term or to aid in interpretation if it does not alter or vary the terms of the contract.” (*Midwest Television, Inc. v. Scott, Lancaster, Mills & Atha, Inc.* (1988) 205 Cal.App.3d 442, 451.)

In support of its argument, Anaheim submitted the declaration of James D. Ruth, former Anaheim city manager, and one of Anaheim’s principal representatives during the Lease negotiations. In his declaration, Ruth states: “Every major league baseball team has a City or State name as part of the team name *before* its nickname. There are no teams that have more than one such City or State designation as part of its team name.” (Italics added.) Even assuming such a custom and usage, substantial evidence demonstrates the parties did not contract in reference to it.

Specifically, a Los Angeles Times newspaper article admitted into evidence quotes Anaheim City Attorney, Jack White, as stating that Disney refused Anaheim’s request to amend the Lease to designate “Anaheim Angels” as the team name. Disney explained it required flexibility, suggesting “it might someday want to call its baseball team the Angels of Anaheim or something similar”³ The name “Angels of Anaheim” would have deviated from any purported custom and usage for naming major league baseball teams. The trial court therefore could have reasonably concluded that the broad wording of section 11(f) was not formed in reference to the custom and usage in major league baseball, but instead reflected Disney’s desire it not apply.

D. Name Prominence

In addition to evidence of custom and usage, Anaheim submitted declarations from those involved in the Lease negotiations to demonstrate it bargained for name prominence. Specifically, Anaheim argues its taxpayers “paid dearly” for its right to be promoted as a major league city, like Boston or New York, when it agreed to

³ This evidence refutes the notion the parties “bargained for a single name change.” (Conc. & dis. opn. *post*, at p. 10.)

provide \$30 million in cash and future revenues toward renovation of the stadium.⁴ Anaheim sought name prominence to give it national exposure and publicity, thus promoting Anaheim as a destination for tourism, conventions, sports, and entertainment. Although Anaheim's declarations buttress the notion Anaheim sought these benefits during Lease negotiations, substantial evidence also supports the trial court's determination, on the evidence presented thus far, these benefits were not fully granted under the lease.

Ruth states in his declaration the parties' intent to promote Anaheim's identification with the baseball team was "accomplished by [Disney] publicizing the name Anaheim Angels prominently in its marketing of the team, its printing of the Anaheim Angels name on tickets, media guides, team photos, merchandise, public announcements, public broadcasting of games, team web site, and in 2002 it even went beyond the usage made of the California Angels name prior to 1997 by putting the Anaheim Angels name on the player's road uniforms."

Disney, with a theme park and other enterprises in Anaheim, understandably promoted Anaheim's name while it owned and marketed the team. But nothing in the Lease itself suggests Disney undertook these efforts because Anaheim held a contractual right to have its name promoted and identified with the team, beyond having Anaheim in the name and on the stadium. Indeed, the Lease provides just the opposite. Specifically, in paragraph 22 (c) of the Lease, Anaheim expressly disclaimed any right to require the promotion of Anaheim in the manner described by Ruth: "[N]othing in this Lease is intended to or shall be deemed to require Tenant to adopt any marketing, licensing, sales, pricing or operating policies or procedures which Tenant, in its sole discretion, does not elect to adopt."

⁴ We deny ABLP's motion requesting us to take additional evidence purporting to refute Anaheim's contention its taxpayers "paid dearly" for promotion rights in the Lease.

The declaration of Greg Smith, former general manager of Anaheim Stadium, similarly states: “The changing of the name of the baseball team from the California Angeles to the Anaheim Angels was one of the principal benefits that the City obtained under the 1996 Lease Agreement.” But the trial court could reasonably reject this assertion based on section 41(u) of the Lease, entitled “Consideration for Landlord’s Obligations,” which does not even mention the change of team name as substantial consideration for the Lease. Section 41(u) states: “The parties hereby recognize and agree that there are substantial benefits to the City of Anaheim and its inhabitants resulting from Tenant occupying the Baseball Stadium and causing the Team to play its home games therein, and it is hereby agreed that Landlord’s obligations to make payments under this Lease in any year of the Term are contingent upon and in consideration of Tenant’s occupying the Baseball Stadium and the Team playing its home games therein.”

Ruth’s declaration also states that “[i]t is highly unlikely that the Lease Agreement would have been approved [by Anaheim] without the commitment of the team to change its name to the Anaheim Angels.” Ruth’s own declaration, however, points out that Anaheim attempted to revise section 11(f) to specifically require Disney to change the team name to “Anaheim Angels,” but Disney refused to do so. According to Ruth, Disney declined to revise section 11(f) because it wanted to retain flexibility *for a new team owner* to change the mascot name. Other evidence contradicted this version of events, however. Anaheim’s city attorney, quoted in a newspaper report admitted into evidence, stated Disney did not agree to the name “Anaheim Angels” because *Disney* wanted flexibility in selecting team names not involving a change of mascot, citing as an example the “Angels of Anaheim.” Regardless of why Disney did not agree to restrict itself to naming the team the “Anaheim Angels,” the parties discussed the issue during negotiations and Anaheim did not attempt to include any further naming restrictions in the Lease.

Other lease provisions support the trial court's conclusion. As ABLP notes, Anaheim failed to bargain for prominence in the team name as it had in section 11(d), which designated "Anaheim" a part of the stadium name, and specified that a sponsor name could be used only if stadium signage gave "prominence to the name 'Anaheim' at least equal to 75% of the size of the sponsor name."

Moreover, the trial court could consider evidence Disney's purchase of the Angels was contingent on reaching a lease agreement with Anaheim; indeed, at one point, negotiations had broken down and, according to a participant in the negotiations "it appeared that the entire purchase by Disney would be abandoned. . . ." Based on Disney's rejection of Anaheim's proposal to name the team the "Anaheim Angels," Anaheim's acquiescence to Disney's stance, and Anaheim's failure to list in section 41(u) the change of the team name as substantial consideration for the lease, the trial court reasonably could conclude Anaheim's primary purpose in reaching the lease agreement was to prevent Disney walking away from the team purchase and avoid the risk that other potential buyers might relocate the team to a larger market.

E. *Course of Dealing*

Anaheim next cites the general rule that we may discover contractual intent from the parties' conduct before a dispute surfaced. (See *Crestview Cemetery Assn. v. Dieden* (1960) 54 Cal.2d 744.) This doctrine is inapplicable here. Disney had its own interest in promoting Anaheim in its marketing campaign, no doubt because of its theme park and other attractions located in the city. Even though Disney changed the team name to the "Anaheim Angels," and aggressively promoted the Anaheim name by including it on tickets, in marketing materials, and on the team's road jerseys, the trial court reasonably could infer Disney refused to "hardwire" these steps into the Lease because it recognized that doing so might reduce the value it would receive for the team if it were sold to an outsider. Indeed, ABLP submitted evidence it would not have paid

\$180 million to purchase the team if the Lease mandated promotion of Anaheim and Anaheim's prominence in the team name.

In sum, although Anaheim introduced evidence demonstrating it negotiated for national name recognition through association with the team, substantial evidence also demonstrated Disney sought maximum flexibility for itself and any new team owner. On the evidence submitted thus far, the trial court reasonably could have concluded the ultimate bargain struck in the Lease favored Disney.

II

Substantial Evidence Supports the Trial Court's Implied Finding ABLP Did Not Breach the Implied Covenant of Good Faith and Fair Dealing

““Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.” . . .” (*Carma Developers (Cal.), Inc. v. Marathon Development California, Inc.* (1992) 2 Cal.4th 342, 371-372 (*Carma*)). “The covenant of good faith is read into contracts in order to protect the express covenants or promises of the contract, not to protect some general public policy interest not directly tied to the contract's purpose.” [Citation.] . . . ‘In essence, the covenant is implied as a supplement to the express contractual covenants, to prevent a contracting party from engaging in conduct which (while not technically transgressing the express covenants) frustrates the other party's rights to the benefits of the contract.’” (*Racine & Laramie, Ltd., Inc. v. Department of Parks & Recreation* (1992) 11 Cal.App.4th 1026, 1031-1032.) Thus, the starting point for applying the implied covenant is to determine the parties' bargained-for benefits under the contract.

“One commentator has suggested that good faith performance of the discretionary power to affect the other party's rights requires the party holding such power to exercise it ‘for any purpose within the reasonable contemplation of the parties at the time of [contract] formation — to *capture opportunities that were preserved upon entering the contract*, interpreted objectively,’ and that, conversely, breach of the

covenant occurs when the discretionary power is used to *'recapture opportunities foregone' when the contract was entered into.*" (*Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 796, italics added.)

In essence, Anaheim contends ABLP's predecessor gave up the opportunity to associate the Angels with any city other than Anaheim when it agreed to section 11(f) of the Lease. If Anaheim is correct, adding "Los Angeles" to the team name represented an attempt to recapture this opportunity, thus breaching the implied covenant. ABLP, however, contends Anaheim gave up its opportunity to designate Anaheim as a prominent feature in the team name when it acquiesced in Disney's refusal to name the team the "Anaheim Angels," and failed to propose more restrictive language in section 11(f). If ABLP is correct, Anaheim cannot use the implied covenant to recapture this lost opportunity.

ABLP disputes the contention Anaheim paid \$30 million for the privilege of having any say in the team name beyond that expressly provided in the Lease. Although the Lease requires Anaheim to contribute \$20 million in cash and approximately \$10 million in future revenues, Anaheim received in return an \$80 million contribution from the team toward the renovation of Anaheim's aging stadium. Anaheim also received the right to revenue sharing for ticket sales over a specified minimum and a long term tenant who prepaid rent through the year 2027. ABLP notes that in the two years it has owned the team, Anaheim received over \$3.6 million in revenue sharing due to increased stadium attendance. ABLP asserts Anaheim "received quite a bargain" in exchange for its contribution.

The lease expressly precluded Anaheim from any team marketing decisions, and vested the team owner with sole discretion in how to conduct its marketing campaigns. Thus, two of the benefits the Disney/ABLP ownership captured in the lease were the right to market the team without any interference from Anaheim, and flexibility in the team name. Undisputed evidence demonstrates ABLP implemented the name

change solely to exploit marketing opportunities in the greater Los Angeles region. Specifically, ABLP offered evidence to show the Los Angeles Dodgers recently obtained a \$10 million television deal from KCAL (9), while the best deal the Angels previously received from that station was worth only \$5.5 million, despite virtually identical viewership shares. By associating the team with the larger Los Angeles market, ABLP expects to increase television revenues. Thus, the trial court could conclude naming the team the “Los Angeles Angels of Anaheim” did not demonstrate bad faith, but was simply an effort to capture benefits expressly bargained for under the lease agreement.

Anaheim responds the name “Los Angeles Angels of Anaheim” is nonsensical, and the parties could not have anticipated the precise change when negotiating the lease. But a party is not excused from taking steps to protect its own interests merely because it cannot anticipate the precise manner in which it may be harmed. (Cf. *Bigbee v. Pacific Tel. & Tel. Co.* (1983) 34 Cal.3d 49, 57-58 [“it is settled that what is required to be foreseeable is the general character of the event or harm . . . not its precise nature or manner of occurrence”].) Here, during lease negotiations the parties discussed the potential sale of the team to a new owner who would receive the contractual flexibility Disney bargained for in designating the team name. Given (a) the team’s previous 30 years as the “California Angels,” (b) Disney’s refusal to stipulate to the name “Anaheim Angels” in the lease, and (c) teams playing in small markets routinely adopt the name of the larger adjacent market,⁵ the trial court reasonably could conclude Anaheim should have contemplated a new team owner might change the team name to expand market opportunities. For example, Anaheim can hardly claim it could not anticipate a new owner might call upon the team’s history and change the team name

⁵ For example, the Los Angeles Rams played football in Anaheim; the New York Jets and New York Giants both play football in East Rutherford, New Jersey; the Dallas Cowboys play football in Irving, Texas, the Detroit Pistons play basketball in Auburn Hills, Michigan, and the Los Angeles Lakers played basketball for many years in Inglewood.

to the “California Angels of Anaheim,” a name incorporating two geographical designations. If Anaheim could anticipate this development, then it should have negotiated express limitations precluding it.

Anaheim further contends, however, the name “Los Angeles Angels of Anaheim” is “oxymoronic” and denigrates Anaheim by placing one of its chief competitors — the City of Los Angeles — in the name. ABLP responds that inclusion of Los Angeles in the team name describes a larger geographic area held by both the Los Angeles Dodgers and the Angels under Major League Baseball’s constitution. This assertion is bolstered by evidence that Anaheim’s mayor admitted Anaheim “is certainly firmly in the center of the Los Angeles market,” when asked about the possibility of an NFL football team moving to Anaheim.⁶

Finally, Anaheim contends that the trial court’s decision would permit ABLP to change the team name to, for example, “The Angels Who Are Embarrassed to be Associated with Anaheim,” “The Angels of the Disgusting City of Anaheim,” “The Angels Formerly Known as the Team Identified With Anaheim,” “The Angels Who Vastly Prefer Los Angeles to Anaheim,” or “The Angels of Bush League Anaheim.” We disagree with this contention. As noted above, substantial evidence supports a finding that the change to “Los Angeles Angels of Anaheim,” was a marketing decision, in large part due to the large disparity between the television revenues generated by the Los Angeles Dodgers and the former Anaheim Angels. We cannot, however, conceive of any legitimate marketing purpose in the pejorative names suggested by Anaheim, and such a name change would demonstrate bad faith.

⁶ The concurring and dissenting opinion dismisses Mayor Pringle’s admission as the misstatement of a “tongue-tied” politician, and proceeds to explain what the mayor meant to say, using as its guide the existence of popular phrases such as “The O.C.” and “Behind the Orange Curtain.” (Conc. & dis. opn. *post*, at p. 7, fn. 7.) Such arguments cannot supplant the deference we must give to the trial court in weighing of the evidence introduced by the parties.

We therefore conclude substantial evidence supports the viewpoints of both Anaheim and ABLP. Recognizing that the trial court's decision must be upheld if supported by substantial evidence, Anaheim argues in a supplemental letter brief⁷ we need not defer to the trial court's finding on the probability of success prong, but should review the matter de novo. Relying on our previous decisions in *Sappington v. Orange Unified School Dist.* (2004) 119 Cal.App.4th 949, 953, and *Golden West Baseball Co. v. City of Anaheim* (1994) 25 Cal.App.4th 11 (*Golden West Baseball*), Anaheim argues we must independently review the contract when the extrinsic evidence is undisputed, even though varying inferences may be drawn from the evidence.

Although Anaheim correctly states the general principle, it is inapplicable in the present situation. As we observed in *Golden West Baseball*: "We review the agreement [fn. omitted] and the extrinsic evidence de novo, even if the evidence is susceptible to multiple interpretations, *unless the interpretation depends upon credibility.*" (*Golden West Baseball, supra*, 25 Cal.App.4th at 22, italics added.) Here, the interpretation of the Lease at issue turns in large part on the credibility of Anaheim's declarations.

For example, Ruth's declaration states Disney rejected a provision designating "Anaheim Angels" as the team name because it wanted flexibility for a new owner to change the mascot name. But other evidence from Anaheim's city attorney demonstrated Disney would not agree to name the team the Anaheim Angels in the Lease because Disney wanted flexibility in naming the team, and said nothing about a possible change in mascot name. Ruth's declaration states the purpose of the Lease was to provide "Anaheim with the name recognition that was brought through the close identification of Anaheim with the Angels," an intent manifested by Disney when it put the Anaheim Angel's name on tickets, media guides, merchandise, etc. Nonetheless, the

⁷ We grant ABLP's application to file its supplemental brief, and Anaheim's application to file its response.

Lease specifically precluded Anaheim from any right to have its name appear in connection with any marketing of the team. Similarly, Smith's declaration states the name change to the Anaheim Angels was one of the principal benefits Anaheim obtained under the Lease. This statement conflicts with section 41(u) of the Lease, which purports to recite the consideration for Anaheim's obligations under the Lease, but fails to even mention the change in team name. These disparities may reasonably have caused the trial court to question the overall credibility of Anaheim's evidence.

Consequently, whether Anaheim had met its burden of demonstrating a substantial probability of success on the merits of its claim for breach of the implied covenant depended upon the credibility of the evidence it offered in support of its motion. Because we defer to the trial court's credibility assessments, we apply a substantial evidence test, and conclude the trial court did not abuse its discretion in finding Anaheim had not demonstrated a substantial likelihood of success on the merits. Because the court did not abuse its discretion as to the "likelihood of success" prong, we need not consider whether the court abused its discretion under the "balance of harms" prong.

We note under the limited evidence presented at this state of the proceedings, the question whether ABLP breached the implied covenant is close. We emphasize that "[t]he granting or denying of a preliminary injunction does not constitute an adjudication of the ultimate rights in controversy," (*Cohen v. Board of Supervisors* (1985) 40 Cal.3d 277, 286), and the abuse-of-discretion standard "acknowledges that the propriety of preliminary relief turns upon difficult estimates and predictions from a record which is necessarily truncated and incomplete. . . . The evidence on which the trial court was forced to act may thus be significantly different from that which would be available after a trial on the merits." (*Butt v. State of California* (1992) 4 Cal.4th 668, 678, fn. 8.)

DISPOSITION

The petition for an extraordinary writ is denied.

ARONSON, J.

I CONCUR:

O'LEARY, J.

SILLS, P.J., Concurring and dissenting.

I. *Introduction*

I concur in the result only because at oral argument it became abundantly clear that a preliminary injunction issued at this stage of the proceedings would be virtually useless. Tickets for the season have been printed and sold; schedules distributed; advertising scripted, filmed and purchased; websites put online; newspapers around the country have changed the name; and the league which is not a party to this action has made name changes. Indeed, billboards all over Southern California will go unchanged for months. In short, the status quo has not been preserved. The season has started and all the trappings of the great game of baseball cannot be changed again until well before the start of next season. Indeed, the playoffs or the World Series could be in progress by the time today's opinion becomes final and the case further reviewed by the California Supreme Court. For us to grant the preliminary injunction now in mid-season would put the trial court in an untenable position regarding the enforcement of the sought-after injunction. In fact, to the extent that an injunction might be enforced, those costs of enforcement might only be passed on in higher ticket, beer and hot dog prices to fans next season.

That said, I must respectfully part company from the majority opinion. Clearly, the trial judge should have granted the requested injunction when the matter came to him before the season began. It is clearly an abuse of discretion to permit any other city name than Anaheim to be preeminent in the team name. The clause in question may, for sake of argument, permit use of a state or geographic "market" name in a *subordinate* relationship to Anaheim (e.g., the Anaheim Angels of Southern California, the Anaheim Angels of California or perhaps even the Budweiser Angels of Anaheim). In fact, I will go so far as to say that the extent to which other geographic or commercial names might be included in the team name is a matter which can await trial. However, whatever else the contract says, it does clearly preclude the use of another city's name preeminent in the team name to Anaheim. It cannot be the San Diego Angels of

Anaheim, the Los Angeles Angels of Anaheim, or even the San Clemente Angels of Anaheim. The contract simply will not permit two city names where Anaheim is relegated to a clearly subordinate position to the other city. It does not permit what we have here: the Los Angeles Angels *of Anaheim*.¹

One doesn't need to attend law school to know that language requiring Anaheim be included as part of the "name" of a major league baseball team necessarily precludes subordination of Anaheim to that of another city in the team's name. Journalists know that, English teachers know that and Joe Sixpack knows that. The "Brooklyn Dodgers of Los Angeles" would not be a permitted name if Los Angeles were the beneficiary of a similar clause. The language of this contract is susceptible to no other reasonable interpretation. Anaheim bargained for something more than being a mere hiccup after the words "Los Angeles Angels." When preceded by "Los Angeles Angels," the words "of Anaheim" effectively drop from being included in the team name and become nothing more than an optional prepositional phrase. Only the sophistry of lawyers allows such a result.

Given these considerations, it is thus extremely important that the trial in this case, now scheduled for the Fall of 2005, go forward. Any delay that could impact the 2006 season certainly would require that an injunction be granted to prevent further harm to Anaheim's rights under the contract.

*II. The Angels' New Owner Has Abused
His Discretion by Depriving Anaheim
of a Benefit for Which the City Bargained*

Though I agree with the result, the majority's analysis harbors a weak core at its center (though one must read about 14 legally elegant, well-written, noncontroversial, and ultimately irrelevant pages to get to it). That weak core is the idea that Anaheim should have anticipated that any new owner might append the name of the

¹ The typefont trick doesn't work if you reverse it so that you minimize the initial location modifier, because there is a natural tendency to call a team with the location modifier first. People don't say, "mumble mumble Angels of Anaheim," they say the "Los Angeles Angels" and forget the second location qualifier.

Los Angeles *market* to the name of the team, and the city should have bargained against the possibility. The problem is, this theory is directly contrary to the California law of contracts.

The law is well-developed in California concerning situations, like this one, where one party has a certain amount of discretion in the performance of a contract. The discretion cannot be abused to the detriment of the other party. Thus, for example, even today's majority concedes that the Angels' new owner could not use his discretion over the team name to name the team in a way that was unmistakably and affirmatively derogatory to Anaheim, e.g., "The Angels Who Are Too Embarrassed to Admit They Play in Anaheim."²

This well developed law has been excellently cataloged in *Third Story Music, Inc. v. Waits* (1995) 41 Cal.App.4th 798. Basically the rule is this: Unless a contract specifically and unambiguously gives a party discretion to do as it likes, any discretion it has under a contract must be exercised in such a way so as not to deprive the other party of a benefit it has under the contract.³ In regard to the contract before us, the Angels new owner cannot use his discretion over the team name to deprive Anaheim of the benefits of its right to have the name "Anaheim" in the "team name."

There is nothing in the contract that says something on the order of: "Tenant shall have discretion to choose any team name it desires, as long as the name Anaheim appears somewhere in it." The contract says: "Tenant will change the name of

² The majority implies that *any* formula that is not affirmatively degrading to Anaheim will pass muster, at least for purposes of this preliminary injunction case. But that logic quickly devolves into absurdity. By that logic the "Algonquin Penguins Flapping Their Los Angeles Wings Madly Somewhere in the Vicinity of Anaheim" would pass muster, because it is not facially pejorative of Anaheim.

³ The *Third Story Music* court found that the cases fell into three categories. First, if any discretionary power is ambiguous, the implied covenant is used to interpret that discretionary power, and against the abuse of that power. (*Third Story Music, supra*, 41 Cal.App.4th at p. 806.) Second, the implied covenant even goes so far as to preclude even an "express contractual grant of discretion" when preclusion is necessary "to protect an agreement which otherwise would be rendered illusory and unenforceable." (*Third Story Music, supra*, 41 Cal.App.4th at p. 806.) That's pretty much Anaheim's case now: Its right to be in the name of a major league baseball team has been rendered illusory and unenforceable by discretion exercised by the team's new owner. The third category of cases is when the grant of discretion is "unambiguous," and the contract is otherwise supported by adequate consideration so that the implied covenant is not needed to "effectuate the parties' expressed desire for a binding agreement." (*Third Story Music, supra*, 41 Cal.App.4th at p. 806.) That is, only if the contract had specifically said that the team name could be changed to "The Los Angeles Angels of Anaheim" would Anaheim not have a case.

the Team to include the name 'Anaheim' therein, such change to be effective no later than the commencement of the 1997 season." That is, *the name of the team* must include Anaheim, and the name change must be accomplished by the beginning of the 1997 season.

Identification with a *major league* baseball team is most certainly a valuable right, perhaps especially for Anaheim. Some readers of this concurrence and dissent may be still remember the old 1940's and 1950's Jack Benny routine of a railroad station call which spoofed the outlying boonie towns of "Anaheim, Azusa, and Cuc...a ... monga." Well, decades later the city of Anaheim paid big bucks to be identified as a big league venue, an identification that would elevate the image of the city to something considerably more important than some outlying berg to LA. (Azusa and Cucamonga have, since the old Jack Benny routine, certainly risen in stature too, but they have not paid good money to be identified with a major league baseball team; Anaheim has.)

And yet the intent to deprive Anaheim of the benefits of identification with a professional baseball franchise fairly radiates from the very structure of the new owners' name change. The human habit of shortening names from long formal, "official" designations to shorter versions, easier to remember, is undeniable. No one can argue with a straight face that "Los Angeles Angels of Anaheim" isn't a mouthful, calculated to force people to shorten it to either the "Los Angeles Angels" or just, "The Angels." Either way Anaheim is deprived of the benefits of its contract -- being included in the "team name." The effect is to chuck Anaheim into the memory hole. It is a formulation that relegates the name Anaheim, as the trial judge put it at one point in the hearing, to a "useless appendage."

Anaheim clearly bargained for more than the possibility of being relegated to a useless appendage. It paid not for mere attenuated *association* with a big league team, it paid for *identification* -- and specifically the benefits of *unavoidable* identification -- the kind of identification that comes when, for example, sports writers and newscasters *have* to use the name "Anaheim" because they refer to *every* major league team by its geographic signifier. ("This just in, Boston has just beaten New York

3-2 in overtime, in the second game of the playoffs”) In the wake of the new owners’ name change, box standings that refer to all teams by geographic signifiers⁴ now say “Los Angeles” when they mean the Angels, or sometimes “LA Angels,” to differentiate them from “LA Dodgers.”

Here’s a hypothetical to illustrate what the new owner has done: Suppose the maker of a certain kind of faucets paid a plumbing company to put “the name of the faucet maker on at least one of the doors of each of its trucks.” But then suppose the plumbing company decided it could make even more money by putting the logo of a *rival* faucet maker on all of the doors of its trucks, so it decides to cut out tiny little “mouse doors” on the back panels of its trucks, inscribe the name of the first faucet makers logo in virtually microscopic letters, and then claim -- tah dah! -- that it had complied with the contract -- after all, the first company’s name was indeed on “at least one of the doors” of its trucks -- all the while its trucks driving around with the rival faucet manufacturer’s name plastered on all the human-sized doors so that potential customers could buy from that firm, not the first firm that paid good money for the right have *its* name on one of the doors. The plumbing company would be laughed out of court if it claimed that it had “technically, technically” complied with the contract. The argument simply would not pass the straight face test -- particularly given the prominence the plumbing company was giving to the rival. I’m afraid the case before us is no different. The Angels’ new owner has prominently displayed the name of a rival, relegating Anaheim to the equivalent of tiny mouse doors.

III. The Self-Contradictory Nature of the New Name Is A Clear Breach of Contract on Its Face

It is elementary contract law that contracts are interpreted according to the “ordinary and popular” meaning of their words, except when the words are used in a

⁴ The Orange County Register and Los Angeles Times have solved the problem by using geographic signifiers in their box standings for every team except the Angeles and the Dodgers.

technical or specialized sense involving industry custom, usage and trade. (See Civ. Code, § 1644; *AIU Ins. Co. v. Superior Court* (1990) 51 Cal.3d 807, 822 [the “clear and explicit” provisions of a written contract are to control judicial interpretation “unless ‘used by the parties in a technical sense or a special meaning is given them by usage’”]; *Horsemen’s Benevolent & Protective Assn. v. Valley Racing Assn.* (1992) 4 Cal.App.4th 1538, 1560 [“Custom and usage of words in a certain trade are admissible to explain the meaning of the terms used in a contract. Custom and usage may not be used to vary the terms of the contract, but may be used as an aid in the interpretation of contracts.”].)

The “ordinary and popular” meaning of the “name” of a professional baseball team has *always* been a title consisting of two components: First, some sort of unified geographic designation or location modifier followed by some sort of generic or “mascot” designation.⁵ Moreover, in the ordinary and popular sense, the “name” of a *baseball team* has never been to have the mascot designation followed by the preposition “of” preceding a locality. Ordinary usage does not refer to the “Yankees of New York” or the “Rangers of Texas.” When this contract was made in 1996, no major league baseball team had ever been named using the formula of a location modifier followed by a mascot name followed by yet another location modifier.

Let’s think about the new owner’s formula. To put a location modifier in front of a mascot name (such as the “San Francisco Giants” or the “Texas Rangers”) is *already* to identify the team with a particular geographic location or “market.” To then add an “of,” with another geographic designation at the end is to nonsensically give the “team name” two geographic identifiers. The “New York Red Sox of Boston” -- well, New York’s the bigger “market,” isn’t it? -- makes absolutely no sense because people are confronted with two, mutually exclusive geographic identifiers, and if they have to choose between the two in that example, they will assume that New York is the host city.

Ironically enough, the most conspicuous example of an “of” usage in modern sports -- the hockey team that plays in Anaheim, Mighty Ducks of Anaheim --

⁵ The majority must resort to other sports for examples of teams that takes names from cities where they do not play.

illustrates wonderfully the tendency of popular usage to identify a team geographically by referring first to a geographic modifier and then to the mascot name. Even though the “official name” of the team includes an “of Anaheim” in the formula, internet references using “Anaheim Mighty Ducks” outnumber references to “Mighty Ducks of Anaheim” by about 5 to 1.⁶

If formulations based on the “of” designation are resisted in popular usage even when the name is the comparatively simple, “the X of Y,” how much more resistance is there to a self-contradictory formula not in accord with the popular and ordinary meaning of the word “name” as applied to a professional sports team. Anaheim and Los Angeles are mutually exclusive geographical areas.⁷ They are most assuredly not the “twin cities” of Minneapolis and St. Paul. They are different cities within different counties, and in fact have come to have a whole host of different popular associations. You cannot be in Los Angeles and Anaheim at the same time. The most one can say is they are both within Southern California. To put both cities in the same team name is to be mutually contradictory. To put Los Angeles before the mascot designation (Angels) is to effectively remove Anaheim from the name.⁸

IV. The Conduct of the Parties Shows

They Expected “Anaheim” To Be The First,

If Not Only, Location Modifier in the Team Name

I do not think this contract is ambiguous. In the context in which it was made in 1996, the location modifier mascot team of location modifier formula adopted by

⁶ In an embarrassing simple google search, I found 637,000 hits for “Anaheim Mighty Ducks” and only 135,000 for “Mighty Ducks of Anaheim.”

⁷ To seize on a misstatement by Anaheim’s mayor that the city is “within the Los Angeles market” is unfair. Politicians often get tongue-tied. The mayor meant the “Southern California” market, or, at worst, the “LA Basin” market (depending on whether you consider San Diego its own market, separate from that of “Southern California”). Regardless of how things were decades ago, Orange County is now firmly fixed in the popular imagination as a region distinct from Los Angeles (either county or city), as currently popular phrases like “The O.C.” and “Behind the Orange Curtain” attest.

⁸ In a slightly less embarrassing google search, I found that there are about 620,000 websites that *only* use the words, “Los Angeles Angels” without adding the “of Anaheim.” It is precisely the association with a big league that would otherwise be reflected in, among other venues, those 620,000 websites that Anaheim bargained for and which it has been deprived of by the new formula.

the new owner violates the promise to include Anaheim in the “team name” when Anaheim is the second location modifier.

However, even if we assume, for sake of argument, that this contract is ambiguous, the new owner clearly has no case.

In cases where a contract is ambiguous, the immediate post-contract conduct of the parties can serve to show how the parties originally understood the contract to operate. As the court stated in *Southern Cal. Edison Co. v. Superior Court* (1995) 37 Cal.App.4th 839, 851, “The rule is well settled that in construing the terms of a contract the construction given it by the acts and conduct of the parties with knowledge of its terms, and *before any controversy has arisen as to its meaning*, is admissible on the issue of the parties’ intent.” (Emphasis added.) The rule appears to us particularly apropos in the context of a party who takes over as the successor in interest to the promisor.

Here, it is undisputed that in the immediate aftermath of the 1996 contract, the Disney Corporation changed the “name of the Team” to the “Anaheim Angels,” which would conform exactly to ordinary expectations of how the name of a professional baseball team would be structured. The logical inference to be drawn from that conduct is clear: Disney, with no ulterior motive of trying to get out of the contract, simply read it as it would naturally be read, and recognized, in the context of professional baseball, that it had agreed to put the name Anaheim in front of the mascot designation. As Civil Code section 1636 states: “A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful.” Disney’s behavior in the immediate aftermath of the contract, i.e., the “time of contracting” is strong evidence that the parties intended the name change to be to the “Anaheim Angels.” And while there is some extrinsic evidence consistent with the idea that Disney retained the right to such formulations as, say, the Anaheim Sun Devils (change of mascot name) or even Angels of Anaheim (without competing location modifier), there is no extrinsic evidence that Anaheim ever agreed to have its name as a subordinate location modifier.

V. *Allowing A Second Name Change
After the 1997 Deadline Would Render Parts of
the Contract Surplusage and Effectively
Re-writes the Contract*

In focusing on the phrase, “name of the Team” it is perhaps too easy to read past the rest of the sentence in section 11(f): “such change to be effective no later than the commencement of the 1997 season.” That is, the specific name change that Anaheim bargained for was a change that would take place relatively soon after the signing of the contract -- by the commencement of the 1997 season -- even though the lease would run through 2016.

Courts must resist interpretations of contracts that render parts of it surplus. (E.g., Civ. Code, § 1641 [“The 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.”]; *Farmers Ins. Exchange v. Knopp* (1996) 50 Cal.App.4th 1415, 1420-1421 [interpreting contract so that the words “use” and “used” had independent meaning]; *Mid-Century Ins. Co. v. Bash* (1989) 211 Cal.App.3d 431, 438 [rejecting interpretation which would make the words “financial responsibility” mere surplusage]; *Appalachian Ins. Co. v. McDonnell Douglas Corp.* (1989) 214 Cal.App.3d 1, 12 [an “interpretation which renders part of the instrument to be surplusage should be avoided”].)

Further, as noted above, courts must interpret contracts to effect the mutual intention of the parties at the time of contracting. (Civ. Code, § 1638.)

Here, the 1997 deadline to change the name of the team makes it patently obvious that the parties intended the name of the team to be changed in accordance with the custom and practice of the baseball industry by a date certain. That custom and practice was, as we have already shown, the name of a city or geographical region followed by the mascot or moniker name: Boston Red Sox, New York Yankees, Chicago Cubs. And by that date certain Disney had indeed performed its part of the bargain and changed the name to the Anaheim Angels.

The parties thus bargained for a single name change, namely the one resulting in the change from "California Angels" to "Anaheim Angels." The new owner's interpretation of the contract, however, nullifies that language, in effect making multiple name changes when the contract calls for only one name change, to be accomplished by the beginning of the 1997.

Modification of contracts requires a modifying agreement involving mutual assent and must be supported by new consideration. (1 Witkin, Summary of Cal.Law (9th ed. 1987) Contracts, § 909, p. 814.) There is no such new consideration here. Instead, the team's new owner simply unilaterally modified the contract, converting a contemplated single name change into license to undo that name change. It is an absurd interpretation of the contract to say that Anaheim and Disney agreed to change the name of the team "effective no later than the commencement of the 1997 season" but that the name of the team could be changed again immediately thereafter. If an insurance company tried that sort of retroactive re-writing of the contract, it would be in big trouble. (Cf. *Fletcher v. Western National Life Ins. Co.* (1970) 10 Cal.App.3d 376 [insurer made disability payments for several years then tried to get out of obligation by threats of rescission].) Courts do not interpret contracts to allow a party to unilaterally deprive the other party of a bargained-for benefit, but that is exactly what we have here.

VI. Conclusion

I concur in the result only because correction of the trial court's error at this late date is untenable. Nevertheless, the initial the abuse of discretion in refusing to grant the preliminary injunction is manifest. The contract does not permit the oxymoronic inclusion of the name of another city in the team name.

SILLS, P. J.

