

Nos. 11-56926 and 11-57048

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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JOHN BRANCA, *et. al.*,  
Plaintiffs-Appellees

vs.

HEAL THE WORLD FOUNDATION, *et. al.*,  
Defendants-Appellants

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APPEAL FROM JUDGMENT  
BY THE UNITED STATES DISTRICT COURT  
FOR THE CENTRAL DISTRICT OF CALIFORNIA,  
THE HONORABLE DOLLY M. GEE, PRESIDING

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**APPELLANTS' REPLY BRIEF**

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I

INTRODUCTION

Appellees' Answering Brief ("AAB") is identical to an appellant's opening brief, containing its own Statement of Issues, Case and Facts, as though Appellants had not done so in its 68-page, 16,000 word (with permission) Opening Brief ("AOB").<sup>1/</sup> AAB, pp. 3-4. Appellees (used here interchangeably with "Estate") did not file its own notice of appeal nor cross appeal any ruling.

A. The AAB's Fact Statement Section

Of the AAB's 71- page, certified 13,969 (non-exempt) words, the Estate consumes 40 pages roughly 8100 words with it's own Statement of the Case and Facts. AAB, pp. 1-43. The AAB's case and fact statements duplicates fact statements already in the AOB, omits facts not helpful to its presentation, and misstates others. In addition, the AAB's Case and Fact Statements include a fair share of argument and spin, laced with hyperbole, principally character assassination, little of which is either balanced, or more, critically, relevant to the issues presented on appeal. Hyperbole such as

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<sup>1/</sup> AOB contains *errata*. AOB, p. 2, June 17 should be 27. Typo: courter [should be "counter"] claims. *id.*, p. 57.

“exploitation of trademarks inextricably linked to Michael Jackson..” are strange, since those terms have little legal effect for an Estate which came lately to any such over broad claimed rights, the bulk of which registrations, to the extent actually existed, were long abandoned.<sup>2/</sup> AOB, pp. 6-8, 13, 17-18, 20, 22-28.

An example of repetitious spin is the Estates claim that Appellants’ alleged admission that such “exploitation” “was not authorized by Plaintiff Triumph or Plaintiff the Estate, the respective owners of these rights.” AAB, pp. 4,7, 14, 26, 28, 35, 37, 55, 60, 62, 63, 67, 69, 71. As discussed below, the Estate’s “authorization,” if, in fact, was actually needed, only commenced with Jackson’s death on June 29, 2009. Additionally, many of the Estate’s alleged entitlements had long been abandoned, some since 2001, and only became officially recognized arguably enforceable entitlements when the Estate filed a flurry of applications in August 2009. AOB, pp. 4,7, n.5, 26-28, n.11. Notwithstanding Appellants’ extensive undisputed record

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<sup>2/</sup> Other examples include, “went into high-gear,” “some amorphous and vaguely identified group.” AAB, pp. 6, 7. Additionally, the AAB puts Appellants’ evidence and authorization in quotation marks, negatively characterizing them but not so treating its evidence and authorizations. This mocking and superior attitude is unworthy and uncalled for in this forum. *Id.*

of prior association with, and authorization by, Jackson and his representatives long predating his death, the Estate spends much ink attempting to assassinate Melissa's character. AOB, pp. 15-19; SER00173, 01315-19, 03330-447, 03429-42, 04730-91, 04792, 04804-30, 04846-51.

An example of the reverse, that is, the lack of space the AAB gives to a fact not helpful to it's position is the 100 or so words devoted to contradict the AOB's extensive discussion of the initiation and breaches of the 2003 Domain Transfer Agreement ("DTA"). AAB, pp. 15, 62, n.26; AOB, pp. 3, 4, 15, 23-25, 58, 63-64.

However, with the goal of complying with the word count limitation on reply, Appellants here cannot rebut each of the AAB's unsupported or misstated case and fact statements, or include all the material omissions of facts, only those deemed material to this brief are included here. FRAP 32(a)(7)(B).

B. The AAB's Argument Section

About 25 pages of the 71-page AAB are devoted to argument, not including a page and a half of Standards of Review which does not appear to conflict with those in the AOB and thus redundant. AAB, pp. 45-46, 47-71. As mentioned, both the Statement of the Case and Facts are not so confined,



since both contain large measures of argument laced with hyperbole and character assassination.<sup>3/</sup>

Rather than following the Estate's reframing or spinning of Appellants' issues or follow the AAB's AOB-like format and organization, Appellants focus on the issues actually appealed.<sup>4/</sup>

## II

### ARGUMENT

A. The District Court Erred in Rejecting Appellants' Challenges to the Enforcement of the Settlement Agreement and Judgment (As Amended) (Used Interchangeably with Mou.

The Estate's 5- page, 1,000 word, argument (after its unnecessary

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<sup>3/</sup> In an attempt to characterize Melissa with aberrant behavior, the AAB states that Melissa admitted in a letter that the relationship between her and Jackson was non-existent AAB, p. 14; SER3332, ¶7; 3361. However, the Estate distorts the time line, as it does elsewhere in its facts, since that letter was post marked in 2002, a full year before Jackson and Melissa combined to protect the charity intellectual property (IP) in 2003 and two years before Jackson handed the charity completely over to Melissa's charge in 2005, while he was busy fighting a legal battle. SER00173.

<sup>4/</sup> The Estate erroneously claims that the "first and last" issues presented here are waived because they have not been framed or argued, or include contentions and reasons, if one understands what constitutes the unnamed "first and last issues presented." AAB, p. 3, n.4. For example the "first issue" is stated and argued in Appellants' Opening Brief (AOB), pp. 2, 3, 4, 20, 28, 29, 34, 42, 44. If the "last issue" lacking "contentions and reasons" is the issue of merger, then it is appropriately discussed. AOB, pp. 3, 10, 32-33.

standard of review discussion) essentially maintains that Appellants' evidence was not newly discovered, that there was no request for an evidentiary hearing on its attorney's conflict of interest, misrepresentation of documents to be signed, and failure to disclose, and even if not requested, did not constitute an abuse of discretion. AAB 46-51.

1. Newly Discovered.

The Estate argues that "Defendants have failed to show that there was a 'clear showing of abuse' in the district court's finding that there was no 'newly discovered evidence'. Indeed, the record reflects that Defendants simply re-argued the same 'evidence' they had previously argued." AAB, p. 47. The record is to the contrary.

In its October 27<sup>th</sup>, 2011 ruling, the district stated: "Because Defendants fail to identify any newly discovered evidence, they are not entitled to relief under Rule 60(b)(2)." ER000997. It found that:

Defendants' evidence—that their former attorney, Edgar Pease, allegedly committed billing fraud—is not newly discovered. Defendants claim that Pease dramatically increased both his billing hours and rate following the settlement agreement when it became clear that his fees would be paid by Plaintiffs. Defendants assert that they first became aware of this increase on or about June 22, 2011—one week before the Court entered Judgment. (Id. at 6.) This fact does not help them, however, because "[e]vidence 'in the possession of the party before the judgment was rendered is not newly

discovered” and does not entitle the party to relief under Rule 60(b)(2). [citation omitted] Moreover, as Plaintiffs point out, Pease submitted his first inflated bill to the Court on June 1, 2011 [Doc. # 209-2]—nearly two weeks before the hearing on Plaintiffs’ motion to enforce the settlement agreement and four weeks before the Court entered Judgment. ER000996; SER03938-69, SER04004-81.

A. Pease’s “Revised” Invoices Were Neither Made Available to His Clients, Nor Authorized by Them.

The June 22, 2011 invoice was not the sole newly discovered evidence that Appellants’ presented in support of their claim. Rather, it was the February 28, 2011 invoice compared to the June 22 invoice that created only one part of Defendants’ newly discovered evidence presented. SER03588-603, 3938-69, 04039-60. The results of that comparison defined the billing fraud argument and that product of the comparison, was the “new” evidence provided and was not in Appellants’ possession, because the June 22<sup>nd</sup> invoice alone was merely an alert to investigate and discover the evidence of the extent of the indicated fraud and his failure to communicate the inflated rates, as compared to earlier billings, coupled with the substitution of successive MOU’s, occurring after the June 14 hearing and after the June 17 tentative ruling, and after the June 27, 2011 judgment and dismissal of the case. SERRB000605-19; ER000806-20, 000996; SER04004-81.

Furthermore, Pease's admitted "revised upward" billings were filed under seal and not then served on his clients, but only on opposing counsel which authorized their payment via their own drafted MOU. Even before the hearing began on June 14, 2011, the court had already made a tentative ruling dated that date and filed June 17, granting the Estate's motion to enforce the now contested MOU and terminate the case. SERRB605-19, ER001015.

The district court dispenses with this undisputed billing surprisingly minimized by the term "irregularity." "Moreover, as Plaintiffs point out, Pease submitted his first inflated bill to the Court on June 1, 2011—nearly two weeks before the hearing on Plaintiffs' motion to enforce the settlement agreement and four weeks before the Court entered Judgment." ER000997.

Both the Court and the Estate fail to mention that Pease filed his admitted inflated bill under seal and his clients could not get access to the filing, nor see and thus not "discover" the inflated bill which would then lead to the discovering of billing fraud until after Pease sent his further inflated June 22<sup>nd</sup> and July 4<sup>th</sup> billings to his clients and they compared it to his Feb 28<sup>th</sup> billing. There is nothing in the record to show that Pease's clients were so served the June 1<sup>st</sup>, billing, when filed under seal. AOB, p. 41;

SER04039-41, 04043-60, 4062-81.

More critically, the district court was not only on notice that Pease had been accused of unprofessional conduct, including misrepresentation, fraud and conflict of interest with respect to the settlement agreement, but that he had been terminated and replaced on June 2, 2011. SER04004-81, 04190-200; ER000918-43, 000516-629. The district court's exclusive reliance on the Estate's representations that Pease acted appropriately and that his clients fully understood and agreed with the terms and conditions in the various versions of the settlement agreement shuffled in a flurry the same day is, at best, questionable, and, at the worst, a clear abuse of discretion. This should have been especially bothersome, since the Estate was hardly present having no first hand knowledge in Pease's now well documented conversations, emails, and voicemails with his clients. ER000630-81, 000682-97; SER03689-891, SERRB427-39, SERRB440-604.

In spite of a wealth of evidence documenting Appellants' claim that it had been induced to sign a misrepresented flurry of MOU's, directly related to the billing fraud of their counsel, the only change from its June 27<sup>th</sup> judgment of its October 27, 2011 amended judgment, was the district court's addition of a footnote attempting to modify it as to Melissa, over objections

that it failed to cure the problems that Appellants raise. AOB, pp. 41-43.

While the court correctly summarized Appellants' contention that "Pease's actions as their attorney amounted to gross negligence 'by inducing Ms.

Johnson to sign a binding settlement after specifically giving her the understanding that it was non-binding.' (Mot. for Relief from Judgment at 16.)" SER 03665-87, 04004-081, 04018-22; ER000989-1002.

However, the court continued that

Defendants present no new argument or relevant evidence that the Court did not previously consider in connection with Plaintiffs' motion to enforce the settlement agreement. Even if, as both parties maintain, Pease submitted fraudulent or inflated bills to Plaintiffs after the settlement agreement was in place, that is not the kind of behavior that shows gross negligence towards Defendants under the circumstances of this case.<sup>5/</sup> Given that Plaintiffs were to pay for Pease's fees and expenses, Pease owed a duty of honesty to Plaintiffs, who were the ones that stood to be harmed by his alleged dishonesty.

ER001001.

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<sup>5/</sup> The Estate is correct that "on the first day of trial, the district court held an in-chambers conference wherein the parties advised the court of the settlement that had been reached in the litigation. AAB, p. 34. However, Pease excluded both Melissa and Mr. Wilson so that they could not then discover that Pease had deceived them when he told them he was going to ask the court for a 45 day suspension of the case, in order to have settlement discussions. Instead he actually told the court that the case was settled and that his clients agreed to the material terms of the fraudulent MOU, when they had not. AAB, pp. 38-40; AOB, pp 29-30.

The evidence Appellants obtained, which first had to be investigated and vetted through replacement counsel for Pease after the June 27<sup>th</sup> hearing was, in fact, new and extensive and should have caused the district court to convene an evidentiary hearing on conflicting declarations by both Defendant's Counsel instead of merely adding a footnote as to Melissa and otherwise not changing a word of her earlier rulings in her October 27<sup>th</sup> Amended Judgment. SER04004-81.

b. The detailed chain of MOU versions.

In its October 27, 2011 ruling, the district court recognizes that while “An attorney's actions are typically chargeable to his or her client and do not ordinarily constitute extraordinary circumstances warranting relief from judgment under Rule 60(b)(6)...[o]ne exception is an attorney's gross negligence, i.e., ‘neglect so gross that it is inexcusable.’ (quoting *Tani*, 282 F.3d at 1168).” ER000991.

“In *Tani*, the Ninth Circuit found that the attorney ‘virtually abandoned his client by failing to proceed with his client's defense despite court orders to do so’ and deliberately deceived his client about what he was doing (or not doing),’ resulting in a default judgment against the client. *Lal*, 610 F.3d at

524 (quoting *Tani*, 282 F.3d at 1170-71). *Lal* similarly held that ‘an attorney’s gross negligence resulting in dismissal with prejudice for failure to prosecute constitutes an ‘extraordinary circumstance’ under Rule 60(b)(6) warranting relief from judgment.’ *Id.*” ER001001.

Appellants’ evidence included the date stamped email traffic between Pease and the Estate’s counsel which is attached to another email from the Estate’s counsel 10 minutes earlier, in which it had provided the “revised” version MOU#2, to Pease at 10:20am. Ten minutes later Pease then forwarded that same version unchanged to Melissa, particularly already missing pages 5 and 6, he called the “signature pages” to deliberately avoid disclosing to his clients that the MOU had been altered and was no longer “non-binding”. SER03659-63, SER04017-22.

Later that evening when Melissa agreed to sign the non-binding version, MOU#2. Pease told her not to sign the version she had in her possession, because it was missing the “signature pages” and told her he would send her the same document as MOU#2, which would have the “signature pages” pp. 5 and 6 added, which had been deliberately kept from both MOU#1 and the revised MOU#2 the allegedly non-binding versions. Email evidence showed that the two versions (MOU#1 and 2) and the misleading MOU#3 binding



version all originating from the Estate, then emailed to Pease, then to Melissa unchanged, evidenced a concerted covert plan to deceive Defendants into signing the “signature pages” falsely represented as from the earlier “non binding” revised version and specifically concealing that material terms had been modified. SER03659-63, 04011-16, 04017-22, 04023-30; SERRB000436.

Pease’s (and arguably the Estate’s) deception was maintained in order to continue the falsehood that signatures were urgently needed strictly in order to get an extension of the next day trial date, April 19, 2011, so the settlement talks could proceed. ER000630-81.

Pease and the Estate held back the MOU#3 version until Melissa agreed to sign the revised MOU#2 non-binding version, pretextually imposing an artificial 8 p.m. deadline to get Melissa to sign allowing Pease and the Estate, to slip in MOU #3 which changed into a permanent settlement the opposite of what Pease represented to his clients to end the meritorious litigation, obtain increased fees neither known nor authorized by his clients, which Pease desperately needed. *Baranowski v. the State Bar of California* (1979), 24 Cal. 3d 153, 161 (lawyers failure to disclose to his client the full extent and nature of his financial condition constituted a violation of his

obligation to discharge the duties of an attorney at law to the best of his ability (Bus. & Prof. Code, § 6067) as well as an act involving moral turpitude. (Bus. & Prof. Code, § 6106.) ); AOB, pp. 35-37, 46, n.19.

Appellants' detailed testimony, phone records, email and voicemail evidence provided sufficient support to require that the district court formally convene an evidentiary hearing into the allegations of gross negligence, misrepresentations, and ultimately betrayal, negating informed consent in the executing of the settlement agreement. <sup>6/</sup> SERRB000367-69; SER4011-17,

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<sup>6/</sup> The district court did not have the MOU#2, the so called "revised" version before its June 14<sup>th</sup>, or it June 27<sup>th</sup> judgment, and it was in fact, newly discovered. This evidence showed that Melissa did not agree to sign the proposed settlement agreement until 6:30 pm, when phone records record that she called Pease. SER04445-48. It shows she could not have agreed to the "new" material terms in the fraudulent MOU #3 as she did not even receive it until 6:48pm. She only had the MOU#1 and MOU#2, at 6:30 pm, when she agreed to sign; and both versions she possessed were non-binding. SERRB000367-69; SER04007; SERRB000399-406. It showed, Pease never sent Melissa a red-line version of three versions of the MOU's tracking changes in the versions, nor disclosed or discussed any changes. It showed Pease and the Estate waited all day to provide Defendant's with the MOU#3, sending it just minutes before the deadline where the Estate "added" new material terms and revisions to an already revised MOU. SER04004-081, 03659-63. Pease's voicemail message: 4-18-11: "Hi Melissa, boy we just about missed the wire, ah, I just received a message, ah, that they [plaintiffs] weren't going to send over the "signature version" [fraudulent version] ... and yet we, just everything we talked about that we would work out the details later, ...you've got to do this, ..." (SERRB000436) This voicemail shows it was the Estate that held back MOU#3, not Pease. The timeline Appellants presented is so detailed that it should have alerted the district court of the bait

4023-30.

The Estate argues that because Appellants' Fed.R.Civ.P. 60(b)(3)) claim was only on the part of Pease, not "an opposing party," the district court did not err. AAB, pp. 48-49. However, Appellants' evidence included an email the Estate sent Pease on May 11, 2011 of the signed fraudulent MOU #3, apologizing for pages 5 and 6 being inverted, which Appellants alleged were inverted only because those pages had to be removed from the original PDF to assure signing of the switched MOU. This email specifically pointed to the Estate's involvement in the deception with Pease, since the Estate wrote and originated all of the misleading versions. The record demonstrated that the original MOU#1 and MOU#2 were provided by the Estate to Pease, and were both missing signature pages 5 and 6, which the email traffic later showed that those pages were reversed, since they were once not part of the document. ER000663-71, SER03659-63, 04011-16, 04017-22, 04023-30, SERRB000436.

The email and phone record evidence later submitted to the district court shows that Melissa had only 17 minutes to print, sign, scan and return

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and switch agenda alleged. ER000630-681.

the MOU#3 document to Pease, who was rushing her to sign quickly and get it back to him, so he could make the 8 p.m. manufactured deadline.<sup>7/</sup> Again, Pease intentionally made no mention of the material changes.<sup>8/</sup> SER04023-30. The district court's finding of "no new evidence" is contravened by the undisputed facts appellants presented since the "revised version" MOU#2 was discovered, examined and presented to the court, along with the billing fraud, after July 27<sup>th</sup> and before the October 27<sup>th</sup> judgment. SER04017-22, 04004-81.

c. The Estate Does Not Dispute That Pease Breached His Duty of Competence to His Clients.

The Estate does not address Appellant's assertion that Pease breached

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<sup>7/</sup> The Estate asserts that Appellants' "outrageous accusations were made-then and now-without citation to any evidence, and there is no such evidence. AAB, p. 39. However, Melissa's declaration was accompanied by 70 pages of exhibits supporting her claims, including a very detailed time line of her contacts with Pease and the emails, documents and voice mails he sent her, none of which the Estate contravenes. AOB, p.36.

<sup>8/</sup> Examples of the bum's rush are the following: At 6:48 pm, Ed's legal assistant says: "Hi Melissa, Ed said you were expecting this and that he must submit it, signed by 8 pm." SER04023-30. At 7:05 pm, Ed's wife (also a lawyer) says "Ed needs to sign after you and forward to Plaintiffs to sign. We have a deadline...Please send now." [Emphasis added.] SERRB000407-408.

his duty of competence to his clients required by Rule 3-110. AOB, p.50.

The Estate asserts that "Defendants answered the Supplement to the Complaint, but did not assert any counterclaims. 2ER410." AAB, p. 8. The Estate is only minimally accurate. In fact, on March 18, 2011, Defendants filed an answer to the Supplemental Complaint, but undersigned counsel had not been able to obtain a complete copy, and Pacer shows one page. AOB, p.19. In response to a request by Appellants' counsel for a full copy of that answer, the Estate's counsel confirms that it had the same one page caption page filed. This strange filing of just a caption page styled as DEFENDANTS' ANSWER AND AFFIRMATIVE DEFENSES TO PLAINTIFFS' SUPPLEMENT TO COMPLAINT attests to Pease's incompetence at the least, and perhaps a larger professional lapse, alleged by Appellants. ER000410.

d. The District Court Should Not Have Rejected the Filing of  
Melissa's and Wilson's Pro Se Status Reports.

The Estate correctly states that Pease, Melissa and Wilson each attempted to file their own status reports of the settlement with the district court on or about May 17, 2011, but Melissa's and Wilson's reports were refused for filing by the court because Defendants were still represented by

counsel, not as Defendants argue, because the district court treated Defendants "unequally." AAB, p. 38. "Defendants argue that the district court allowed Melissa to file pleadings *pro se* in her individual capacity. The only documents, however, that were permitted to be filed personally by Melissa were documents relating to the status of Defendants' efforts to obtain new counsel. All documents relating to the substance or merits of the case were filed by Defendants' various attorneys." AAB, p. 38, n.17. The Estate fails to mention that the district court already allowed Melissa to appear personally and file *pro se* pleadings although not a named defendant but the subject of the Estate's requested orders and the district court's judgments, orders and rulings. AOB, pp. 29-30.

In fact, both the accepted and the rejected *pro se* pleadings included "the substance and merits of the case," and both were identically "*ex parte*" communications with the district court. Thus, the Estate's distinguishing the rejected *pro se* pleadings on the two grounds of "*ex parte*" and failing in "relating to the substance or merits of the case" is contradicted by the pleadings themselves.<sup>9/</sup> Furthermore, clients are free to inform the district

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<sup>9/</sup> Examples in the filed *pro se* pleadings dealing with "substance and merits of the case" included the following: "The extraordinary circumstances

court of potential fraud upon the court by a lawyer betraying his clients in the fashion undertaken by Pease failure to request a vital evidentiary hearing, as expressly directed by his clients on May 16, 2011, two days before he deceitfully filed the MOU, his client opposed, as discussed next.

SERRB000298.

e. An Evidentiary Hearing Should Have Been Held.

The Estate argues that Defendants did not request an evidentiary hearing from judgment. ER833-982. To the contrary, on 5-18-11 they asked their counsel to file a motion requesting the evidentiary hearing and after refusing to file the request for them, their counsel instructed his clients to file their own requests *pro se*, which they did on May18, 2011, and that filing

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surrounding our case, the wealth and fame of the plaintiff and the bad press endured by the defendant at the hand of the Plaintiff's false claims, seem to intimidate and even frighten potential counsel, and this has been exacerbated by the unethical conduct of the Plaintiff described in paragraph C, and has frustrated Defendant's attempts to find replacement counsel.” SERRB000002. (“C. Plaintiffs Unethical Conduct Requires Court Investigation”). In fact the entire *pro se* filed pleading is replete with fact statements found in the AAB’s Statement of Facts and those in the AOB. It’s difficult to understand how the Estate can allege with a straight face that Melissa’s *pro se* pleading does not deal with the substance and merits of the case. Melissa’s exhibits include U.S. Patent and Trademark Office documents at issue here and an article supporting the libel charged in its counterclaims. SERRB000048.

was rejected due to their counsel's filing on the same day, omitting the request for the evidentiary hearing request. SERRB000153-59, 000160-66, 000298; SER03685. Even if they had proper representation and had the request submitted by Pease, however, Fed.R.Civ. Pro. 43(c) provides the district court with wide discretion to take testimony on a motion, or to rely on affidavits. AAB, p.49. Perhaps so, but not done in this case.

Here not only were there "dueling declarations" between Defendants two counsels and clients, upon which no court could have made credibility determinations (on documents alone), but also Pease made no declaration opposing his clients' serious allegations of his at least professional and most probably fraudulent misconduct. Nonetheless Pease refused to request the evidentiary hearing his clients requested and instead, filed motions supporting the MOU his clients opposed. As a result the Estate, with the obvious opposing motives, undertook the explanation of Pease's actions, with the obvious deficit of lacking first hand knowledge of his interchange with his clients. ER000806-20; SERRB000153-59, 000160-66, 000167-279, 000298; 000280-439.

The Estate fails to mention that on May 15, 2011, Appellants' asked



Pease to move or “demand a full evidentiary hearing on the MOU” due to the clients’ allegations of a “bad faith” agreement, deception and fraud, which they charged against their counsel. AOB, pg.30-31, 41, n.16 (California Rule of Professional Conduct 3-310(F) and Business and Professions Code section 6068, subdivision (e); and (3) direct a State Bar Member to obtain the clients’ informed written consent to avoid an undisclosed adverse interest when being paid by the opposition.) AOB, p. 45; SER04004-081, ER000918-943; SERRB000294-5.

The Estate’s hyperbolic assertions of “outrageous ,” “reckless,” and “unsupported” claims were in fact not only left unrebutted by Pease, but supported by an extensive detailed record of documents and contacts. AAB, pp. 8, 40, 41; AOB, pp. 46-50, 52-53

“Neither party’s evidence established — beyond the declarants’ conflicting assertions” but the district court chose to credit the Estates hyperbolic assertions and summarily discarded all of Appellants’ allegations of its attorney’s false representations removing *knowing assent* to the settlement agreement and his refusal to carry out his clients specific request for an evidentiary hearing, all of which was on the record before the

June 14<sup>th</sup>, hearing and tentative ruling in favor of the Estate. ER000806-820. In accepting one account over the other, in the face of Appellants' detailed record of false representations and clearly improper conduct, "the court improperly resolved an evidentiary conflict." *Oswalt v. Resolute Indus.*, 642 F.3d 856, 861 (9th Cir. 2011).

The Estate offered no evidence that Pease timely disclosed to his clients the retroactive almost doubling of his hourly rate nor the retroactive increase of hours allegedly expended for which he should have obtained the clients' written approval mainly through revised retention agreements. AOB, p.45 and n.18. The record is bare of any evidence that Pease met any of these requirements, and the district court erred in summarily disposing of Appellants' largely unopposed contentions of counsel's conflict. AOB, pp.67-68.

B. The District Court Erred in Dismissing Appellants' Counterclaims.

The Estate admits it made the two statements giving rise to Appellants' counterclaims: the "CBS Statement" and the "Press Release." AAB, p.54; AOB, pp. 14, 16-17, 53-56. Appellants pled those counterclaims as follows:

10. For example, the Estate issued a public statement that "The

Michael Jackson estate has no connection whatsoever to the 'Heal the World Foundation' run by Melissa Johnson. This statement was made to a Los Angeles CBS affiliate and was widely published.

11. The Estate also issued a press release stating that HTWF was engaged in "unauthorized exploitation" of Mr. Jackson and was taking actions to 'deceive the public.' The press release also falsely stated that Ms. Johnson and HTWF "falsely suggest she had a long history of working with Mr. Jackson's legitimate charitable endeavours." "12. The false and damaging statements made by the Estate in Paragraphs 10 and 11 are collectively referred to as the 'False Statements'.

AOB, pp. 16, ER000047-48.

1. Issue Not Moot.

The Estate's 7-page argument defending the district court's dismissal of Appellants' counterclaims first argues that this issue is moot because it is not separately listed on the Notice of Appeal. AAB, pp. 52, n.21. Appellants listed the October 27, 2011 Amended Judgment as the final order disposing of the entire matter. AOB, pp. 2-3. This final judgment necessarily included all prior judgments, rulings and orders opposed by Appellants, because interlocutory appeals are limited and generally disfavored and listing the final dispositive judgment is sufficient to incorporate any prior non-dispositive opposed rulings which lead to issues on appeal. Cir.R. 3-3. Furthermore, appellate counsel, as in this appeal, may not have been counsel below and is hardly expected to review what may well be an extensive record, the 300

docket entries for a case which was not tried, with portions sealed . One of the Estate's pleadings is over 2,000 pages and, on review by undersigned counsel, gave rise to the view that it contains facts and issues relevant to this appeal not known due to a still incomplete record when the Notice of Appeal had to be filed. Cir.R. 3-5

2. Appellants' Counterclaims Stated Claims Requiring Relief.

The Estate correctly asserts that neither allegedly libelous statement made any [express] reference to United Fleet. AAB, pp.53-55. However, the alleged libelous statements admittedly made against HTWF and Melissa Johnson personally had material consequences to her other entities, including United Fleet. As a principal in HTWF and TUF, both of the allegedly libelous statements negatively affected her reputation as an officer of United Fleet, which is closely linked to both HTWF and Melissa Johnson. Thus, Melissa should have been permitted to make a case to a jury that any defamation of her affects HTWF and TUF directly and by association United Fleet as well. SERRB000048-9, 001168.

Libel may be implied and need not be express or expressly mention all the conduct of the target. *Patton v. Royal Industries, Inc.*, 263 Cal. App. 2d

760 (1968). AOB, p. 16, 54-55. Rather, an entire publication, and the sense and meaning associated with an allegedly false statement is to be considered in its entirety as well as the impact intended on the reader: The publication in question must be considered in its entirety; it may not be divided into segments and each portion treated as a separate unit. *Corman v. Blanchard*, 211 Cal. App. 2d 126, 131-132 (1962). The Estate's statements " must be read as a whole in order to understand its import and the effect which it was calculated to have on the reader and construed in the light of the whole scope and apparent object of the writer, considering not only the actual language used, but the sense and meaning which may have been fairly presumed to have been conveyed to those who read it." *Baker v. L.A. Herald Examiner* (1986) 42 Cal. 3d 254, 261.

3. The Litigation Privilege Does Not Extend to  
These Two Statements.

The Estate argues that the Press Release was made after this lawsuit was filed and was protected by the litigation privilege, that there is no requirement that the charged statement was made in pleadings, and that Appellants cite no contrary authority. The Estate seeks refuse in the privilege extended to in-court statements made in furtherance of litigation. AAB, p. 56.

But the “privilege extends to communications made in furtherance of the objects of the litigation and having some logical relation to the action. *Getfugu, Inc. , v. Patton Boggs LLP*. (2013) 220 Cal. App. 4th 141, 151-152; *Silberg v. Anderson* (1990) 50 Cal. 3d 205, 212. “The communication ‘must further the objects of the litigation, that is, it ‘must function as a necessary or useful step in the litigation process and must serve its purposes.’ *Rothman v. Jackson*, 49 Cal. App. 4th 1134, 1147 (1996).”

Initially, it strains the Estate’s claim of litigation privilege, since its first media statement was made on August 11, 2009, 48 days prior to the filing of its complaint on September 29, 2009 and only two days after on August 9, 2009 the Estate revived Plaintiff Triumph International, a then suspended California corporation, having been defunct for many years and officially suspended for two years.<sup>10/</sup> SER03323; SERRB001502.

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<sup>10/</sup> Triumph was wholly owned by Jackson and is now owned by the Estate. AAB, p. 10. However, the Estate fails to mention that Triumph holds only a single registration on one class of goods and services for the trademarks Jackson owned. The rest of the dozens of trademark applications were only filed by the Estate in August 2009 after Jackson's death, but only after Appellants filed for them on behalf of the Jackson charity and his family. AOB, pp. 22-23, 26-28.

The Headline of the media statement read: “Charity’s FAKE link to Jackson” “Jackson Estate says “no connection to the pop star.” The text read: “The Estate has no connection what so ever to the Heal the World Foundation run by Melissa Johnson” said Terry Fahn, a spokesperson for John Branca, the special administrator of the Jackson Estate.” Not only can the pre-litigation media statement not invoke the litigation privilege but the actual complaint makes no such claim or allegation. Rather, the complaint alleges repeatedly in variations that Defendants have “falsely suggested a connection” with Mr. Jackson and his HTWF. The complaint never uses the term in the media statement of “no connection what so ever” nor “The Estate has no connection whatsoever to the Heal the World Foundation run by Melissa Johnson” in their Complaint. ER000008; SER03323; SERRB000048-49.

The alleged false statements were made directly to the press which is not, either in, or the equivalent of, pleadings filed, or statements made, in court. More critically, these false statements were made to the general public. “Notwithstanding the expansion of the scope of the litigation privilege to extend to publication to nonparties with a substantial interest in

the proceeding, ‘the expansion does not encompass publication to the general public through the press.’” *Getfugu, supra*, at p.153. “Dissemination of these publications...is essentially... disclosure to the general public. If anyone with an interest in the outcome of the litigation is a person to whom a privileged communication could be made, *Silberg* and *Rothman* would be eviscerated. We conclude the...press release and the [other alleged statement] are not shielded by the litigation privilege.” *Id.*, at 154. The Estate is not entitled to the litigation privilege, and the district court erred in court extending it to the Estate’s clearly public relations oriented statements when it dismissed the counterclaims. AOB, pp. 56-57.

The Estate’s statements were clearly “libelous on [their] face,” a question of law. *Patton, supra*, 263 Cal.App.2d at 765; *MacLeod v. Tribune Publishing Co.* (1959) 52 Cal.2d 536; *Cameron, supra*, 251 Cal.App.2d at 893. “The test is whether in the mind of the average reader the publication, considered as a whole, could reasonably be considered as defamatory.” If it is determined that the publication is susceptible of a defamatory meaning and also of an innocent and nondefamatory meaning it is for the jury to determine



which meaning would be given to it by the average reader. *Scott v. McDonnell Douglas Corp.* (1974) 37 Cal. App. 3d 277, 288-289.

4. The Counterclaims Alleged Both Malice and Damages.

The Estate asserts that Appellant's "failed to adequately allege... 'actual malice' by Plaintiffs in making the statements, or...any "special damages' suffered as a result of the statements." AAB pp.3-4. While the Estate's use of the term "adequately allege" is unclear, the complaint alleges both malice and damages sought sufficiently to satisfy notice pleading requirements, as follows: "19. Plaintiffs' False Statements were made in a state of mind arising from ill will towards Defendants."<sup>11/</sup> "25. Plaintiffs either knew their False Statements were false or acted with reckless disregard for their falsity."

The complaint also sufficiently alleged damages sought: "26. Plaintiffs' False Statements have caused specific pecuniary damage to Defendants."

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<sup>11/</sup> "Malice,' in its common acceptance, means ill will towards some person. In its legal sense, it applies to a wrongful act done intentionally, without legal justification or excuse." Black's Law Dictionary Online 2<sup>nd</sup> Edition. <http://thelawdictionary.org/malice/#ixzz2lK6i0D4D>. "In liable and slander, as to privileged communications, 'malice' involves an evil intent or motive arising from spite or ill will." Blacks Law Dictionary, Ninth Edition, p.862.

The prayer is also sufficiently plead: "3. GRANT Defendants their reasonable attorneys' fees and costs incurred in defending against Plaintiffs' Complaint; and 4. ENTER a judgment awarding Defendants all quantifiable and measurable damages sustained by Defendants as the result of Plaintiffs' actions described herein and punitive damages to the extent permitted by law." ER000048-49.

C. Injunction

1. Issue not moot

The Estate asserts that Appellants' improperly granted injunction "is moot in light of the permanent injunction entered pursuant to the Settlement Agreement and Judgment." AAB, pp. 4, 60. The Estate refers to the provision of the Settlement Agreement which states: "Defendant's HTWF and TUF stipulate and agree that the preliminary injunction in the action shall be entered by the court as a permanent injunction." The Estate apparently assumes that it will succeed here as to all issues presented as it did below. But, since the district court's approval of the Settlement Agreement and Judgment is a principal ruling at issue here, it seems premature for Appellees' mootness claim. SER04514.

2. The Estate provides no evidence disputing that the district court should have held an evidentiary hearing before summarily granting an injunction

The Estate disputes, but provides no evidence, that the district court erred in failing to hold evidentiary hearings, which it "must...", before issuing an injunction unless the adverse party has waived its right to a hearing or the facts are undisputed. AOB, p.66. Since the execution of the settlement agreement by Appellants, containing consent to the injunction, was highly disputed once a sufficient quantum of evidence was disclosed, assembled and reviewed by counsel replacing Pease, the district court erred in failing to investigate in relying on the Estate's misstated factual predicate leading to the grant of the Estate's requested Preliminary Injunction.

a. The Court Should Have Vetted the Legion of Misstated Facts Leading to the Grant of Injunction.

The Estate continually repeats its relatively recent usage of alleged trademarks but cites no evidence of registration, nor prior continual use or prior primary use of the marks HEAL THE WORLD or HEAL THE WORLD FOUNDATION. In fact, Appellants provided sufficient and uncontradicted evidence of their prior rights to, and registrations of, those marks that the district court removed those marks from the preliminary

injunction order. AAB, pp.65-66; SER04672. The Estate admits that Jackson's Heal the World Foundation "has not been active since approximately 2002." AAB, p.5. The Estate fails to mention that there were plans by Jackson to dissolve it at the end of 2004, due to then pending charges of personal misconduct, but HTWF remained active through 2003 when Melissa partnered with Ja in preserving its rights and assets from misuse by non-Jackson related parties and being given complete authority over it in early 2005. SER03442, 04730-91, 04792-97, 04848; SERRB001177-1474, 001475-77.

The Estate, mirrored by the district court, coined the concept that the "inactive" Jackson entity still "invokes Mr Jackson and Jackson's 1991 Corporation," a term for which the Estate provides no legal entitlement. AAB, p. 5. The district court's term "inactive" is somewhat artful, since that entity no longer had legal status as a result of failure to maintain its status. In fact, the allowed lapse of this corporation's legal status and lack of enforcement of related trademarks is clear evidence that Appellees never policed or defended any of the Heal the World trademarks from third party abuse prior to this litigation. AOB, pp. 13, 18, 23, 25, 26. Even after

Jackson's death, the Estate still did not attempt to police, defend or even maintain registrations on the HEAL THE WORLD trademarks against third parties, not related to Mr. Jackson. SER04744-58. Instead, Appellees filed multiple lawsuits in district court and oppositions in the USPTO, only against Appellants. SERRB000020, 001172.

The Estate harps on its endlessly repeated claim that Appellants lack its authorization, but the record is otherwise. AAB, pp. 4, 6, 7, 10, 11-12, 15-16, 18, 19-20, 33, 62-65, n.27. Appellants provided ample uncontradicted evidence of their authority concerning both in the 1991 HTWF and the revived 2008 HTWF, they even showed that the estate was well aware that HTWF shared legal counsel with Jackson a full year prior to his death, for the very purpose of policing, defending and preserving the HEAL THE WORLD brands from other infringing non Jackson third parties, yet still to date, they assert the “no connection” falsehood to the Courts and the public. ER000004-6; SER04846-85, 04792-97, 04730-91, 04837-39, 03340-43, 01286-87, 03336-37, 03338-39; SERRB000001-50, 000051-152, 001177-1474, 001503, 001504-05, 001506, 001507. Melissa was an officer of the 1991 Charity appointed by Jackson himself in 2005, again from 2006

to 2009 by Jackson himself then in 2010, finally, from 2009 till present day. While the executors had long since been fired from 2003 through 2009, never holding a seat on the Board or having any first hand knowledge of its activities. Melissa obtained the consent of Katherine and Joe Jackson to be on the Board of Directors of HWTF, and also elected Jackson's minor children to HTWF's Youth Board of Advisors. AOB, p. 3. The Jackson family, including Katherine Jackson and Joseph Jackson, Michael Jackson's mother and Father, Randy Jackson, Michael's brother, Prince, Paris and Blanket Jackson, Michael's three children and beneficiaries of the Estate, all recognized Melissa as a member of the Board of the 1991 HTWF Charity and participated in the charitable decisions and events for the organization. SER00229, 04792-97, 04798-803, 04846-51; SERRB000783, 000801-03, 000804, 001169, 001170, 001665-1840.

Plaintiff's imply that because the "Estate of Michael Jackson" which took over his affairs after Mr. Jackson's death in July 15, 2009, did not grant any "rights" to Defendants, that "no rights" existed, which is factually and legally false. AAB, p.10. The Estate does not contradict Appellants'

assertion that even if the Estate was to eventually acquire enforceable rights in HEAL THE WORLD or MJ, it cannot prevail on its ACPA claim.

ACPA provides relief to the owner of a mark where the defendant "registers, traffics in, or uses a domain name that ... is distinctive at the time of registration of the domain name [and] is identical or confusingly similar to that mark." 15 U. S.C. § 1125(d)(1)(A)(ii)(I). AOB, p.63. The mark "MJ" was abandoned for 14 years. The Estate's claimed mark "KING OF POP" was never owned by Plaintiff Triumph International, nor was THRILLER, and NEVERLAND was abandoned many years. AOB, pp. 27, 61-62.

ER000005-13; SER01580-99, 04730-91, 04744-58.

In 200 words, the Estate makes relatively short shrift of the provisions of the DTA, since it contradicts its repeated assertions that Melissa had no connection with Jackson, bad faith motives and the like. AAB, pp. 15, 62, 67. But it does not dispute that Appellants have, on multiple occasions, tried to work with the Estate, even tried to outright give certain trademarks to the Estate, with the condition that the Estate include Jackson's three children and family, in part ownership of those rights, an issue currently a problem

between the Jackson family and the Estate Executors. SER04792-97, 04846-851.

Appellees correctly state that “Mr. Jackson raised millions of dollars for his 1991 Corporation by aggressively publicizing the charity and its goals.” AAB, p. 5. However, Appellees omit to mention that Jackson gave Melissa complete authority of his 1991 Charity in 2005, subsequently merged with the 2008 HTWF. SER04846-851, 04850. Thus, all of Jackson’s “good will” and those efforts, would be considered evidence on behalf of Appellants, not the Estate, had the case gone to trial. SER04422-28.

The Estate asserts that “While Mr. Jackson's Heal the World Foundation has not been “active” since approximately 2002, as a result of its success in raising awareness and money for children's causes, ‘Heal the World’ is a phrase that continues to invoke Mr. Jackson and Jackson's 1991 Corporation,” AAB, p.5 (emphasis supplied).<sup>12/</sup>

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<sup>12/</sup> This assertion cites XVSER3329, which is merely a questionable opinion of Karen Langford, Plaintiff John Branca’s paralegal, which was not mentioned by the district court nor raise the need for an evidentiary hearing. Branca and Langford had been terminated by Jackson from 2003 through June 30 2009. (Trial Ex.1840pg15HTWF038621) and only rehired on Jackson’s behalf seven days before his death. Whether both Branca and his paralegal were knowledgeable enough to provide evidence of what happened



The Estate's repeated assertion that "Well aware of this inextricable link between "Heal the World" and Michael Jackson, in 2008, Defendants incorporated their own "Heal the World Foundation" and used Mr. Jackson's trademarks, name, image, and likeness to raise money for this "Heal the World Foundation" that was utterly unrelated to Jackson's 1991 Corporation." AAB, p.5. Again, the terms "inextricable link," and "utterly unrelated" are not only hyperbole but knowingly false which Appellants' evidence demonstrated.

Despite this evidence, the Estate blatantly endlessly repeats its false claim of "no connection" between Jackson's 1991 Heal the World

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during the six year period after being discharged is something the district court should at least have inquired into. The district court took the mere opinion of Branca's paralegal, who was not even an employee of Jackson's during the time period she was testifying about, (2003-2009) over the sworn testimony of Brian Oxman and Raymone Bain, top Jackson executives and representatives during that time period. Their evidence was that Jackson's 1991 Charity had been preserved by Melissa and that she had been given complete control in 2005, three years prior to the 2008 incorporation of the revived HTWF. SER04792-97, 04846-51. The AAB and its SER omitted large portions of Oxman's testimony, referencing only a small excerpt of it in SER04454-62, AAB, p. 29. The complete deposition confirms Melissa's testimony on HTWF's preservation and her authority from Jackson to take control of it in his place. SERRB000051-152.

Foundation and the revived 2008 HTWF, which is not only contrary to the record but is a subject of Appellants' libel counterclaim. AAB, pp. 5,16, 18-19, 29, 44, 58, n. 23, 69; ER000001-26, 00074-106, 000300-09, 000825; SER00162, 00173, 00259, 00826, 01282-319, 01315-16, 03326-47, 03429-42, 03439, 03455-58, 04562-67, 04831-38, 04730-97, 04798-803, 04804-51.

Based on Melissa's belief that "Michael will not go forward with Heal the World Foundation, without [her]," she began to trade off his name and goodwill. AAB, p. 6. Despite their attempts to demonize and discredit Melissa as some crazed fan, she was correct because Jackson did not go forward without her, due to his then pending legal problems.

The Estate states that the 1991 corporation was defunct since 2003. AAB, p.6. However, the 1991 corporation was not dissolved in 2004, as planned, but rather Melissa kept it preserved, operating it completely in 2005, under Jackson's personal authorization and direction. SER04822-24, 04848. (Bain declaration: "Mr. Jackson advised me that he knew Ms. Johnson and had granted her request to take over the Heal the World Foundation in early 2005. He also advised me that he requested that she handle any and all

matters concerning the foundation completely.”<sup>13/</sup> SER04848. The Estate alleges that “Defendants' infringing activities went into high-gear after Mr. Jackson's untimely death, when there was a revived interest in Mr. Jackson and his works. Seeking to exploit this opportunity, Defendants began selling merchandise using trademarks, including MICHAEL JACKSON, that belonged to Plaintiffs.” AAB, p. 6. Not exactly factual.

In fact, Defendants filed 17 trademark applications up to a year prior to Jackson's death. ER000008-13; SERRB000634-752. Further, Melissa began selling Jackson related merchandise, related to the charity brands years prior to his death, with his full knowledge, consent and authorization.

Following Jackson's death and after a full year of Jackson management failing to protect his trademarks, despite Melissa's pleas, she felt a fiduciary

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<sup>13/</sup> “We reported to Mr. Jackson that Ms. Johnson was protecting the charity domain collection, copyrights, (website content and charity initiatives), and the trademarks relating to the Heal the World Foundation.” “Ms. Johnson had Mr. Jackson's full support and permission to acquire and defend any asset or trademark necessary for use in the charity as he turned the charity over to her. He trusted her and felt confident that she would maintain the integrity of the foundation once had founded and without causing further embarrassment to him.” SER04849-50.

duty to preserve Jackson related trademarks left unprotected by the Estate in the face of renewed interest in anything related to him. She was already "authorized" to acquire any mark related to the charity and while Jackson attorneys did nothing, and third parties were rapidly filing trademark applications after his death, Appellants acted to protect as many Jackson marks as they could before the public could take them. SER04730-91, 04792-97 04804-30, 04846-51.

The Estate asserts that Defendants have no right to use Michael Jackson's name, likeness and image. AAB, pp. 4, 6,7,10,15-16,18,19-20,.33, .62-63, 63-64, n.27, 64-65. This mantra accompanies its repetitious assertion that "Defendants concede that at no time has the Estate ever granted any Jackson merchandising rights, Jackson trademark rights, or Jackson name and likeness rights to any Defendant or Melissa." AAB, pp.19-20)

Jackson attorney Brian Oxman, when deposed in preparation for a trial in this matter, testified that he had a conversation with Jackson at the Neverland Ranch in late 2004 regarding Melissa running the charity/ foundation and Jackson authorized Melissa to exploit his likeness for commercial purposes. At that meeting Jackson told Oxman that he really

loved Melissa's presentation and said "I want her to do this." SER000051-152; Oxman Dep. 73:20-25, Feb. 11, 2011.

Oxman also declared that Jackson told him "to tell Ms. Johnson that he had given her permission to run Heal the World Foundation...that the Foundation belonged to her. He was far too busy to be involved with the Foundation because of his pending legal matters, and he wanted Ms. Johnson to do everything she could to preserve it, operate it, protect it, and do all things necessary with respect to its trademarks and copyrights." SER04794.

Oxman and Raymone Bain, Jackson representatives during the years spanning 2004-2009, both declared that Jackson gave all rights and authority to Melissa and HTWF, needed to run his foundation, preserve its brands and IP, including the use of his name and image and that right of publicity was to be used by the foundation forever. SER04790, 04846, 04848.

Bain declared that "Jackson trusted Ms. Johnson but asked that I appoint a liaison from the Michael Jackson Company [Alexander Verbolsky] to communicate with her to make sure that she continued to develop and operate the charity with the utmost integrity and in an efficient and effective manner..." SER04846-851, 04846. Bain declared that Jackson had

authorized Melissa “to take control of the Heal the World Foundation, he said that he had done so with an advisement and strong warning to Ms. Johnson that he did not want to repeat what happened in 2001; and, that he was not going to be held responsible for any legal fees, financial obligations, or stand for the organization *he originally founded*, to be tarnished again in any regard.” SER04848.

In spite of its present denial, the Estate cannot deny that the record is clear that Melissa was given the right of Publicity by Jackson in 2005 prior to his death. The Estate acknowledges that Jackson’s 1991 HTWF had that right of Publicity inherently. AAB, p.4. (SER04764)

Oxman testified that in 2004, Melissa notified him of the expiration of many Jackson and HTWF related domain names, websites, trademarks and copyrights that Jackson attorneys were allowing to expire without Jackson’s knowledge. She told him that these Charity related assets needed to be protected from third parties and various items needed to be sold on behalf of the 1991 Charity, in order to protect and register the brands for future use, all while simultaneously raising money for the foundation’s relief initiatives.

Jackson reviewed Melissa’s proposals for her to take over the charity

completely and begin selling all the items the Charity needed to sell, in order to secure these assets and brands. Mr. Jackson approved for the sale of any items needed to acquire and preserve those brands, including the acquisition of any domain name or trademark that was necessary for the Charity to function according to its Jackson approved initiatives.<sup>14/</sup> SERRB000051-152, 000805-001167; SER04730-91, 04792-97, 04804-30, 04846-51.

b. The Estate misnames the Domain Transfer Agreement (DTA) and Summarily Dispenses with it

While admitting that DTA does not “ acknowledge or make any reference whatsoever to the ownership or transfer of trademarks (see XZSER3 429-3442),” the Estate incorrectly inserts in the title of the DTA the term “Name,” not found there. AAB, p.62, n. 26. The Estate states that Appellants “argue that..Mr. Jackson's representatives “chose” not to renew all the domain names listed in the transfer agreement... Mr. Jackson and his representatives relinquished all their trademark rights, which now properly

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<sup>14/</sup> Q. Did you discuss with Mr. Jackson that Ms. Johnson would attempt to raise money by selling all sorts of various merchandise using the name Michael Jackson, MJ, King of Pop? ...A. He said that she had his permission to operate the foundation, to run it, to sell anything associated with it.” SERRB000051-152; 56:21-57:2.

belong to Defendants. See AOB, 58. AAB, p.62, n.26. This distorts the record. Appellants' did not allege that Jackson's representatives "chose not to renew all the domain names."<sup>15/</sup> AOB, pp.57-58. Appellants stated that "[b]eginning in 2002 and 2003, Jackson's attorneys and management began allowing his many federal trademark registrations to expire." AOB, p.15 (not cited by the Estate). Appellants made no claim that "allowing" those registrations to expire was by choice for by negligence, but this does not stop the Estate from substituting its own spinning instead of quoting Appellants' and document's exact terms.

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<sup>15/</sup> The Estate cites a declaration by Jackson's IP attorney Evan N. Spiegel for vast amounts of character assassination of Melissa, all predating the 2003 DTA. But the Estate omits to mention that Spiegel repeatedly failed to cause the domain registrations to renew during each of the four years the contract required his client to do so. AOB, pp.24-25; SER03330-447, SER3332-33. The Estate misstates a letter to Spiegel, as written by Johnson in 2002, strangely predating the 2003 "domain transfer" it refers to. The domains that Melissa asks Jackson to buy are not from her, as they implied, but from the registrar because they were available to third parties. SER3364-95. The Estate fails to mention that the DTA recites that Jackson and MJJ Productions entered into the agreement to "protect the efforts of Johnson in securing the Domain Names," and it provided for payment to reimburse her for renewal payments for Domain Names. This reimbursement was necessitated due to Spiegel's failure to renew the domain collection in 2003. AOB, pp. 23-24. The Estate's falsely claim that Melissa "sold" the 2003 collection to Jackson, but its cited references actually show that she donated, not sold, it to him and HTWF. SER1344, ¶19; 3144-61; 3332-33, ¶8; 3364-95; 3400-28; 3429-42, 3400-3428, 03403.



The Estate's asserts that "the transfer of domain names in 2003 has no bearing whatsoever on Defendants' unauthorized exploitation of Plaintiffs' trademark and publicity rights more than six years later." AAB, p. 62, n.26. However, the Estate does not dispute the provision of the DTA specifically provided that Jackson would not allow the domain names to expire for three years, but that if they did expire, that Johnson would have the first right of refusal, *i.e.*, that she would be granted an option to register the name for herself. ER000314.

The Estate strangely claims that Appellants' assertions that they "have repeatedly offered to give the trademark registrations at issue to Plaintiffs and the Jackson family... is both contradicted by the record and irrelevant." The Estate then poses a question which Appellants do not know whether posed to them or to this Court:

First, if Defendants were willing to transfer the trademarks at issue, why did they seek to nullify the Settlement Agreement that effectuates such a transfer, particularly when that transfer was coupled with the opportunity for Melissa to serve on the Board of a legitimate Michael Jackson-related charity? Second, even if this statement were accurate, it has no bearing on the irreparable harm Plaintiff would have suffered in the absence of an injunction, or the balance of equities. Even if the marks were transferred to Plaintiffs, an order enjoining Defendants' further uses would still be necessary to protect Plaintiffs' rights.

AAB, p.67.

The Estate ignores a primary issue on appeal, the district court's dispensing summarily with Appellants' undisputed allegations of misrepresentation by its counsel of the need for, the terms of certain provisions, and the intentionally concealed final nature of the Settlement Agreement. The district court summarily disposed of the concept and evidence produced of a lack of informed consent when signing the MOU. There is no dispute that Melissa and the appellants have previously transferred domain names at no cost and were willing to do so, but not under the terms and time frame represented to them by their counsel.

As to the Estate's "opportunity to serve on the Board" inducement to sign, Melissa was already a board member and giving her something she already had was hardly consideration as the district court found. AAB, pp.35-36. In fact, all other board members, except Melissa and Mrs. Jackson, were then forced to lose their seats, and the charity ordered dissolved without any board or shareholders' meeting to authorize or ratify that action, clearly *ultra vires* illegal under California law, which requires directors of charitable corporations to give notice or obtain consent from the Attorney General

before taking certain actions, including "Sale or Disposal of all or substantially all corporate assets." AOB, p. 35, n. 12. In addition, Melissa was to keep certain trademarks she already possessed, hardly consideration.

In short, the consideration the district court found was neither appropriate or sufficient to induce signing even if all the terms and conditions were then known, such as their undisclosed final status as opposed to the represented interim proposal needed to postpone the next day trial date.

None of the foregoing convinced the district court to either convene an evidentiary hearing before granting the requested injunction, delaying the trial date which gave rise to the flurry of documents the night before, or making any change in its October order other than adding a footnote as to Melissa, which Appellants (and Melissa, who was personally affected notwithstanding not a named defendant) opposed.<sup>16/</sup>

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<sup>16/</sup> The Estate does not dispute that Melissa did not sign the MOU in her individual capacity, notwithstanding that the district court made orders directing her personally to perform certain tasks over Appellants' objections. The only change in the July 27 order was the addition of a footnote, over defense objection, that such orders were only in her capacity as an officer. However, as written, the footnote requires Melissa, not a named defendant, to affirmatively act as Defendants' agent, even if she resigned her positions with Defendants. Melissa is not under any obligation to continue acting as an officer and director of Defendants, and as a non-party, cannot be required to

c. Laches Appropriately Alleged the Estate's Sitting on its Alleged Rights by Failing to Enforce its Claimed Rights Against Claimed Infringers.

The Estate claims intellectual property rights to anything “invoking” or “inextricably linked,” or “connected with” Jackson long before it applied for those rights following Jackson’s death. The Estate makes these newly asserted rights in spite of the admitted fact that the Jackson camp had allowed hundreds of trademarks to remain unprotected for years before Jackson's death, and months after Jackson's death, not protecting a single trademark contested for the Estate beneficiaries until August 8th, 2009. This continued lapse was far too long for the authorized Charity HTWF to wait, putting at risk the many brands the Charity had long defended from those lapses. Third party non-Jackson related applicants began flooding the USPTO and WIPO, for Jackson related brands, the very day he died. Time was critical for the trademarks be protected for the family and the charity, which was the authorization Jackson had given Melissa prior to his death. SERRB001512-49, 001550-74.

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continue her affiliation with Defendants indefinitely, and thus it is unclear and unenforceable for that reason alone. Additionally, the court's orders still affects her own personal property and requires her to take affirmative action, regardless of her status as an officer or agent of the named Defendants. AOB, pp.41-42.

d. Likelihood of Success Finding Lacks Support.

The district court erred in finding that the Estate was likely to succeed on its claims of trademark infringement, unfair competition and false designation of origin claims, right of publicity, Anti-Cybersquatting Consumer Protection Act (ACPA), that the Estate would suffer irreparable harm without an injunction. AAB, pp. 63-67; AOB, pp. 59-60.

The Estate cites no evidence contradicting Appellants' assertion that the Estate would not have succeeded on the merits at trial for alleged trademark rights which it failed to demonstrate that it owns. The Estate, and its predecessors, Jackson and his representatives, have known, consented, and failed to object for over a decade and additionally executed the DTA the Estate's predecessors continually breached. AOB, pp.59-60. Furthermore, Appellants are entitled to the exclusive rights to the Heal the World marks. AOB, p. 60, n21. The Estate admits that Appellant HTWF registered the marks HEAL THE WORD FOUNDATION marks detailed in Appellants' brief. AOB, pp. 60-61.<sup>17/</sup> In contrast with these HTWF multiple federal

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<sup>17/</sup> The Estate does not dispute that Melissa personally owns the marks "HEAL THE WORLD" and "MAKE THAT CHANGE" in the United States. She also owns the marks "HTWF" and "MJ" internationally. " Chase "HEAL

registrations, the Estate merely claims that the use of the term "Heal the World" as the title of a song written by Mr. Jackson constitutes sufficient use in commerce to maintain trademark rights. ER000076. However, a song title itself generally cannot serve as a source identifier and thus as a trademark. Nor is plaintiffs' statement sufficient to demonstrate "the public associates the song with Mr. Jackson. AOB, p. 61. The Estate is not the registrant of most of the alleged trademarks at issue here, with its only actual trademark rights appear to be the term MICHAEL JACKSON in connection with sound recordings. AOB, p.62. SERRB001478-1501, 001508-09, 001510-11.

The Estate alleges infringement of trademark based on recently-filed applications, including the terms KING OF POP, NEVERLAND RANCH, NEVERLAND VALLEY RANCH, THRILLER 25 THE WORLD'S BIGGEST SELLING ALBUM OF ALL TIME, and M.J. ER000075. The Estate's sole evidence of those marks are recently filed trademark

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THE WORLD" is registered under Melissa's name AKA Angels Embrace Home Health Care (USPTO No. 77887732) and "MAKE THAT CHANGE" is registered under Melissa's name (USPTO no. 77789656). "HTWF" is also registered under Melissa's name (WIPO No. 1012171); and "MJ" is registered under the name Melissa Johnson (WIPO: 1023921). Many of which have already been acquired by the Estate using the order enforcing the fraudulent MOU. AOB, pp.51, n.20; SERRB000634-752.

applications, filed after Defendant's, yet still readily accepted by the district court. However, the Lanham Act does not provide standing for trademark infringement to a trademark applicant. 15 U.S.C. § 1114(1); AOB, pp.61-62.

The Estate cannot prevail on its ACPA claims which requires both bad faith intent to profit from use of the mark and uses a domain name which is confusingly similar to another's mark or dilutes it. AOB, p.62. The Estate cannot prevail on either element, since its predecessors approved all uses of marks to which the Estate has no exclusive rights. Nor has the Estate produced any evidence of Appellants' bad faith, since its predecessors knew and approved of all of Appellants' right to and use of the recently contested marks.<sup>18/</sup> So, on the one hand, the Estate fails to recognize the positive

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<sup>18/</sup> The Estate provides carefully selected snippets as its evidence of bad faith, but fail to point out that Melissa observed that Jackson's attorneys and management had failed to register critical Internet domain names and keep those registrations, once made, current. At her own expense, she registered over 900 domain names with the intent to provide them to Jackson for his use or the charity's and keep them out of the hands of third-parties. potential cybersquatters. AOB, p.23. At her own cost, she made and renewed lapsed registrations, purchased them from third parties and transferred them back to Jackson for no cost. Nor did she file for breaches of the DTA for allowing those registrations to lapse and for reimbursement. Nor did she accept and of the offers to purchase she received for those domain names. AOB, pp. 25-26. Section 2.4 of the of the May 30, 2003 DTA, recites: "Jackson desires to protect the efforts of Johnson in securing the domain names from the open market, and therefore, by and through MJJ, agrees to

relationships between Appellants and Jackson and his representatives and yet wants to attach itself to any indicia of intellectual rights from which money could result even though either abandoned, ignored, breached, or defaulted.

D. Merger, Neither “Sham” or Capable of Being “Undone”

The Estate alleges that following the district court's Preliminary Injunction, “Defendants commenced a scheme to hijack Jackson's 1991 Corporation and supposedly ‘merge’ Melissa's 2008 Corporation into it.”<sup>19/</sup> “Upon discovery of the sham merger, on March 10, 2011, Plaintiffs promptly filed, with the permission of the district court, a Supplement to the Complaint setting forth the newly- discovered allegations regarding the sham merger.”

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assume ownership and administration of the Domain names....”

<sup>19/</sup> Interestingly, the term "HiJacking" was also used by the Jackson family's attorney of 30 years, Brian Oxman, in an ABC affiliate interview to rebut the Estate's claims to the media that Melissa had "no connection" to Mr. Jackson or his 1991 Charity. Oxman responded that "The estate has been hijacked by strangers." Newscaster: "Oxman says even today the Jackson family is kept out of the loop by the executors, people he says, Michael Jackson did not like and even tried to fire." SER00230. Brian Oxman: "We have these people who Michael Jackson said you are no longer part of my life you are not to have anything to do with me ever again, they are the administrators of his estate." SERRB001168; SER00229, SER00230.



AAB, pp. 7-8; SERRB000051-152, SER00229, 00232, 00234, 04792-97, 04846-51.

The Estate falsely asserts Appellants and Melissa had “no authority” from Jackson to operate the HTWF Corporation and that the Estate Executors somehow did have that “authority” over the board of the 1991 Charity and therefore, could “deny permission” to Appellants to merge the Corporations five years after the merger had been concluded in accordance with state laws. AAB, pp. 3, n. 4, 7, 8, 28, 29, 31, n.11, 32, n.13, 42, 43; SER0022; SERRB000620-633, 000634-752.

The Estate claims that sometime prior to September 21, 2010, Melissa contacted the Franchise Tax Board falsely claiming to be acting on behalf of Jackson's 1991 Corporation, in order to determine "what needed to be done to revive the corporation." AAB, pp.28-29.<sup>20/</sup> It fails to mention that her

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<sup>20/</sup> The Estate does not dispute that in 2008, Melissa registered HTWF with the California Secretary of State at the suggestion of Jackson representative Alexander Vroblesky, Jackson's manager. Nor does it deny that in July 2008, Vroblesky directed Melissa to contact Venable LLP, who represented Jackson in connection with his IP. Melissa worked with Jackson's counsel, Mark Harrison at Venable to defend and protect these trademarks. AOB, p.25; SER00220, 00331.

request was made following her receiving a letter from the IRS, warning the 1991 HTWF Corporation would lose its 501(c)(3) status if it did not get current. The IRS recognized the 1991 corporation and Melissa as its place and person of contact. SERRB000801-03. The Estate asserts that the Bylaws of Jackson's 1991 Corporation provide that in the event of Jackson's death, his personal representatives, here presumably Mr. Branca and Mr. McClain, would control the corporation. AAB, p.29.

As with the Estate's over reaching essentially false claims of retrospective entitlement to any and all IP related, or "linked" to Jackson, its claims of control over Jackson's 1991 HTWF corporation is inaccurate. The sole basis of its claimed entitlement is one section in the 1991 HTWF bylaws, written in 1993, which Appellants provided.

Therefore, the Estate's "personal representatives" would not and could not just "control" the corporation because Mr. Jackson died, without being voted onto the board and even if that had happened, which it did not, they would merely hold a vote, having no control of the public charity. As cited by the Estate, the sole provision it cites allows that in the event of Jackson's

death, his representatives, an unclear term, could take his place on the board. SER00331.

However, the same paragraph also states that in the event of the resignation of a permanent member of the committee, that member may designate a person to fill the vacancy. SER00331. In fact, Jackson was the only director left on the Board just before it was to be dissolved in 2004, as the record shows he had resigned in 2005, designating Melissa to take his place at his sole direction, leaving her as the only director of the Charity upon his death, with Mr. Jackson not being on the Board for many years. In fact the Estate's sole support for its claimed authority was so weak that it had to add provisions to its MOU to give themselves seats on the board to which they had no entitlement. Its drafted MOU only granted its "representatives" control of the Board, by booting all existing directors from the Board, including Jackson's father Joe Jackson. SER04023-30. Appellants provided material evidence that there was a full board of directors of HTWF as merged none of them consisted of the Plaintiffs. The Estate executors had no authority to "control" the board after his death, nor did they when Jackson

was alive, its executors were fired by Jackson since 2003. SERRB001607; SER04793-94, 04848-50.

Appellants' counsel replacing Pease, objected that Melissa had no authority to bind Appellants to the settlement agreement, especially "to dissolve a corporation and relinquish all its assets." AOB, p.31. Further, the district court's reliance on *Mem 'l Hosp. Ass 'n of Stanislaus County v. Pac.Grape Prods. Co.* (1955) 45 Cal. 2d 634, 637, in which "a president or an officer had simply bound that organization to give over funds,...is a far cry from dissolving a public organization" which the settlement agreement required. SERRB000608. Those actions required board approval which was neither sought nor obtained due to prior defense counsel, Pease's rush to obtain Melissa's signature late on the eve of trial knowing there was no time to obtain such approval. AOB, p.31. The district court disregarded all provision of the MOU which were essentially *ultra vires* under corporate law.

The District Court Erred on June 27, 2011 ruling that: "no merger occurred," since Appellants objected that the MOU required Appellants to "undo" a merger which had already taken place and provide evidence that no

merger had occurred. This is somewhat like providing evidence that a living child had not been born.

Thus, the district court's ruling directing Appellants "to conform the public records of California, and any other jurisdiction, to the terms of this Agreement. that... that no merger occurred between the 1991 Heal The World Foundation and Defendants HTWF could not be performed. Cal. Civ. Code ¶ 3390(3); AOB, p.33., SER04563; ER000821-27, AAB, p.3.

#### CONCLUSION

In spite of an extensive, detailed factual record of Appellants' counsel and opposing counsel working to obtain Appellants' signature by misrepresenting that they were interim documents needed to obtain a last minute delay of a trial which appellants' counsel represented he was not prepared for, the district court abused its discretion in approving a settlement clearly lacking Appellants' informed consent. The district court approved the settlement over objections that it took jurisdiction over Melissa, a non party, and required her and appellants to perform acts clearly *ultra vires* under state

law and containing mandates which appellants cannot perform and would be in constant breach if not remanded based on Appellants' objections.

Appellants thus request that this Court vacate the October 27th Amended Judgment, reverse the district court's dismissal of Appellants' counterclaims and the imposition of its preliminary and permanent injunctions.

Dated: January 6, 2014

          /s/           Gary S. Brown  
GARY BROWN  
Attorney for Appellants

CERTIFICATE OF COMPLIANCE PURSUANT TO  
CIRCUIT RULES 28-4, 29-2(c)(2) and (3), 32-2 or 32-4 for  
Case No. 11-56926

This brief is preceded by a motion for leave to file an oversize brief pursuant to Circuit Rule 29-2(c)(2) or (3) and is not more than 12,000 words, excluding the portions exempted by Fed. R. App. P. 32(a)(7)(B)(iii), if applicable.

Dated: January 6 2014

\_\_\_\_\_/s/\_\_\_\_ Gary S. Brown\_  
GARY BROWN  
Attorney for Appellants

9th Circuit Case Number(s) Nos. 11-56926 and 11-57048

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CERTIFICATE OF SERVICE When All Case Participants are Registered for the Appellate CM/ECF System

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