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10 **UNITED STATES DISTRICT COURT**
11 **CENTRAL DISTRICT OF CALIFORNIA**
12 **WESTERN DIVISION**

14 JOHN G. BRANCA, Special Administrator
15 of the Estate of Michael J. Jackson; JOHN
16 MCCLAIN, Special Administrator of the
17 Estate of Michael J. Jackson; TRIUMPH
18 INTERNATIONAL, INC., a California
19 corporation,

18 Plaintiffs,

19 vs.

19 HEAL THE WORLD FOUNDATION, a
20 California corporation; UNITED FLEET, a
21 California corporation; and DOES 1-10,
22 inclusive,

22 Defendants.

CASE NO. CV 09-07084 DMG (PLAx)

**PLAINTIFFS' EX PARTE
APPLICATION FOR AN ORDER
EXCLUDING DEFENDANTS'
EXHIBITS FOR FAILURE TO
PROVIDE COMPREHENSIBLE
EXHIBIT LIST AND ANY EXHIBITS
TO PLAINTIFFS**

Trial Date: April 19, 2011
Complaint Filed: September 29, 2009

Hon. Dolly M. Gee

1 **TO THE COURT, ALL PARTIES AND THEIR ATTORNEYS OF**
2 **RECORD:**

3 **PLEASE TAKE NOTICE** that Plaintiffs John G. Branca and John McClain,
4 Co-Executors of the Estate of Michael J. Jackson (the "Estate") and Triumph
5 International, Inc. (collectively, "Plaintiffs") hereby apply *Ex Parte*, pursuant to Local
6 Rules 7-19 for an order excluding Defendants' exhibits as a result of their failure to
7 timely provide Plaintiffs with a comprehensible exhibit list and any of their exhibits, as
8 required by the rules (the "Application"). As described below, good cause exists.

9 More than a month has passed since Defendants were required to provide
10 Plaintiffs, and this Court, an exhibit list identifying the documents they intend to use at
11 trial. Although Defendants produced some sort of list, that list fell short of meeting
12 any of the basic requirements of an exhibit list, e.g., describing the document sought to
13 be used and/or providing a bates number. Plaintiffs have asked Defendants for a revised
14 list on numerous occasions so that the parties may meet and confer regarding stipulating
15 to exhibits, as the Court ordered the parties to do. Defendants alternatively ignored the
16 requests, or indicated that a revised list was forthcoming. Both responses by Defendants
17 had the same practical effect: no comprehensible exhibit list six days before trial.

18 Despite their failure to provide an exhibit list, Defendants have filed witness
19 statements with the Court referencing exhibits that were neither provided to Plaintiffs,
20 nor identified by the trial exhibit number on Defendants' deficient exhibit list (to the
21 extent that Plaintiffs are able to guess as to what document is referenced in Defendants'
22 list). Accordingly, Plaintiffs are not only in the dark as to any of the documents
23 Defendants intend to use at trial, but also cannot properly analyze or object to
24 Defendants' witness statements without having the referenced documents.

25 As described below, good cause exists for the granting of this Application.
26 Defendants have had ample time to work on and revise an exhibit list that, at the very
27 least, provides a bates number or description of the documents sought to be used. They
28 neglected to do so, despite Plaintiffs' regular reminders. Defendants have once again

1 exploited Plaintiffs' patience to the point of severely prejudicing Plaintiffs' ability to
2 prepare for trial. Such willful conduct is good cause for excluding Defendants' exhibits
3 from use at trial, and Plaintiffs respectfully request that the Court enter such an order.

4 The Application is based on this Notice of Application and Application, the
5 attached Memorandum of Points and Authorities, the concurrently filed Declaration of
6 Nina D. Boyajian, and all documents and papers on file with the Court in this action.

7 Defendants were given notice of this Application via an email sent to Defendants'
8 counsel, Edgar B. Pease, III, Esq., Law Offices of Edgar B. Pease, III, 16255 Ventura
9 Blvd., Suite 704, Encino, California 91436; Tel: 818.981.2200; Fax: 818.981.2201;
10 edgarpease@gmail.com. See Declaration of Nina D. Boyajian, ¶ 2, Ex. A. In response to
11 the *ex parte* notice, Mr. Pease left Ms. Boyajian a voicemail at 11:06 p.m. in which he
12 once again indicated that a revised list is forthcoming, but that Plaintiffs "may go ahead
13 and file their application if they please." *Id.*, ¶ 3. Mr. Pease also failed to indicate when
14 Defendants' documents would be provided to Plaintiffs. *Id.*

15
16 Dated: April 13, 2011

GREENBERG TRAURIG, LLP

17
18 By: /s/ Nina D. Boyajian

NINA D. BOYAJIAN

19 Attorneys for Plaintiffs John G. Branca and John
20 McClain, Special Administrators of the Estate of
21 Michael J. Jackson; Triumph International, Inc.
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Defendants have been provided with the allowances and forgiveness typically reserved only for pro se litigants. They have been treated as such because they have acted as such. Defendants are, however, represented by experienced trial counsel. This Application is intended to bring to the Court's attention, and communicate to Defendants that such litigation practices do not go without consequence. With less than a week before trial, Defendants have failed to produce to Plaintiffs an exhibit list that identifies Defendants' 982 listed exhibits by bates number or even a description that would allow Plaintiffs to identify the document. Defendants have further failed to provide a single one of their exhibits to Plaintiffs, despite their reference to documents in their witness statements (and despite Plaintiffs providing Defendants with all 11 volumes of their exhibits.)

As described in the concurrently filed Declaration of Nina D. Boyajian, Plaintiffs have been requesting a revised exhibit list from Defendants for weeks, and have either been ignored, or told that such a list is forthcoming. Plaintiffs will be extremely prejudiced if Defendants are permitted to attempt to introduce into evidence an unknown number of documents without any prior knowledge as to what those documents are. Moreover, Defendants' failure to submit a workable exhibit list will waste the Court's time in considering the admissibility of those documents, as Plaintiffs did not have the opportunity to consider stipulating to Defendants' exhibits. Defendants' pattern of untimely providing, or failing altogether to provide the documents required by the Federal Rules of Civil Procedure, the Local Rules, and this Court's scheduling order should no longer be excused.

II. RELEVANT FACTS

The Rule 16 pre-trial documents, including a joint exhibit list, should have been filed on March 1, 2011. Declaration of Nina D. Boyajian ("Boyajian Decl."), ¶ 4. Although Plaintiffs were ready to file their portions of the required documents on that

1 day, they agreed to stipulate to Defendants' request to extend the deadline for filing those
2 documents to March 7, 2011. *Id.*, ¶ 4, Ex. B. The week before the pre-trial documents
3 were due, Plaintiffs' counsel, Ms. Boyajian, sent to Defendants' counsel, Mr. Pease,
4 drafts of the joint pre-trial documents. *Id.*, ¶ 5, Ex. C. Ms. Boyajian did not receive any
5 response to the documents she circulated to Defendants until the evening of Sunday,
6 March 6, 2011, at which time Mr. Pease left Ms. Boyajian a voicemail at her office in
7 which he indicated that he would be sending Defendants' portions of the documents to
8 Ms. Boyajian on March 7, 2011, the day they were due. *Id.*, ¶ 6, Ex. D. As a result of
9 Defendants' failure to communicate, and delay in circulating documents, Plaintiffs were
10 under severe pressure to finalize and file all the required documents by the end of the
11 day. *Id.*, ¶ 7. In addition, Defendants' portions of the joint documents were ill-prepared
12 and incomplete, particularly Defendants' exhibit list. *Id.*

13 The exhibit list that Defendants provided to Plaintiffs listed 982 exhibits, described
14 not by bates number or any other description that would allow Plaintiffs, the Court, or
15 any person to determine what document the exhibit is referring to, but rather, by the
16 filename, e.g., "vancalls-qwe.pdf," (Exhibit 1001) or some other meaningless description,
17 e.g., "farming" (Exhibit 1129) or "mjquotes.com" (Exhibit 1148). *Id.*, ¶ 8, Ex. E. This
18 was done despite the fact that Plaintiffs undertook the burden and expense of bates-
19 stamping Defendants' entire document production and producing to Defendants a hard
20 drive containing their document production, in order to facilitate the use of documents at
21 trial. *Id.*, ¶ 9, Ex. F.

22 The parties filed an amended exhibit list on March 10, 2011. *Id.*, ¶ 10. Plaintiffs
23 had also intended to file a corresponding amended exhibit stipulation, but did not do so
24 after Mr. Pease requested that Ms. Boyajian insert into that document (a document that
25 was circulated to Mr. Pease in word format) Defendants' objections to Plaintiffs'
26 exhibits. *Id.*, ¶ 10, Ex. G. Mr. Pease had failed to make any objections to Plaintiffs'
27 exhibits upon the filing of the exhibit stipulation on March 7, and was hoping that
28 Plaintiffs would make Defendants' belated objections to their own exhibits. Ms.

1 Boyajian declined to do so. *Id.*, ¶ 11, Ex. G.

2 On Tuesday, March 22, 2011, Ms. Boyajian sent Mr. Pease a letter stating:

3
4 “Based on Defendants’ listing, it is nearly impossible to determine what
5 document is being identified by each exhibit number.....Plaintiffs request
6 that Defendants revise their portion of the exhibits lists prior to the pre-trial
7 conference this Friday. Doing so will assist all parties and the Court in
8 trying this case.”

9 *Id.*, ¶ 12, Ex. H. In response, Mr. Pease called Ms. Boyajian and said “I agree
10 100% with your letter,” and indicated that Mel Wilson, an officer of both Defendants,
11 was revising the exhibit list to include references to the bates number of the document,
12 and that he should be done with that task by the following Monday, March 28, 2011. *Id.*,
13 ¶ 13. Ms. Boyajian sent Mr. Pease a word document of the exhibit list to facilitate Mr.
14 Wilson’s work. *Id.*, ¶ 14, Ex. I.

15 Not having received any revised list from Defendants, on March 31, Ms. Boyajian
16 once again inquired as to the status of the list:

17 “Also recall that Judge Gee ordered that the parties meet and confer
18 regarding stipulating to exhibits. Obviously, we cannot do this until we
19 receive Defendants’ revised exhibit list, which identifies documents by bates
20 number. Last we spoke, you indicated that Mel Wilson expected to have the
21 revised list completed by Monday. Has that happened? If so, please send us
22 the revised document at your earliest convenience so we may assess the
23 need for any objections.”

24 *Id.*, ¶ 15, Ex. J. Another week passed, and Defendants still failed to produce a
25 revised exhibit list. *Id.*, ¶ 16.

26 On April 9, 2011, in an email noting the deficiencies with Defendants’ witness
27 statement of Katherine Jackson, Ms. Boyajian once again raised the issue of the exhibit
28 list:

“We also note that Katherine Jackson’s statement is missing page 5, and
makes reference to exhibits that have not been provided to us. I have been
asking you for weeks now, for a witness list that is usable (e.g., provides the
name of the document and the bates number, rather than simply providing

1 the file name) so we may meet and confer as to the admissibility of the
2 exhibits. You have indicated to me that you/your clients are working on it,
3 but have failed to produce to us a revised list. Please do so immediately.”

4 *Id.*, ¶ 17, Ex. K. Once again, no response from Defendants, and no revised exhibit
5 list. Despite Plaintiffs’ counsel’s comments regarding Mrs. Jackson’s witness statement
6 referencing exhibits without providing copies of those exhibits, the witness statements
7 filed by Defendants on April 12, 2011 also referenced exhibits without providing copies
8 of those exhibits. *Id.*, ¶ 18, Ex. L. Moreover, the exhibits referenced in the witness
9 statements are not identified by the trial exhibit numbers on Defendants’ deficient trial
10 exhibit list (to the extent that Plaintiffs are able to guess as to what document is
11 referenced in Defendants’ list). *Id.*

12 On April 11, 2011, in an email attempting to meet and confer regarding proposed
13 stipulated facts, Ms. Boyajian again expressed concern as to the status of the exhibit list:

14 “I am becoming very concerned that we have not yet seen a revised exhibit
15 list from Defendants, and accordingly do not have any idea as to the exhibits
16 Defendants intend on using at trial. As I mentioned in Saturday’s email,
17 even the exhibits mention in Mrs. Jackson’s statement were not provided nor
18 identified in an appropriate manner. As you are well aware, trial starts in
19 eight days. It is imperative that you provide us with a workable exhibit
20 list that allows us to identify Defendants’ proposed exhibits. This should
21 have been provided many weeks ago. I reserve all of Plaintiffs’ objections
22 to all proposed Defendant exhibits, including seeking to preclude
23 introduction of those exhibits for failure to follow the applicable Rules.”

24 *Id.*, ¶ 19, Ex. M. Notwithstanding Plaintiffs’ counsel’s express statement advising
25 of the possibility of seeking the precise relief sought by this Application, Defendants
26 once again failed to provide to Plaintiffs a revised exhibit list. *Id.*, ¶ 20.

27 On April 12, 2011, Plaintiffs sent to Defendants their complete set of exhibits and
28 again requested information regarding the status of Defendants’ lists. *Id.*, ¶ 21, Ex. N.

29 In contrast to Defendants’ conduct, Plaintiffs provided Defendants an exhibit list
30 prior to the filing of the pre-trial documents, and have kept Defendants apprised of any
31 revisions made to that list. *Id.*, ¶ 22, Ex. C. In addition, Defendants have the luxury of

1 reviewing Plaintiffs' witness statements while having, in their possession Plaintiffs full
2 set of exhibits. *Id.*, ¶ 23, Ex. N. Plaintiffs, on the other hand, have neither an exhibit list
3 nor Defendants' documents. *Id.*, ¶ 24.

4 With less than a week before trial, Defendants have failed to provide a
5 comprehensible exhibit list to Plaintiffs or this Court. In response to Ms. Boyajian's *ex*
6 *parte* notice, Mr. Pease left Ms. Boyajian a voicemail at 11:06 p.m. in which he once
7 again indicated that a revised list is forthcoming, but that Plaintiffs "may go ahead and
8 file their application if they please." *Id.*, ¶ 3. Mr. Pease also failed to indicate when
9 Defendants' documents would be provided to Plaintiffs. *Id.*

10 Mr. Pease responded that he expects to have a revised exhibit list to Plaintiffs by
11 noon, April 13, 2011, which will "give [Plaintiffs] five days to get at the documents."
12 *Id.*, ¶ 25. Such a representation not only lacks credibility, given counsel's prior broken
13 promises, but is also too little, too late. Even if Defendants do in fact provide a revised
14 list today, Plaintiffs would still be severely prejudiced by Defendants' failure to follow
15 the requirements of the rules.

16 III. ARGUMENT

17 A. Defendants' Failure To Comply With The Rules And The Court's Order 18 Regarding Pre-Trial Submissions Should Preclude Them From Introducing 19 Exhibits At Trial.

20 As described above, Defendants' exhibit list fails in every respect to serve the
21 purposes of an exhibit list, namely, identifying for the Court and all parties, the
22 documents and evidence Defendants intend to use at trial. Accordingly, as a result of
23 Defendants' failure to comply with the Federal Rules of Civil Procedure, the Local
24 Rules, and this Court's scheduling order, they should be prevented from introducing their
25 documents at trial.

26 Federal Rule of Civil Procedure 16(f) provides that, "[o]n motion or on its own,
27 the court may issue any just orders, including those authorized by Rule 37(b)(2)(A)(ii)-
28 (vii), if a party or its attorney...fails to obey a scheduling or pretrial order." Fed. R. Civ.

1 Proc. 16(f)(1)(c). *See, e.g., Carter v. Jablonsky*, 121 Fed. Appx. 888 (2d Cir. 2005)
2 (dismissal of plaintiff's case as a sanction for failing to obey scheduling and pretrial
3 orders was warranted, where, despite multiple extensions offered by the district court and
4 considerable efforts to secure plaintiff's cooperation, plaintiff inexplicably failed to meet
5 multiple deadlines requiring plaintiff to file witness and exhibit lists.)

6 Local Rule 16-2.3 states "[t]he parties shall disclose all exhibits to be used at trial
7 other than those contemplated to be used solely for impeachment, as set forth in
8 F.R.Civ.P. 26(a)(3)(A)(iii). The disclosure of exhibits shall be filed with the Court as
9 provided in L.R. 16-6. Exhibits shall be marked in accordance with the procedures set
10 forth in L.R. 26-3." Federal Rule of Civil Procedure 26(a)(3)(A)(iii) provides, in turn,
11 that "a party must provide to the other parties and promptly file the following information
12 about the evidence that it may present at trial other than solely for impeachment...an
13 identification of each document or other exhibit, including summaries of other evidence."

14 As Defendants have failed to comply with this Court's order and the applicable
15 procedural rules, the appropriate sanctions under Rule 37 include: "prohibiting the
16 disobedient party from supporting or opposing designated claims or defenses, or from
17 introducing designated matters in evidence; striking pleadings in whole or in part; . . .
18 dismissing the action or proceeding in whole or in part; [or] rendering a default judgment
19 against the disobedient party." Fed. R. Civ. Proc. 37(b)(2)(A)(ii), (iii), (v), (vi). "By the
20 very nature of its language, sanctions imposed under Rule 37(b) must be left to the sound
21 discretion of the trial judge." *Von Brimer v. Whirlpool Corp.*, 536 F. 2d 838 (9th Cir.
22 1976) (excluding certain documents which plaintiffs has not produced until the eve of
23 trial); see also *Malone v. U.S. Postal Service*, 833 F. 2d 128, 132 n.1 (9th Cir. 1987)
24 ("Alternative sanctions include: 'a warning, a formal reprimand, placing the case at the
25 bottom of the calendar, a fine, the imposition of costs or attorney fees, the temporary
26 suspension of the culpable counsel from practice before the court...dismissal of the suit
27 unless new counsel is secured...preclusion of claims or defenses, or the imposition of fees
28 and costs upon plaintiff's counsel.") (quotation omitted); see also *G.J.B. & Assoc., Inc. v.*

1 *Singleton*, 913 F. 2d 824, 826, 831-32 (10th Cir. 1994) (affirming monetary sanctions
2 under Rule 16(f) for counsel's failure to disclose exhibits used at trial).

3 Here, a Court order precluding Defendants from using their virtually unidentified
4 exhibits at trial is an appropriate sanction for Defendants' willful failure to provide
5 Plaintiffs and the Court a proper list of the exhibits to be used at trial.

6 **B. Good Cause Exists For Granting This Application As Plaintiffs Have Been**
7 **Prejudiced By Defendants' Failure To Provide An Exhibit List And Any**
8 **Exhibits.**

9 As a result of Defendants' failure to identify the documents they intend to use at
10 trial, despite being provided numerous extensions to do so, Plaintiffs have been unable to
11 adequately prepare for trial. Even if Defendants were to provide Plaintiffs their exhibit
12 list on the day of the filing of this Application, Plaintiffs would have five days to
13 consider an unknown number of exhibits, determine whether they have any evidentiary
14 objections to the documents, and otherwise integrate them into their trial preparation.
15 Such prejudice, caused through no fault whatsoever of Plaintiffs, should not be permitted.

16 Equally concerning as Defendants' failure to provide an exhibit list is Defendants'
17 filing of witness statements that reference exhibits that were (1) not attached to the
18 statements, and (2) not identified by the trial exhibit numbers on Defendants' deficient
19 trial exhibit list. *Id.*, ¶ 18, Ex. L. While Plaintiffs may be able to ascertain what some of
20 these exhibits are, Plaintiffs simply cannot identify all of them and should not be put to
21 the risk of guessing right or wrong on what exhibits Defendants are referencing.
22 Moreover, even if Defendants do provide their revised exhibit list today, no indication
23 whatsoever has been made regarding when they will be providing the actual documents
24 to Plaintiffs.

25 In the alternative, if the Court is not inclined to issue an order excluding
26 Defendants' exhibits on an *ex parte* basis, Plaintiffs request that the request for exclusion
27 be heard on a shortened basis. Defendants have put Plaintiffs in a position where filing a
28 noticed motion to the Court addressing this issue is simply not feasible.

1 In order to obtain *ex parte* relief shortening time for a motion to be heard outside
2 the ordinary law and motion schedule, the moving party must satisfy two factors: "First,
3 the evidence must show that the moving party's cause will be irreparably prejudiced if
4 the underlying motion is heard according to regular noticed motion procedures. Second,
5 it must be established that the moving party is without fault in creating the crisis that
6 requires *ex parte* relief, or that the crisis occurred as a result of excusable neglect."
7 *Mission Power Eng'g Co. v. Continental Cas. Co.*, 883 F. Supp. 488 , 492 (C.D. Cal.
8 1995). Here, both elements are easily satisfied, for the same reasons described above.
9 First, Plaintiffs will have *at most* five days to review Defendants' revised exhibit list
10 (assuming that it is actually provided today), which severely prejudices Plaintiffs' trial
11 preparation. Moreover, because Defendants have not provided any actual exhibits to
12 Plaintiffs, Plaintiffs do not know what documents are referenced in Defendants' seven
13 witness statements. With objections to those witness statements due on April 15, 2011,
14 such a failure on Defendants' part is unacceptable.

15 Second, Plaintiffs requested, time and time again, that Defendants provide them
16 with a revised exhibit list. Those requests were either ignored or met with empty
17 promises. Plaintiffs did everything in their power to avoid the very situation they now
18 find themselves in. Because Plaintiffs have no fault in creating the circumstances that
19 demand this relief, they should not be subjected to the resulting prejudice.

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IV. CONCLUSION

Plaintiffs have been severely prejudiced by Defendants' failure to provide them with a comprehensible exhibit list and Defendants' exhibits. Defendants failure to do so has been willful, and caused through no fault of Plaintiffs. Accordingly, an order excluding Defendants' exhibits is appropriate under these circumstances.

Dated: April 13, 2011

GREENBERG TRAURIG, LLP

By: /s/ Nina D. Boyajian
NINA D. BOYAJIAN

Attorneys for Plaintiffs John G. Branca and John McClain, Special Administrators of the Estate of Michael J. Jackson; Triumph International, Inc.