No. A136626
(San Francisco County Super. Ct. No. CGC-12-523966)

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

DAWN LOFTON, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Plaintiff,

v.

WELLS FARGO HOME MORTGAGE, A DIVISION OF WELLS FARGO BANK, NATIONAL ASSOCIATION,

Defendants.

INITIATIVE LEGAL GROUP APC,

Appellant,

v.

DAVID MARK MAXON,

Intervener/Respondent.

Appeal From Orders Of The Superior Court
For The County Of San Francisco
(Hon. Harold Kahn, Presiding)

[CORRECTED] APPELLANT'S REPLY BRIEF

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INTRODUCTION

Respondent David Mark Maxon provides no satisfactory rebuttal to ILG's showing that this Court should reverse the TRO and related orders below. The unprecedented and extreme TRO entered against a stranger to this action violates well-established law governing jurisdiction, mediation confidentiality and basic statutory requirements for ordering injunctive relief.

Maxon barely mentions that he is pursuing his claims against ILG—the identical grievances he raises here—in a separate action, *Maxon v. ILG*. That is the appropriate place for his complaints about ILG to be adjudicated. It is far too late for him to challenge the amount he received from the settlement of this action. Maxon, who knew class counsel, apparently discussed the proposed settlement with him, in addition to reviewing the court's notice. Maxon then submitted a claim for a $5,000 settlement payment. Maxon now claims, however, to have been entitled to $250,000 from Wells Fargo. To the extent Maxon wished to object to the approved settlement or class notice in this action, or opt out of the settlement, it is much too late to do so. If Maxon wants to pursue a claim against ILG for not *advising* him to opt out of the class settlement in this action, the proper forum to do so is in his separately filed action against ILG.

Maxon's legal arguments in support of his flawed effort to pursue ILG in this settled class-action all fail. As Maxon concedes, the final approval order terminated the court's jurisdiction with the sole exception of enforcing, under Section 664.6 of the Code of Civil Procedure, the approved settlement between Wells Fargo and the class members. That reserved jurisdiction would, for instance, allow a class member like Maxon to seek relief from Wells Fargo if the agreed-upon settlement was not paid. But it does not permit the court to rewrite the settlement it approved, and it does not allow the court to order any relief at all against persons who were not party to the settlement, such as ILG.

All other avenues failing him, Maxon falls back on the court's "inherent authority" to issue the TRO. But this, too, is of no help because a court's inherent authority cannot be exercised where subject-matter jurisdiction does not exist in the first place. His attempt to apply law governing class counsel to ILG is based on the false premise that ILG served in that role. It did not. Neither ILG nor its clients agreed to undertake the fiduciary responsibilities that serving as class counsel or representative plaintiffs would entail. ILG and its clients had a direct relationship with each other, not a court-imposed attorney-client relationship as is the case for absent class members who are deemed to be represented by class counsel.

Even if Maxon could overcome each of these jurisdictional hurdles, the TRO must be reversed for the independent reason that virtually all of the evidence Maxon submitted consisted of inadmissible mediation materials. This includes an unexecuted, draft term sheet from the mediation session that Maxon's counsel filed just hours before the TRO hearing. Maxon's argument that the TRO can be affirmed based on information in the "public record" lacks merit because the documents to which he points purport to reveal mediation communications. Any public disclosure of mediation information is beside the point, because the Evidence Code *does not permit* an implied waiver of mediation confidentiality. A waiver of mediation confidentiality may occur *only* if all participants and the mediator expressly so agree in writing or on the record.

Maxon's attempt to rely on communications between ILG and Wells Fargo after the mediation session likewise fails, because those communications—like the "public records" on which Maxon relies—purport to reveal what took place during the mediation. Moreover, those communications were made pursuant to the mediation and would not have existed but for the mediation. Maxon's extensive violations of mediation confidentiality require

reversal of the TRO because they without doubt materially affected the proceedings below.

In addition to all of the problems already described, each of which independently mandates reversal of the TRO, Maxon fails to rebut numerous other grounds for reversing the TRO, such as: the TRO was issued in violation of the basic statutory requirement of a complaint alleging a valid cause of action against ILG; lack of any evidence of irreparable harm; the availability of an adequate legal remedy in *Maxon v. ILG*; and case law stating that when an order is in practical effect a pre-judgment writ of attachment, it must meet statutory requirements that unquestionably were not satisfied here.

For each of these reasons, the TRO and related orders must be reversed.

ARGUMENT

I.

THE TRIAL COURT LACKED SUBJECT-MATTER JURISDICTION TO ENTER THE TRO AND OSC.

A. The Final Approval Order Terminated The Court's Jurisdiction Over Matters Other Than Enforcing The Approved Settlement.

Maxon does not contest that the final approval order constituted a final judgment nor that such a judgment, once the deadline to appeal has passed—which it has—results in "the court [having] no further jurisdiction of the subject matter." 2 B. WITKIN, CALIFORNIA PROCEDURE *Jurisdiction* § 328, at 942 (5th ed. 2008); AOB 14. Maxon also does not dispute that "any judgment or order rendered by a court lacking subject matter jurisdiction is void on its face." *Varian Med. Sys., Inc. v. Delfino*, 35 Cal. 4th 180, 196 (2005) (citation and internal quotation marks omitted). In an effort to avoid the inescapable conclusion that the TRO and OSC were beyond the court's jurisdiction,

Maxon presents a hodge-podge of arguments, all of which lack merit.

1. The TRO And OSC Did Not Enforce The Class Settlement.

As Maxon concedes (RB 21), the court reserved jurisdiction only over the construction, interpretation, implementation, and enforcement of the class settlement pursuant to Rule 3.769(h) of the Rules of Court and Section 664.6 of the Code of Civil Procedure. Maxon offers no explanation of how the TRO and OSC could be considered "enforcement" of the terms of the court-approved settlement between the class and Wells Fargo. Instead, he ignores this dispositive point presented in ILG's opening brief. AOB 16. ILG was not a party to the approved class settlement and that settlement did not grant any rights to, nor impose any obligations on, ILG. AA 151-54 (approved class settlement agreement). Accordingly, the TRO and OSC cannot be justified as enforcement of the class settlement under Section 664.6.

Maxon's contention that the court could assert jurisdiction because "the Supplemental Settlement was inextricably intertwined with the *Lofton* class settlement" (RB 22) is unsupported by any authority. It conflicts with Section 664.6's text, which states "if requested by the parties, the court may retain jurisdiction over *the parties to enforce the settlement* . . . ." (emphasis added). Here, the TRO and OSC did not enforce any settlement ILG agreed to in writing or on the record, and ILG is not a party to this action. *See Reed v. United Teachers Los Angeles*, 208 Cal. App. 4th 322, 340-41 (2012) (reversing consent decree entered against party that did not sign settlement agreement); *Wackeen v. Malis*, 97 Cal. App. 4th 429, 440 (2002). Additionally, the Supreme Court has made clear that only the parties to an action, not their counsel, are subject to Section 664.6. *Levy v. Superior Court*, 10 Cal. 4th 578, 586 (1995) ("the

term 'parties' as used in section 664.6 . . . means the litigants themselves, and does not include their attorneys of record").

Contrary to the strictures of Section 664.6, Maxon argues that the statute grants authority "to issue orders that affect third parties, if necessary to effectuate the settlement." RB 21. But his only authority for that argument, *In re Clergy Cases I*, 188 Cal. App 4th 1224 (2010), offers no support. *Clergy Cases* involved a global settlement of 25 individual cases brought by plaintiffs against a religious order. As part of that settlement, the parties—*i.e.*, the plaintiffs and the defendant—agreed that the court could retain jurisdiction under Section 664.6 to determine whether and to what extent confidential files related to members of the order could be made public. *Id.* at 1228-30.

The appellate court rejected a jurisdictional challenge by some of the persons discussed in the files. The Court of Appeal reasoned that "the court and the parties possessed documents produced by the [religious order] in discovery or listed on privilege logs, and the parties had every right to agree upon the means to determine if those documents were to be made public." *Id.* at 1237 (emphasis omitted). The court did *not* hold that orders could be issued against non-parties, only that non-parties could not prevent the parties from agreeing on a procedure to resolve their dispute about the files.

2. Post-Judgment Administration Of The Settlement Did Not Re-Open The Final Judgment.

Maxon implies that the court had jurisdiction to enter the TRO and OSC because "Settlement Administration was very much ongoing." RB 22. Because such activity to implement the approved settlement was within the scope of the court's limited post-judgment jurisdiction, it in no way undermines the finality of the judgment. The court's jurisdiction was limited to enforcing the terms of the settlement between the *Lofton* class and Wells Fargo, and the court was not free to add new terms related to the

individual settlements ILG's clients entered into with Wells Fargo. *Hernandez v. Bd. of Educ.*, 126 Cal. App. 4th 1161, 1176 (2004); *Weddington Prods., Inc. v. Flick*, 60 Cal. App. 4th 793, 810 (1998). Even if the court had previously exceeded its reserved jurisdiction, such action would be void. *Varian*, 35 Cal. 4th at 196.

In any event, Maxon's contention that post-judgment activity to enforce the class settlement was ongoing at the time of the TRO and OSC is unsupported by the record. He argues that post-judgment settlement administration was ongoing "as late as *April 2013*." RB 22 (emphasis in original). To do so, he points to an *unsigned* declaration of the settlement administrator dated *August 2012*—eight months *earlier*. RB 22 (citing RA 221). Obviously, an unsigned declaration is of no evidentiary value and, even if it were given any weight, its contents actually establish the opposite of what Maxon claims: namely, that as of the time the document was prepared, settlement administration had concluded.[1] That being the case, the court's jurisdiction terminated, even by Maxon's standard. RB 21 (reserved jurisdiction under Section 664.6 terminates when "all of [a settlement's] terms have been performed by the parties") (quoting *Wackeen*, 97 Cal. App. 4th at 439).

3. Post-Judgment Jurisdiction To Award Attorney's Fees Had Lapsed And Could Not Have Supported Jurisdiction To Enter The TRO And OSC.

Citing to *State ex rel. Standard Elevator Co. v. West Bay Builders, Inc.*, 197 Cal. App. 4th 963, 979 (2011), Maxon notes

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[1]The unsigned declaration states that, as of August 2012, all claims had been processed. RA 221 ¶ 11; *see also* RA 221 ¶ 15 (some checks remained uncashed but "void dates have passed"). Class counsel's declaration likewise confirms, as of September 2012, "all of the disputed claims are now resolved." RA 203 ¶ 13. (Notably, the two declarations just referred to are not even in the appellate record. Maxon's motion to add them remains pending.)

that when a case is dismissed for lack of jurisdiction, a court has ancillary jurisdiction to award attorney's fees to a prevailing party. RB 22. While true, the point is irrelevant. Maxon did not seek an *award* of attorney's fees. Maxon sought *disgorgement* of fees from ILG, a non-party, under theories that have nothing to do with the ability of a court to award attorney's fees to a prevailing party.

In any event, the power to award fees—even if somehow relevant—does not last forever. A party must bring a motion for fees within the time to file a notice of appeal, which time can be extended by stipulation for 60 days. CAL. R. CT. 3.1702; *Brown v. Desert Christian Ctr.*, 193 Cal. App. 4th 733, 737 (2011). Those deadlines rule out Maxon's reliance on the court's power to award attorney's fees. The time to appeal the final judgment, along with the court's jurisdiction over awarding attorney's fees to a prevailing party in this action, expired 60 days after final judgment was entered on July 27, 2011, a year before Maxon sought to intervene in September 2012.

4. The Intervention Statute Did Not Revive Subject-Matter Jurisdiction.

Maxon argues that Section 387 of the Code of Civil Procedure, which governs intervention, afforded subject-matter jurisdiction to support the TRO and OSC. RB 20. But Section 387 does not create subject-matter jurisdiction or serve to restore it once lost. Section 387(a) provides that a "third person is permitted to become a party to an action or proceeding between other persons" under certain circumstances. For Section 387 to apply, an action must be pending for the intervener to join. Here, there was no pending action between Lofton—or the class she represented—and Wells Fargo. That action had been resolved by final judgment, and the appeal deadline had passed, with the court reserving jurisdiction only to enforce the settlement. *E.g.*, *Pangborn Plumbing Corp. v. Carruthers & Skiffington*, 97 Cal.

App. 4th 1039, 1047 n.3 (2002) (order enforcing settlement under Section 664.6 appealable "because it purport[ed] to finally resolve all issues between these particular parties . . . , and left nothing to be done *but to enforce what had been determined*") (emphasis added); *see also* AOB 13-14 (additional authorities).

Maxon points out that Section 387, which once required intervention to be sought before trial, now permits it to be sought post-judgment. RB 20-21 (citing *Mallick v. Superior Court*, 89 Cal. App. 3d 434, 439 (1979) (absent class member's intervention appropriate to challenge fitness of current class representative pending active appeal)). But Section 387 does not create subject-matter jurisdiction where none exists. Since the parties could no longer invoke the court's jurisdiction, it would make no sense that a non-party could revive the action as an intervener.

Maxon goes on to argue that two cases on which ILG based its finality argument, *Martorana v. Marlin & Saltzman*, 175 Cal. App. 4th 685 (2009), and *Louie v. BFS Retail & Commercial Operations, LLC*, 178 Cal. App. 4th 1544 (2009), are "inapplicable" to his supposed right to intervene. RB 21 n.8. Maxon is conflating two entirely different points. Those two cases do not relate to Section 387 but, along with numerous other authorities (AOB 13-16), reflect the rule that final judgment terminates a court's subject-matter jurisdiction.[2]

Maxon's point that neither *Martorana* nor *Louie* "address[] the right of an injured class member to intervene in an *ongoing proceeding*" (RB 21 n.8) proves nothing. As already explained, the proceeding here was not ongoing but had been concluded by final judgment. *Martorana* and *Louie* both discuss the finality of

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[2]The issue of jurisdiction, discussed above, is entirely distinct from whether—if the court had jurisdiction—it erred in allowing Maxon to intervene. *See* Section IV, *infra*; RB 16-18 (arguing intervention permitted under Section 387), 20 (arguing that subject-matter jurisdiction existed because Section 387 no longer requires intervention to be sought pre-trial).

class settlements and their conclusive effect. *See Martorana*, 175 Cal. App. 4th at 695 (court's "findings on the fairness of [the] settlement, adequacy of notices, and adequacy of class representation are final and have the force of law") (citation and internal quotation marks omitted); *Louie*, 178 Cal. App. 4th at 1559 (only issues "withdrawn by an express reservation" from a final class judgment remain open). Those decisions, and all the others ILG cited, confirm that the final approval order marked the end of the court's jurisdiction, except for enforcement of the approved settlement.

B. The Court Could Not Enter Judgment Against ILG, And Thus Did Not Have Jurisdiction To Enter The TRO And OSC.

1. Judgment Cannot Be Entered Against A Non-Party.

Maxon fails to address the well-established principle that a judgment may not be entered against one who is not a party to the action. AOB 17-20; *Tokio Marine & Fire Ins. Corp. v. W. Pac. Roofing Corp.*, 75 Cal. App. 4th 110, 123 (1999); *Fazzi v. Peters*, 68 Cal. 2d 590, 594 (1968); *see also Donovan v. Hollar*, 25 Cal. App. 2d 548, 553-54 (1938) (judgment reversed because complaint lacked cause of action against appellant). Maxon agrees that ILG is not a party to this action (RB 2), which means that no judgment could be entered against ILG. It follows that the TRO must be reversed, because a TRO serves only as a prelude to a judgment following a trial on the merits. *Landmark Holding Grp., Inc. v. Superior Court*, 193 Cal. App. 3d 525, 528 (1987); *Cont'l Baking Co. v. Katz*, 68 Cal. 2d 512, 528 (1968).

Maxon defends the TRO by pointing to the court's authority to regulate the conduct of attorneys before it. RB 26. Putting aside the obvious point that ILG was *not* counsel of record, Maxon is wrong. A judgment cannot be entered against counsel of record. *See, e.g., Moore v. Kaufman*, 189 Cal. App. 4th 604, 615-16 (2010) (the rule prohibiting judgment against a stranger to the action

"applies if the nonparty is the attorney or former attorney of a party").

2. The Court Could Not Enter A Second Final Judgment.

Another reason the court could not enter judgment against ILG is that only one final judgment may be entered in an action. *Griset v. Fair Political Practices Comm'n*, 25 Cal. 4th 688, 697 (2001); *see* CODE CIV. PROC. § 904.1. Such judgment ends the action, and finally determines the rights of the parties in relation to the matter in controversy. *San Joaquin Cnty. Dep't of Child Support Servs. v. Winn*, 163 Cal. App. 4th 296, 300 (2008). Here, there *already* was a final judgment: the July 2011 final approval order, which concluded the dispute between the class and Wells Fargo, leaving nothing to be adjudicated between the parties other than to enforce the approved settlement. Because there can only be one judgment, Maxon could not obtain a *second* judgment in this action against ILG. Maxon's inability to obtain a judgment against ILG renders the TRO and OSC invalid.

C. The Court's "Inherent Authority" Did Not Confer Jurisdiction To Issue The TRO And OSC.

Under the rubric of "inherent authority," Maxon asserts a variety of arguments by which he incorrectly seeks to expand the court's reserved jurisdiction beyond enforcement of the class settlement under Section 664.6. RB 23-28. Not one is correct.

1. Section 187 Of The Code Of Civil Procedure Did Not Confer Jurisdiction.

Maxon first argues that the court had jurisdiction to issue the TRO and OSC under Section 187 of the Code of Civil Procedure. RB 23. But that statute does not create jurisdiction where none exists. It provides that "*[w]hen jurisdiction is . . . conferred* [a trial court has] all the means necessary to carry it into effect." (Emphasis added.) "[S]ection 187 operates only where some other provision of law confers judicial authority *in the first instance*."

People v. Gonzalez, 51 Cal. 3d 1179, 1257 (1990) (emphasis in original); *Tokio Marine*, 75 Cal. App. 4th 110, 116 (1999) (Section 187 "has never been construed to allow imposition of liability on an entity which was never a party to the action").

2. Maxon Provides No Authority For His Assertion That A Class Action Court May Enjoin Non-Parties Who Are Not Counsel Of Record.

Maxon argues that a "court's supervisory authority . . . includes the power to issue orders affecting the rights of third parties whose actions and omissions impact the case at issue." RB 24. The authorities he cites do not support his flawed argument. In fact, each of the cases on which Maxon relies involved parties and their counsel who were *before the court* issuing the order in question.

Maxon first argues that the TRO and OSC may be justified by a line of federal cases that allow multi-district litigation courts "to examine and adjust individual contingent fee contracts implicated in a global settlement, even if not denominated a class action." RB 24 (citing, *inter alia*, *In re Vioxx Prods. Liab. Litig.*, 650 F. Supp. 2d 549 (E.D. La. 2009)). Maxon mischaracterizes the decisions he cites. They do not permit courts to reach out and regulate strangers to the action but instead involve global settlements of multiple actions that the parties and their counsel *agreed* to have a court administer. *In re Genetically Modified Rice Litig.*, No. 4:06 MD 1811, 2010 WL 716190, at *5 & n.4 (E.D. Mo. Feb. 24, 2010); *Vioxx*, 650 F. Supp. 2d at 558-59, 561-62; *see also In re Oil Spill by Oil Rig "Deepwater Horizon,"* MDL No. 2179, 2012 WL 2236737, at *2 (E.D. La. June 15, 2012) (imposing cap on attorney's fees "for all attorneys representing claimants/plaintiffs that settle claims through either or both of the Settlements" submitted for court approval); *In re Zyprexa Prods. Liab. Litig.*, 424 F. Supp. 2d 488, 490 (E.D.N.Y. 2006) ("[u]nder court supervision, a complex claims administration process was developed" and special masters recommended fee

schedules "[u]pon consultation with counsel and with members of the plaintiffs' steering committee").[3]

Numerous federal courts considering the question have rejected the notion that an MDL court may assert jurisdiction over parties, counsel or settlements in cases not consolidated before it. *Genetically Modified Rice*, 2010 WL 716190, at *4-5 (no jurisdiction to force defendants to hold back funds from settlements with non-party plaintiffs to contribute to leadership counsel fees) (collecting cases); *see also In re Showa Denko K.K. L-Tryptophan Prods. Liab. Litig.-II*, 953 F.2d 162, 166 (4th Cir. 1992) (no jurisdiction to force "[c]laimants who have not sued and plaintiffs in state and untransferred federal cases" to contribute to leadership counsel fees because the absent parties "have not voluntarily entered the litigation before the district court nor have they been brought in by process"); *Hartland v. Alaska Airlines*, 544 F.2d 992, 1001 (9th Cir. 1976) ("[T]he District Court had not even a semblance of jurisdiction . . . to order anything or anybody, and least of all to compel lawyers who were not parties to the action" to contribute to a fund to pay leadership counsel). Neither ILG nor its clients voluntarily submitted any agreement between them for court supervision in this action. To the contrary, the record reflects that ILG, the court and class counsel all treated ILG's representation of its clients as independent of this action. AA 561:5-6, 563:7-14.

Of course, Maxon is not left without a forum to assert his grievances against ILG. He can, and has, filed a separate action to do just that: *Maxon v. ILG*. Ironically, even while attempting to justify the TRO, Maxon cites two cases that confirm that his

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[3]Even when parties have submitted a settlement for administration, supervisory power over attorney's fees is "'reserved for exceptional circumstances.'" *Zyprexa*, 424 F. Supp. 2d at 493 (most often "'[a]n agreement between two freely consenting, competent adults will . . . be controlling'") (quoting *Rosquist v. Soo Line R.R.*, 692 F.2d 1107 (7th Cir. 1982)).

claims must be brought, if at all, in a separate action. Maxon cites *Mark v. Spencer*, 166 Cal. App. 4th 219 (2008), to argue that a class action court's "supervisory authority . . . includes the power to issue orders affecting . . . third parties" (RB 24), but the case says no such thing. The court ruled that the plaintiff attorney, who had served as co-class counsel in a prior action, could not enforce a fee-splitting agreement against his co-counsel because the agreement had not been disclosed to the class action court during the fee approval process. 166 Cal. App. 4th at 223, 228-29. *Mark* was a *separate* case from the class action, like *Maxon v. ILG*, as is another decision Maxon cites in support of the court's supposed power to enter orders against non-parties. *See Pillsbury, Madison & Sutro v. Schectman*, 55 Cal. App. 4th 1279, 1281-82 (1997) (preliminary injunction upheld against lawyer who *was a defendant*). All of Maxon's authority involves relief adjudicated by a court in an action in which the attorney was a named party or acting as counsel of record to a named party. *E.g.*, *Conn v. Superior Court*, 196 Cal. App. 3d 774, 777 (1987) (plaintiff and his counsel of record ordered to return documents plaintiff stole from his former employer).

3. The TRO And OSC Cannot Be Justified As Regulation Of Class Counsel Or Class Action Fees.

Maxon argues that "California law, informed by the Due Process Clause of the U.S. Constitution, not only authorizes but *requires* that trial courts safeguard and protect the rights of absent class members against overreaching and collusive conduct by attorneys who purport to represent them." RB 23 (emphasis in original). In so arguing, Maxon points to case law that discusses a class action court's supervisory role over class counsel who are deemed to represent *absent* class members. RB 22-25; *see also In re Fine Paper Antitrust Litig.*, 617 F.2d 22, 27 (3d Cir. 1980) (judicial "duty to supervise class counsel in order to protect *absent* class members") (emphasis added); *Cummings v. Connell*,

402 F.3d 936, 944 (9th Cir. 2005) ("the *absent* class members' rights must be scrupulously observed") (emphasis added). ILG was not court-appointed class counsel but instead had a direct attorney-client relationship with Maxon and the other clients ILG represented in their individual claims against Wells Fargo.

Maxon pervasively relies on rules and doctrines unique to class counsel even though ILG did not serve as class counsel. Those special rules apply "[b]ecause absent class members are not directly involved in the proceedings" and, as a result, "oversight to ensure settlements are fair and untainted by conflict is the responsibility of both the class representative and the court." *Mark*, 166 Cal. App. 4th at 227 (emphasis omitted). ILG's clients were not "absent" in their relationship with ILG, a firm they hired directly. Accordingly, Maxon errs in relying on rules and doctrines regarding class counsel's conduct with respect to unnamed class members. RB 23.[4]

The cases Maxon cites regarding the court's supervisory power over class counsel are not only inapposite but demonstrate

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[4]Maxon's brief erroneously implies that ILG was class counsel. For instance, Maxon claims that "thirteen cases controlled by ILG, including the *three filed as class actions*, were handled together at the mediation." RB 7 (emphasis added). ILG had *previously* acted as counsel to two individual clients who sought to bring class claims but did not obtain class certification. AOB 2-3. A third action, *Mevorah*, was certified but later decertified and was prosecuted by class counsel in this action, not ILG. AOB 3. In any event, even if ILG were class counsel in some *other* case, that would not justify the court in *this* action asserting jurisdiction over ILG.

In an even bigger stretch, Maxon cites to materials beyond the record, and to which ILG has objected in its Opposition To Maxon's Motion To Supplement The Record And Request For Judicial Notice, regarding a proposed (but not certified) class action prosecuted by Mark Yablonovich, a former partner of a defunct partnership, Initiative Legal Group LLP. No evidence demonstrates that ILG "controlled" Yablonovich or that Yablonovich's acts or omissions may in any way be imputed to ILG.

supervisory power to be far from unlimited—even over named parties and counsel of record. *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 91 (1982) (reversing pre-certification order limiting communications of parties and their counsel with actual and potential class members); *Howard Gunty Profit Sharing Plan v. Superior Court*, 88 Cal. App. 4th 572, 580-82 (2001) (reversing order regulating parties' pre-certification communications with potential class members). None of the concerns that arise when a court appoints counsel to represent unnamed class members apply here, where ILG's clients directly retained that firm as their counsel.

Maxon also relies on inapplicable cases that involve named parties and class counsel, who were before the court issuing the order, and who attempted to interfere with a court-ordered notice procedure. *Hernandez v. Vitamin Shoppe Indus., Inc.*, 174 Cal. App. 4th 1441, 1444 (2009), involved an attorney who represented one of the named plaintiffs in a class action in which the court preliminarily approved a settlement on the motion of another named plaintiff. The court prohibited the attorney from attempting to convince absent class members that the settlement was not good for them and that they should opt out of it and retain him. *See also Gainey v. Occidental Land Research*, 186 Cal. App. 3d 1051, 1057-58 (1986) (where *defendant* sent its own communications to class members after court-approved notice was sent, trial court appropriately ordered corrective notice). Here, Maxon does not contend that ILG interfered with the court-approved notice procedures, but he actually argues the opposite: that ILG *encouraged* him to *accept* the class settlement. RB 9; AA 215 ¶¶ 10-15.

Notably, even the court in *Hernandez* did not attempt to prohibit communications between the attorney there and class members who, like ILG's clients, retained him as their own counsel *prior* to class certification. 174 Cal. App. 4th at 1452; *see also Gulf Oil*, 452 U.S. at 95 (order regulating communications

with class members "exempted attorney-client communications initiated by the client"). When unnamed class members have a pre-existing relationship with counsel of their own choosing, a class action court would not have authority to override that choice and impose new counsel. *Lyle v. Superior Court*, 122 Cal. App. 3d 470, 481-83 (1981) (court erred in disqualifying counsel without weighing client's interest in counsel of choice and hardship from disqualification). While Judge Giorgi appropriately respected the right of ILG's clients to choose their own counsel (AOB 5), Judge Kahn in effect asserted authority to regulate the relationship of ILG with its former clients as though ILG had served as class counsel for unnamed class members. Since ILG's clients had retained ILG on their own, long before this action was even filed, and were never deemed by the court to be represented by ILG as class counsel, the court acted beyond its jurisdiction. The fact that the class settlement imposed a release in favor of Wells Fargo in exchange for class members receiving compensation did not subject ILG, as their counsel in *other actions*, to the court's jurisdiction.

Significantly, neither ILG nor its clients agreed to take on the fiduciary obligations that named plaintiffs owe to unnamed class members. ILG's clients, and ILG on their behalf, were free to seek an enhanced result over and above the benefit that the court-approved settlement in this action afforded the class. AOB 17; *Duhaime v. John Hancock Mut. Life Ins. Co.*, 183 F.3d 1, 6 (1st Cir. 1999); *Weight Watchers of Philadelphia, Inc. v. Weight Watchers, Int'l, Inc.*, 455 F.2d. 770, 775 (2d Cir. 1972). Unlike Plaintiff Lofton, the class representative, and class counsel, ILG did not represent the unnamed class members and owed no duties to them. And, unlike class counsel in this case, ILG did not participate in prosecuting this action or seek any fees or costs payable out of the class recovery in this action.

Having no reasoned response to ILG's argument that neither it nor its clients owed duties to the class, Maxon contends that

Duhaime—which so held—is inapplicable because it was a federal, rather than a state, decision. RB 27. But California courts routinely look to federal decisions on class action procedure for guidance (*Green v. Obledo*, 29 Cal. 3d 126, 145-46 (1981)), a practice Maxon acknowledges when he cites to federal law in his brief. RB 3, 24-25, 46-47.[5]

Maxon goes on to argue that Rule of Court 3.769(b) conferred "[a]uthority" over ILG. RB 28. At the outset, Maxon errs again in attempting to apply to ILG a rule that regulates class counsel. Rule 3.769(b) imposes a disclosure obligation "in any application for approval of the dismissal or settlement of an action that has been certified as a class action." ILG did not file any such application and, for the reasons just discussed, had no reason to. More importantly, Maxon cannot rely on Rule 3.769(b) to confer jurisdiction. The rule does not vest jurisdiction at all but merely imposes a disclosure obligation on class counsel. The court's authority to enter judgment based on a class action settlement derives from Section 664.6, not Rule 3.769. *See Reed*, 208 Cal. App. 4th at 341-42 (the "rule . . . did not create the trial court's power to enter judgment. Rather, the rule reflects the Judicial Council's instruction on employing that power").

Additionally, Section 664.6 did not provide authority to modify the settlement that was already approved and entered by the court. *Hernandez*, 126 Cal. App. 4th at 1176 (under Section 664.6, "[t]he court is powerless to impose on the parties more restrictive or less restrictive or different terms . . ."); *Weddington Prods.*, 60 Cal. App. 4th at 810 (same). The trial court's

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[5]Maxon's citation to *Neal v. Bank of America*, 93 Cal. App. 2d 678 (1949) does not support his contention that the TRO and OSC can be justified under a class action court's supervisory powers. *Neal* addressed whether a court in a non-class action could strike a sham amended complaint. *Id.* at 683. Nor does *In re Ungar*, 25 So. 3d 101 (La. 2009), support Maxon's jurisdictional argument; *Ungar* was an attorney disciplinary proceeding that does not speak to the scope of a civil court's jurisdiction.

jurisdiction was limited to enforcing the settlement agreed to by the *Lofton* class and Wells Fargo, and it could not add new or different terms related to the separate settlements ILG secured for its clients.

4. The Court Did Not Assert, And Could Not Have Asserted, Jurisdiction Over ILG As An Enjoined Party's Agent Because ILG Was The Only Party Enjoined.

In another attempt to support his inherent authority jurisdictional argument, Maxon points to case law that provides that an agent of an enjoined party may be held in contempt for violating an injunction. RB 25. He argues that ILG was an agent of its former clients and "also as the holder of funds paid by defendant Wells Fargo, ILG was an agent of the parties for purposes of this rule." RB 25. Maxon's argument is nonsensical. First and foremost, neither Wells Fargo nor ILG's former clients were enjoined, which means ILG's acts or omissions cannot be viewed as violating an injunction *against* Wells Fargo or ILG's former clients—none exists. Second, ILG was not, and could not be, an "agent" for Wells Fargo, its adversary in litigation.

The rule on which Maxon relies exists to prevent enjoined parties from evading an injunction by carrying out prohibited acts with or through nonparties. *People v. Conrad*, 55 Cal. App. 4th 896, 902 (1997); *Berger v. Superior Court*, 175 Cal. 719, 721 (1917) ("[T]he whole effect of this is simply to make the injunction effectual against all through whom the *enjoined party* may act, and to prevent the prohibited action by persons acting in concert with or in support of the claim of the *enjoined party*, who are in fact *his* aiders and abetters") (emphases in original); *see also Bussart v. Superior Court*, 464 P.2d 668, 671-72 (Ariz. Ct. App. 1970) (applying similar rule to conclude that injunction against an attorney for a party to the action could not stand when the *party* was not first enjoined).

D. The Preclusive Effect Of The Final Approval Order Bars Maxon's Untimely Objection.

Maxon's contention that his claim was worth more than he received in the class settlement amounts to nothing more than a tardy objection to the settlement. Maxon's newfound belief that he is entitled to $250,000 in unpaid overtime cannot turn back the clock and allow him to object when the deadline has long passed.[6] The court's notice to him stated that failure to request exclusion by the deadline would result in the request being ineffective and him being bound by the class settlement. AA 424; *see also* AA 153 (final approval order). Maxon, who knew class counsel, apparently discussed the proposed settlement with him, in addition to reviewing the court's notice. RA 201 ¶ 9. Nevertheless, not only did Maxon fail to object or opt out, he affirmatively chose to participate by submitting a claim form. AA 418 ¶ 14. He cannot now object that the settlement is unfair to him or anyone else.

A final approval order conclusively determines the adequacy of notice, and that finding is binding on the class as a matter of res judicata and collateral estoppel. *Martorana*, 175 Cal. App. 4th at 694-95. That would be the case even if the court had not been informed of the potential separate settlements that ILG was negotiating for its clients. But, of course, Judge Giorgi and class counsel were apprised of the possibility of separate settlements. AA 9-24, 109:18-19, 113 n.1, 133:21-25, 560:9-21, 560:27-561:4, 562:17-18. Class counsel did not propose, and Judge Giorgi did

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[6]After ILG presented the separate settlement to Maxon, he told ILG he was owed $250,000 in "back compensation" for "unpaid commissions." AA 445, 447. In his declaration before the court, he claimed his *overtime* claims against Wells Fargo were worth just over $250,000. AA 217 ¶ 28, 254. Yet, Maxon elected to participate in the class settlement after receiving the court-approved notice that stated he would receive $5,023.68. AA 417-18, 436.

not order, that the notice contain any reference to a proposed separate settlement.

The final approval order also, as Maxon is aware, necessarily includes a finding that class counsel performed adequately, which bars any malpractice action against class counsel. RB 21 n.8 (discussing *Martorana*). The import of Maxon's theories is that class counsel should have performed differently with regard to the separate settlement. But the final approval order, which includes a determination that class counsel represented the class adequately, as well as that the settlement was fair and adequate to the class, precludes relitigation of that issue. *See Martorana*, 175 Cal. App. 4th at 694-95; *Wyly v. Weiss*, 697 F.3d 131, 142 (2d Cir. 2012) (malpractice action against class counsel "constitute[d] a collateral attack on the District Court's findings that the [s]ettlement was 'fair, reasonable and adequate,' that class counsel was entitled to an award of attorneys' fees, and that those fees were 'fair and reasonable'"); *Golden v. Pac. Mar. Ass'n*, 786 F.2d 1425, 1428-29 (9th Cir. 1986) (approval of class settlement by trial court precluded relitigation of class counsel's competence); *Laskey v. UAW*, 638 F.2d 954, 956 (6th Cir. 1981); *Thomas v. Albright*, 77 F. Supp. 2d 114, 121-23 (D.D.C. 1999), *aff'd*, 247 F.3d 260 (D.C. Cir. 2001).

Maxon argues that because Judge Giorgi was misled into thinking ILG's clients would opt out of the settlement, the court had jurisdiction to issue the orders on appeal. RB 27. Not only is Maxon mistaken about the law, his facts are wrong. Maxon claims that the court was misled because, in the motion for final approval, class counsel claimed "[i]t was contemplated that the ILG clients would recover from the richer per capita fund secured by ILG for its individual clients and opt out of the $19 million class settlement." *Id.* Class counsel stated no basis for this comment, and the court did not ask about it. Judge Giorgi had no need because Wells Fargo had already clarified that ILG's "clients [would] get notice that fully informs them and they have

the opportunity to not participate in the settlement if they wish to." AA 562:24-26; *see also* AA 562:22-23 ("persons who are affected can file objections if they wish or counsel for them [may] file objections").

In addition, as part of the final approval of the settlement, class counsel reported to Judge Giorgi the final number of claims made, class members choosing to opt out, and other relevant claims administration statistics. AA 145-48. As a result, Judge Giorgi knew that only 56 requests for exclusion had been submitted out of 8,390 notices sent (AA 146-47) and therefore that most of ILG's 600 clients had not opted out. To the extent the parties did earlier "contemplate" more opt-outs, that fact and the actual outcome of the class notice process were disclosed to Judge Giorgi. Consequently, Maxon is wrong that Judge Giorgi was in any way misled and, in any event, the time for challenging Judge Giorgi's rulings has long passed.[7]

II.

THE COURT'S CONSIDERATION OF CONFIDENTIAL MEDIATION AND SETTLEMENT COMMUNICATIONS REQUIRES REVERSAL OF THE TRO AND OSC.

Maxon dismisses ILG's objection to the extensive violations of mediation confidentiality in the trial court as an effort by ILG to "hide behind the mediation privilege." RB 33. Not so. The statutes impose a duty to maintain confidentiality (EVID. CODE § 1119(c)) that not only precludes admission of covered information in court proceedings but also mandates that the information "remain confidential" in all contexts. *All* participants

[7]Maxon's concern about "reward[ing] parties who are able to conceal illegal fees until the day after a final judgment is entered" (RB 22-23) is unfounded. The fees were not "illegal" and were not concealed from those clients who agreed to them *in writing* and were thereby freed from their fee and cost obligations to ILG, a concern other class members would not have had.

are bound to maintain mediation confidentiality unless *all* participants *expressly* waive confidentiality in writing or on the record. EVID. CODE § 1122(a)(1); *see also Cassel v. Superior Court*, 51 Cal. 4th 113, 131-33 (2011); *Simmons v. Ghaderi*, 44 Cal. 4th 570, 586 (2008).

The courts have repeatedly rejected all of Maxon's arguments concerning mediation confidentiality, in particular his claims that mediation confidentiality cannot shield what—in his now-familiar hyperbole—he calls "egregious" misconduct (RB 33) or that mediation confidentiality has been impliedly waived. *See, e.g., Cassel*, 51 Cal. 4th at 122 (the Legislature, not the courts, balances the competing policy concerns" regarding mediation confidentiality).[8]

A. Mediation Confidentiality Applied.

Maxon argues that mediation confidentiality does not apply because ILG's clients were not present during the February 2011 mediation session and because Maxon asserts he was not told about the mediation beforehand. RB 36.[9] Maxon's points are irrelevant under the governing statutes.

All that is required for a mediation to occur as defined by Section 1115(a) is a mediator and *some* disputants. So long as there are at least two "disputants" and one mediator, mediation commences and "[a]ll communications, negotiations, or settlement negotiations by and between *participants* in the

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[8]Maxon errs in referring to "mediation privilege" rather than the broader concept of "mediation confidentiality." *Wimsatt v. Superior Court*, 152 Cal. App. 4th 137, 150 n.4 (2007) ("we will use the term 'mediation confidentiality'") (citations omitted); *see also Cassel*, 51 Cal. 4th at 132 ("mediation confidentiality").

[9]Maxon's statements as to what other ILG clients knew or were told are unsupported by the record and also without foundation because Maxon has no personal knowledge of what was said or not said between ILG and its other clients.

course of a mediation . . . shall remain confidential." EVID. CODE § 1119(c) (emphasis added); *see also Cassel*, 51 Cal. 4th at 130 ("there is no persuasive basis to . . . restrict confidentiality to potentially damaging mediation-related exchanges *between disputing parties*") (emphasis in original); *Travelers Cas. & Sur. Co. v. Superior Court*, 126 Cal. App. 4th 1131, 1146 n.18 (2005) (mediation participants include both parties and nonparties who attend or take part in a mediation) (dictum); *Doe 1 v. Superior Court*, 132 Cal. App. 4th 1160, 1169-70 (2005). Even a mere "observer is . . . a 'participant' in the mediation." *Cassel*, 51 Cal. 4th at 130.

Here, a single mediation occurred with "three camps in separate offices. Class counsel was there on behalf of a California putative class, Wells [Fargo] was there, and in the third office was ILG and Mark Yablonovich." AA 133. Maxon does not contest that Wells Fargo and McInerney and Clapp's clients were "disputants." That alone would be sufficient to constitute a mediation, and everyone else attending would be a "participant." But Peña, represented by Yablonovich, was also a disputant, as were ILG's clients, all of whom had actions pending against Wells Fargo.

Maxon's suggestion that mediation confidentiality did not apply because, according to him, ILG did not tell him about the mediation in advance is wrong as a matter of law. At the outset, Maxon is wrong that ILG needed consent to discuss the mere *possibility* of settlement. A lawyer needs express client consent only to *agree* to a settlement on a client's behalf (*see Blanton v. Womancare, Inc.*, 38 Cal. 3d 396, 404-05 (1985)), a rule ILG undisputedly followed. But even if Maxon had demonstrated a breach of duty by ILG, that would not vitiate mediation confidentiality. *E.g.*, *Wimsatt v. Superior Court*, 152 Cal. App. 4th 137, 162-63 (2007) (no exception to prevent perjury or inconsistent statements); *Cassel*, 51 Cal. 4th at 118-19 (testimony that lawyer coerced his client during a mediation inadmissible);

Foxgate Homeowners' Ass'n v. Bramalea California, Inc., 26 Cal. 4th 1, 17 (2001) (mediation communications could not be considered evidence of bad faith conduct warranting sanctions). The courts have repeatedly recognized that the mediation confidentiality statutes are not subject to a "'good cause' exception" (*Rojas v. Superior Court*, 33 Cal. 4th 407, 415, 424 (2004)) and must be "strictly construe[d] . . . even when the equities in the case suggest contrary results." *Wimsatt*, 152 Cal. App. 4th at 155.

B. Mediation Confidentiality Cannot Be Waived Impliedly, Including By Public Disclosure.

Maxon argues that mediation confidentiality has been waived because ILG or others disclosed confidential mediation communications in pleadings and ILG disclosed some of the communications to Maxon when turning over his client file. RB 33-35, 40. Supreme Court precedent decisively rejects such implied waiver arguments—even when a party relies on mediation communications and later objects to their consideration. *See Simmons*, 44 Cal. 4th at 586-87 (where defendant argued the significance of mediation communications with no objection to admissibility pre-trial, no waiver of objection at trial). As already noted, mediation confidentiality may only be waived expressly by "*all participants*, including not only parties but also the mediator and other non-parties attending the mediation." *Id.* at 586 (emphasis in original; internal quotation marks omitted) (citing EVID. CODE § 1122(a)(1)); *see also Cassel*, 51 Cal. 4th at 131-33 (waiver rules relating to attorney-client privilege do not apply to mediation confidentiality).[10]

[10]Maxon argues that there was a waiver by oral recitation of settlement terms (RB 39-40), but the statements on the record do not come close to satisfying Section 1118's requirements. That statute requires *all* of the parties to appear in court and expressly agree to waive mediation confidentiality in the presence of the parties *and the mediator*, and to otherwise meet the express
(. . . continued)

C. Negotiations Between ILG And Wells Fargo Pursuant To The Mediation Session Were Inadmissible.

Maxon argues that mediation confidentiality does not apply to certain communications on which he relied because they occurred after the mediation session was over. RB 37-38. He relies on Section 1125(a)(5) of the Evidence Code, which provides:

> For purposes of confidentiality under this chapter, a mediation ends when . . . [f]or 10 calendar days, there is no communication between the mediator and any of the parties to the mediation relating to the dispute. The mediator and the parties may shorten or extend this time by agreement.

Maxon claims that a declaration from ILG attorney Marc Primo that the ongoing, post-mediation session negotiations with Wells Fargo were "mediated" and "eventually resulted in a proposed settlement to ILG and its clients" in January 2012 (AA 919-20 ¶ 17) is too "self-serving" and "vague" to establish that the mediation continued. RB 38.[11]

(. . . continued)

statutory requirements of an oral agreement to waive mediation confidentiality. EVID. CODE § 1118 (requiring mediator and all parties to expressly state on the record that an agreement to waive mediation confidentiality was enforceable and to sign the transcript within 72 hours).

Similarly, Maxon's contention that the court was free to discipline a party for mediation "conduct" is based on a case holding that attendance or absence at a mediation is not confidential and that failure to attend accordingly could be a basis for sanctions. RB 35 (citing *Campagnone v. Enjoyable Pools & Spas Serv. & Repairs, Inc.*, 163 Cal. App. 4th 566, 571-72 (2008)). As noted above, California courts have time and again rejected a "bad conduct" exception to mediation confidentiality. *Wimsatt,* 152 Cal. App. 4th at 162-63 (no exception to prevent perjury or inconsistent statements); *Cassel*, 51 Cal. 4th at 118-19 (no exception for lawyer's alleged coercion of client during a mediation); *Foxgate,* 26 Cal. 4th at 17 (no exception to assess sanctions).

[11]ILG agrees with Maxon that the present TRO record is not sufficient to rule on whether mediation terminated ten days after the formal session. ILG has a mediation confidentiality

(. . . continued)

Even if the Court were to agree with Maxon, that would not make the materials on which Maxon relied admissible. The starting point for all of Maxon's arguments is an *unsigned, draft* term sheet prepared *for the mediation itself.* RB 7; AA 1039-40. In his Respondent's Brief, Maxon offers no justification for submitting that document to the court or the court's consideration of it. *See* AOB 23-24. He also relies on other materials that purport to disclose what happened during the mediation. RB 7-8. Even if the mediation had ended ten days after the formal session, that could not support admission of materials prepared *for* the session or which reveal communications that took place *during* the session. *Wimsatt*, 152 Cal. App. 4th at 159 (e-mails quoting from mediation brief protected); *Eisendrath v. Superior Court*, 109 Cal. App. 4th 351, 364-65 (2003) (declaration describing conversations during a mediation inadmissible).

The post-mediation session documents on which Maxon relies consist of correspondence between ILG and Wells Fargo's counsel that purport to discuss and reveal what happened at the mediation. For instance, Maxon relies on a June 22, 2011 letter from ILG to Wells Fargo's counsel that discusses what happened at the mediation and encloses a draft agreement that reflected discussions at the mediation except for addition of "non-material"

(. . . continued)
agreement that explicitly extends the mediation until a final agreement is reached, as authorized by statute. EVID. CODE § 1125. ILG was not able to submit that document within the short time it had to oppose the TRO. But, in connection with Maxon's motion to supplement the record, ILG has submitted that agreement, as well as a check paid to the mediator for work done *after* the mediation session. *See* Decl. of Natalie Vance (filed 7/26/13) ¶¶ 4-5 & Exs. 1 & 2 (Confidentiality Agreement included agreement that "[a]ll statements made during the course of the mediation or in mediator follow up thereafter at any time prior to complete settlement of this matter are privileged settlement discussions . . .").

terms. RB 9; AA 485-86 ("At the mediation, the Wells Fargo [group] agreed . . ."). Maxon also relies on a June 22, 2011 e-mail from Wells Fargo's counsel to ILG which states a position that "has not changed . . . from the agreement reached at the mediation" (AA 493) and other emails that turn on what transpired during the mediation. AA 492.

Finally, all of the emails between ILG and Wells Fargo, including the draft settlement agreement that was never signed, are based on the proposed settlement discussed during the mediation, and were made "pursuant to" the mediation session. AA 434-93; EVID. CODE § 1119(a); *Wimsatt*, 152 Cal. App. 4th at 159 (e-mails quoting from mediation brief protected); *Eisendrath*, 109 Cal. App. 4th at 364-65 (communications between participants at conclusion of mediation inadmissible).

As the court in *Wimsatt* put it, "[m]ediation confidentiality is to be applied where the writing[] or statement would not have existed but for a mediation communication, negotiation, or settlement discussion." 152 Cal. App. 4th at 160. All of the materials on which Maxon relies that were created after the mediation session fall within that description and were inadmissible. EVID. CODE § 1119(a) (excluding from evidence communications "for the purpose of, in the course of, or pursuant to a mediation", i.e. before, during, and after the mediation session itself).

D. The TRO And OSC Must Be Vacated Because Confidential Mediation Information Materially Affected The Proceedings.

Section 1128 of the Evidence Code requires vacatur of any decision that results from a reference to protected mediation information that "materially affected the substantial rights of the party requesting relief." (Emphasis added). Here, the record reflects without question that confidential mediation information materially affected ILG's substantial rights:

- The court commented to ILG's counsel that "[t]he term sheet that was prepared belies what you say." 9/13/12 RT 17:21-22.
- The court cross-examined counsel based on a draft term sheet from the mediation. *Id.* 18:14-18.
- The court asked, "You saw that June 22nd letter, didn't you." *Id.* at 26:24-25 (referring to the June 22, 2011 letter discussed above).
- After class counsel referred to "mediation privilege" being "throw[n] . . . under the bus," the court invited counsel "to tell me any part of the picture that you think I should know." *Id.* at 36-37.
- Maxon's counsel misstated the governing law to the court by stating that "counsel has already waived the mediation privilege by talking about splitting people up into separate rooms." *Id.* at 41:8-10.

In an effort to avoid Section 1128, Maxon makes several erroneous points. First, he cites to Section 353 of the Evidence Code, which states that a verdict or finding shall not be reversed due to the erroneous admission of evidence unless the admission resulted in a "miscarriage of justice." RB 33. That analysis does not apply with respect to the erroneous admission of confidential mediation information; Section 1128's "materially affected" standard governs. *Foxgate*, 26 Cal. 4th at 18. Accordingly, Maxon cannot rely on Section 353's "miscarriage of justice" test to impose a burden on ILG to show a reasonable probability that it would have achieved a more favorable outcome absent the challenged evidence. *People v. Richardson*, 43 Cal. 4th 959, 1001 (2008); *Bender v. Cnty. of Los Angeles*, 217 Cal. App. 4th 968, 981 (2013).

Section 1128's standard is completely different from Section 353's. When the Legislature directed that review of wrongful disclosure of confidential mediation materials proceed under the "materially affected" test, it adopted a standard that does not

require showing a different result would have obtained. The standard is substantially lower: vacatur is required if consideration of protected materials "materially affected" the proceedings. The Law Revision Commission noted that "[a]n appropriate situation for invoking [Section 1128] is where a party urges the trier of fact to draw an adverse inference from an adversary's refusal to disclose mediation communications." EVID. CODE § 1128—Law Revision Comm'n cmt. (1997). That is exactly what Maxon urges here when he accuses ILG of attempting to "hide behind" mediation confidentiality.

Second, when Maxon argues that "substantial public record evidence" could support the orders on review (RB 33-35), he still points to statements about what happened during the mediation. As described above, those statements—public or not—are not admissible and could not waive mediation confidentiality. Even if some isolated snippets could be said to be outside mediation confidentiality, they are meaningless without consideration of the confidential mediation information. For instance, Maxon argues that "admissible evidence" established "ILG's undisputed failure to apprise the court that the Supplemental Settlement included substantial attorneys' fees" and "ILG's undisputed failure to inform [Maxon] about the Supplemental Settlement until January 30, 2012—*eleven months after the $6 million settlement payment had been agreed to.*" RB 34. As these examples demonstrate, Maxon's "evidence" necessarily turns on inadmissible mediation communications. Even under the Section 353 standard, it is manifest that ILG would have prevailed if the mediation materials were excluded, as they should have been. Those materials had a powerful influence on Judge Kahn.

Third, Maxon suggests in passing that the violations of mediation confidentiality do not require reversal because the court stated that it considered only "admissible evidence." RB 33-34. Maxon ignores Supreme Court precedent overturning an appellate decision that previously allowed trial courts to employ

that method of addressing objections. *See* AOB 21 & n.7 (discussing *Reid v. Google, Inc.*, 50 Cal. 4th 512, 532 n.8 (2010) ("We disapprove *Biljac* . . . to the extent it permits the trial court to avoid ruling on specific evidentiary objections")). And, despite the trial court's assurances, the record demonstrates that the court did consider inadmissible mediation materials during the September 13 hearing as summarized above. *See* p.28, *supra.*

Fourth, Maxon contends ILG's evidentiary arguments should be disregarded "on procedural grounds" because they were not re-asserted with sufficient specificity on appeal. RB 35. Maxon's argument is mystifying because ILG's Opening Brief sets forth the inadmissible material in detail along with the corresponding objections. AOB 23-26.

E. Under Evidence Code Section 1152, ILG's Settlement Offer To Another Former ILG Client Was Inadmissible.

Maxon agrees that ILG's offer to another former client, Schechtman, to settle any claims he might have against ILG was not admissible to prove liability against ILG. RB 41. Accordingly, that document cannot support the TRO's requirement that ILG deposit $5 million.

But Maxon now claims that the communication was admissible "to demonstrate the need for an injunction to prevent ILG from obtaining additional releases on the basis of misleading information." RB 41. Maxon's argument fails on its own terms because the document is not misleading. To the contrary, it contains blunt warnings to Schechtman, including repeated admonitions to seek independent counsel. AA 458-70. And, in any event, the court had neither jurisdiction nor authority to regulate ILG's communications with Schechtman or ILG's other former clients.

III.

EVEN IF THE COURT HAD JURISDICTION, THE TRO AND OSC SHOULD BE REVERSED.

The mandatory injunction requiring ILG to disgorge $5 million was beyond extraordinary; it was unprecedented and erroneous as a matter of law on multiple grounds that Maxon fails to rebut. *See* 9/13/12 RT 30:5-6 (even the court referred to the TRO as a "mandatory" injunction that imposed "a very extreme form of relief").

A. The Standard Of Review Is De Novo.

Lacking answers to the legal errors ILG's brief identified, Maxon asks this Court to review the TRO for abuse of discretion. RB 42. But in doing so, Maxon disregards longstanding authority (AOB 30-31) that the standard of review is de novo when no facts are in dispute *or* when an error of law has occurred. *Smith v. Adventist Health Sys./West*, 182 Cal. App. 4th 729, 739 (2010). In fact, Maxon himself describes the evidence as "uncontroverted." RB 2.

Nor does Maxon dispute that de novo review applies when an injunction impinges on protected free speech and petitioning rights. *Khawar v. Globe Int'l, Inc.*, 19 Cal. 4th 254, 275 (1998). And, even if the standard of review were abuse of discretion, when a "preliminary injunction mandates an affirmative act that changes the status quo," the court "scrutinizes it even more closely for abuse of discretion." *Shoemaker v. Cnty. of Los Angeles*, 37 Cal. App. 4th 618, 625 (1995).

B. The Code Of Civil Procedure Permits Issuance Of A TRO Only When The Moving Party Has Pleaded A Valid Cause Of Action In A Complaint.

By statute, an injunction may be granted "[w]hen it appears by the complaint that the plaintiff is entitled to the relief demanded." CODE CIV. PROC. § 526(a). A prejudgment injunction cannot issue unless the moving party both pleads a cause of

action and establishes that he will prevail. *Korean Am. Legal Advocacy Found. v. City of Los Angeles*, 23 Cal. App. 4th 376, 399 (1994);*see also San Francisco Newspaper Printing Co. v. Superior Court*, 170 Cal. App. 3d 438, 442 (1985); CODE CIV. PROC. § 527(a) & (b) (verified complaint or affidavit also required for TRO or preliminary injunction).

Maxon made no effort to counter ILG's argument (AOB 13-20) that his complaint in intervention (containing only wage and hour allegations against Wells Fargo) failed to meet the statutory prerequisite for the TRO against ILG. Instead, Maxon relies entirely upon the court's "inherent" or "supervisory" authority to issue the injunctive relief ordered. RB 23-24. But the trial court's inherent powers do not exceed those granted by statute. *See, e.g., Rutherford v. Owens-Illinois, Inc.*, 16 Cal. 4th 953, 967 (1997); *City of S. San Francisco v. Cypress Lawn Cemetery Ass'n*, 11 Cal. App. 4th 916, 922-23 (1992) (statutes restrict court's inherent power to issue TRO).

Section 187 of the Code of Civil Procedure, on which Maxon relies (RB 23), allows courts to adopt suitable modes of proceeding only "if the course of proceeding be *not specifically pointed out* by this Code or the statute." CODE CIV. PROC. § 187 (emphasis added); *see also People v. Ponce*, 173 Cal. App. 4th 378, 384 (2009); *People v. Uribe*, 199 Cal. App. 4th 836, 882 (2011) (a "court's inherent power arises from necessity where, *in the absence of any previously established procedural rule*, rights would be lost or the court would be unable to function") (internal quotation marks omitted; emphasis added). Where, as here, a statute requires a court to exercise its jurisdiction in a particular manner or follow a particular procedure, acts contravening such limits exceed the court's authority.[12]

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[12]*See, e.g., People v. Black*, 55 Cal. 2d 275, 277 (1961); *see also Yarnell & Assocs. v. Superior Court*, 106 Cal. App. 3d 918, 922-23 (1980) (monetary sanction under court's inherent authority improper); *Jeld-Wen, Inc. v. Superior Court*, 146 Cal. App. 4th
(. . . continued)

In *Marquez-Luque v. Marquez*, 192 Cal. App. 3d 1513 (1987), for instance, the trial court could not rely on its inherent powers to evict an alleged harasser to prevent damage to real property for two reasons. First, the proceeding in question under Section 527.6, regarding harassment, was not intended to protect property and, second, the injunction did not comply with Section 526's requirement that an injunction be supported by a complaint. *Id.* at 1517 ("The court therefore lacked a pending cause on which to proceed"); *see also id.* at 1517-18 ("Rules of equity cannot be intruded in matters that are plainly and fully covered by positive statute"). Similarly, in *Cypress Lawn*, the court reversed an order based on inherent authority requiring a public entity to post an undertaking in connection with a TRO because a statute expressly exempted the public entity from the undertaking requirement. *Cypress Lawn*, 11 Cal. App. 4th at 922-23.

C. The Court Erred In Entering A $5 Million Mandatory Injunction.

1. Maxon Has An Adequate Remedy At Law.

Maxon does not dispute that he has an adequate remedy at law and that he is already pursuing it in his action for damages against ILG for the same $5 million in *Maxon v. ILG*. AA 622-79. Maxon's remedy at law alone requires reversal of the injunction. *Dep't of Fish & Game v. Anderson-Cottonwood Irrigation Dist.*, 8 Cal. App. 4th 1554, 1565 (1992) (injunctive relief not permitted

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(. . . continued)
536, 543 (2007) (trial court lacked inherent authority to order parties to attend and pay for private mediation because order conflicted with statute); *People v. Municipal Court*, 20 Cal. 3d 523, 528-32 (1978) (trial court lacked inherent power to allow criminal defendant to depose police officers under circumstances not specified by statute).

where damages are available to compensate a plaintiff for the alleged wrong).

2. Maxon Did Not Demonstrate Irreparable Harm.

Maxon does not dispute that he failed to submit evidence below of ILG's insolvency, inability to pay a judgment or any other fact that would demonstrate irreparable harm. *See* CODE CIV. PROC. § 526(a)(3) (permitting injunction where it appears party is about to do some act in violation of another party's rights, which would render a judgment ineffectual). This is yet another reason the TRO must be reversed.

On appeal, Maxon attempts to submit new "evidence" in the form of yet another action Maxon has filed against ILG attorneys, this time related to the alleged transfer of clients' cases to another law firm. This "evidence" was not before the trial court and for that reason is not part of the record on appeal. *In re Zeth S.*, 31 Cal. 4th 396, 405 (2003) ("[A]n appeal reviews the correctness of a judgment as of the time of its rendition, upon a record of matters which were before the trial court for its consideration") (citation and internal quotation marks omitted). But in any event, Maxon's allegations are not evidence at all. *Bach v. McNelis*, 207 Cal. App. 3d 852, 865 (1989) ("a court *cannot* take judicial notice of *hearsay allegations* as being true") (emphasis in original).[13]

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[13]Maxon misstates even his own allegations, claiming that his latest complaint alleges that ILG attorneys were transferring "accounts receivable to a new, separate entity," when the complaint actually alleges only that certain attorneys transferred some of *their clients' matters* from ILG to a firm started by a former ILG attorney. RB 45; RA 81 ¶ 6. Of course, ongoing client matters are not "assets" of any law firm. Clients have the right to choose their own counsel. *Lyle v. Superior Court*, 122 Cal. App. 3d at 481.

3. Maxon Did Not Prove, Or Even Plead, A Cause Of Action For Constructive Trust.

Maxon contends that the $5 million injunction can be justified as imposition of a constructive trust. RB 44. But constructive trust is a cause of action that must be pleaded and proved at trial. CIV. CODE §§ 2223, 2224; *In re Marriage of Buford*, 155 Cal. App. 3d 74, 79 (1984) (constructive trust cannot be imposed without properly pleaded facts constituting the cause of action), *disapproved on other grounds by In re Marriage of Fabian*, 41 Cal. 3d 440, 451 n.13 (1986). Having no complaint before it alleging a claim for constructive trust, the trial court could not have imposed a constructive trust remedy. *See Friedman v. Friedman*, 20 Cal. App. 4th 878, 885-86 (1993) (reversing "amorphous 'order to pay money'" because it was "not a cognizable provisional remedy under California law").

Maxon similarly attempts to argue that the $5 million represents a disputed "res" that the trial court "preserved." RB 44-45. A "res" consists of funds that have not yet been transacted. *See, e.g., Mitsui Mfrs. Bank v. Texas Commerce Bank-Fort Worth*, 159 Cal. App. 3d 1051, 1059 (1984) (enjoining defendant lender from making *further* advances on a line of credit to a borrower who was alleged to have fraudulently used the initial advance of funds for personal use); *Wind v. Herbert*, 186 Cal. App. 2d 276, 286 (1960) (TRO prohibited partner from *further* withdrawals of partnership funds without the signature of another partner). Here, the court did not enjoin future transactions but rather disgorged and took control of funds to secure Maxon's claim for damages. Such relief amounts to a prejudgment writ of attachment for which Maxon did not establish his entitlement, as explained in the next section.

4. The TRO Granted Maxon The Equivalent Of A Writ Of Attachment For Which He Did Not Qualify.

Maxon ignores ILG's cited authority that requiring the deposit of $5 million into a court-controlled bank account was a *de facto*

prejudgment writ of attachment. AOB 34-36. *Doyka v. Superior Court* holds that ordering court control of funds "effectively imposes a prejudgment attachment upon [a party's] liquid assets without satisfying the statutory requirements for attachments." 233 Cal. App. 3d 1134, 1136-37 (1991). An "[a]ttachment is a . . . provisional remedy to aid in the collection of a money demand by seizure of property in advance of trial and judgment." *Id.* at 1137. The seizure of $5 million pending resolution of Maxon's claim to the fees on behalf of himself and other ILG clients fits this definition.

Maxon's only retort is to note that he did not label the relief he sought below a "writ of attachment" (RB 45), but *Doyka* demonstrates that the label is not controlling. Maxon does not dispute that he failed to meet the statutory requirements for a pre-judgment writ of attachment, nor could he. He has not pleaded a claim eligible for prejudgment attachment, demonstrated the probable validity of that claim, and posted an undertaking to protect the defendant from wrongful attachment. CODE CIV. PROC. §§ 484.050(b), 484.090(a), 489.210.

D. The Non-Monetary Aspects Of The Orders On Appeal Should Be Reversed As To All Enjoined Persons, Not Just As To ILG.

In a footnote (RB 15 n.6), Maxon points out that only Initiative Legal Group APC ("ILG") appealed from the TRO, OSC and order granting Maxon's motion to intervene. AA 1089. Based on that, Maxon argues that this Court lacks jurisdiction to reverse those orders as to the other affected parties, Initiative Legal Group LLP and four individual attorneys. Maxon ignores the rule that when "an appeal is taken by only one of several parties," then the order or judgment on appeal will be reversed as to all of them when the issues are "interwoven, and in fact identical" for all of the parties. *Estate of McDill*, 14 Cal. 3d 831, 841 (1975). That is the case here, which means that Maxon has not been prejudiced by the form of the notice of appeal not listing all affected parties

as appellants. *See Beltram v. Appellate Dep't*, 66 Cal. App. 3d 711, 715 (1977).

Even if that were not the rule, the record reflects that ILG received the fees at issue on this appeal, and ILG deposited those fees into the blocked account. AA 1053. Accordingly, Maxon's challenge to appellate jurisdiction would at most apply to the non-monetary aspects of the orders on appeal, such as the speech restrictions. Because the orders on appeal are interlocutory, and the TRO is by definition temporary, any ruling by this Court as to ILG only would be equally applicable to the other affected parties in future proceedings on remand. *Nally v. Grace Cmty. Church*, 47 Cal. 3d 278, 301 (1988) (an appellate court decision, stating a rule of law necessary to its decision, establishes the rights of the parties in any subsequent retrial or appeal in the same case). Accordingly, even if the Court were to accept Maxon's invitation to reverse the orders on appeal only as to ILG, the same result as to all other affected parties would ultimately be required below.

E. The Order Restricting ILG's Communications With Clients Violated The Right to Free Speech.

Maxon contends that "limited restraints" on free speech rights are permissible in connection with class actions. RB 45-48 (citing a series of federal decisions that restrained parties or counsel of record from contacting putative or certified class members in pending actions).[14] Each of those cases is readily distinguishable

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[14] *Mevorah v. Wells Fargo Home Mortgage*, No. C-05-1175 MHP, 2005 U.S. Dist. LEXIS 28615, at *16-18 (N.D. Cal. Nov. 17 2005) (defendant's communication to putative class member employees mischaracterized lawsuit as attack on profession and *both* parties restricted from communicating with putative class members without court approval); *Pollar v. Judson Steel Corp.*, No. C 82-6833 MHP, 1984 U.S. Dist. LEXIS 19765, at *1-2 (N.D. Cal. Feb. 3, 1984) (defendant published public notice to class members targeting absent class member in certified class action in attempt to circumvent class action rules); *Bowens v. Atl. Maint. Corp.* 546 F. Supp. 2d 55, 72-73 (E.D.N.Y. 2008) (. . . continued)

from the case at hand, because ILG did not serve as class counsel or even counsel of record in this action. ILG's communications *with its own clients as Judge Giorgi permitted* did not interfere with court-approved notice procedures.

The sole California case Maxon cites in support of the speech restrictions, *Bronco Wine Co. v. Frank A. Logoluso Farms*, 214 Cal. App. 3d 699 (1989), is equally inapplicable. *Bronco Wine* involved a class action defendant who obtained releases from absent parties *after* the court indicated it would issue a judgment for restitution on behalf of those absent parties. When the court was asked to stop the defendant from doing so, it declined. The court *allowed* the defendant to continue to communicate with the potential class members, and to obtain further releases, so long as the defendant informed the class members of the amount of restitution awarded by the court. *Id.* at 716.

Here, Maxon contends that the letter to former client Schechtman accompanying the proposed settlement and release was misleading, but Maxon does not point to a *single misstatement* in the letter. At the time of the communications, Maxon had merely threatened to sue ILG, a fact which was disclosed in the communication. *See* AA 445. The letter discusses all of the claims Maxon ultimately alleged, including the claims that ILG's conduct violated ethical rules, that its fee was allegedly unconscionable and that ILG's clients should have received more of the $6 million proposed settlement. AA 458-68. Maxon now claims for the first time on appeal that the letter was "misleading" by *omission* because it did not disclose the amount

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(. . . continued)
(defendant's contact with conditionally certified class members violated ethical rules prohibiting communication with represented party); *Belt v. EmCare, Inc.*, 299 F. Supp. 2d 664, 667-70 (E.D. Tex. 2003) (unilateral notice to certified class sent day before court notice violated class action notice procedures and rules against communication with represented parties).

that Schechtman would have received had he opted out of the class settlement or had the separate settlement been allocated *pro rata* to all of ILG's clients. RB 46. Maxon cites no legal rule requiring such advice be given to a former client in connection with settling any claim against his former counsel. There is none.

Attorneys may propose and obtain releases of malpractice and other claims even from a current client so long as "the client is informed in writing that the client may seek the advice of an independent lawyer of the client's choice regarding the settlement and is given a reasonable opportunity to seek that advice." RULES OF PROF'L CONDUCT R. 3-400(B). The Schechtman letter indisputably complies with that rule (AA 458-470), even though Schechtman was by that point a former client. Consequently, ILG's proposal to Schechtman cannot support the TRO's speech restrictions.

F. Maxon Provides No Basis For Affirming The Order Restricting ILG From Enforcing Releases.

In its opening brief, ILG argued that the TRO's restriction against ILG enforcing releases it obtained from former clients other than Maxon violated the right to petition and was unsupported by a showing of irreparable injury. AOB 39-40. In response, Maxon exclaims that ILG's legal argument "stands justice and reason on its head" (RB 46) before moving on to discuss decisions that address entirely different issues such as a class action court's ability to restrain misleading communications and to issue corrective notices to address prior misstatements in those notices. RB 46-48. The sole case Maxon cites that addressed enforcement of releases actually *enforced* them despite an argument that they were obtained based on inadequate disclosure. *Bronco Wine*, 214 Cal. App. 3d at 716.

G. The Court Erred In Compelling Disclosure Of Client Information.

Maxon contends that the order requiring ILG to disclose confidential client information, including clients' personal addresses and phone numbers, should be affirmed because (1) the clients disclosed that information to the settlement administrator; and (2) the information is discoverable. RB 48-49. Maxon fails to articulate any reason that the order should have been issued on an expedited basis rather than through ordinary discovery procedures.

Individuals have a substantial interest in the privacy of their home address and phone numbers, which is not defeated by California's discovery statutes. *Planned Parenthood Golden Gate v. Superior Court*, 83 Cal. App. 4th 347, 359 (2000) ("when the constitutional right of privacy is involved, the party seeking discovery . . . must do more than satisfy the [standards of the discovery statute]"). Even if the information would be discoverable in another action (not in this action, in which final judgment has been entered), the Legislature has imposed special protections when a client's private information is sought *through the client's former attorneys*. *See* CODE CIV. PROC. § 1985.3 (special procedures for providing notice when seeking personal information from lawyers or law firms related to third parties).

The fact that some clients' personal information was disclosed to the administrator for the limited purpose of claims administration does not alter the private nature of the information. Individuals may disclose their personal addresses and phone numbers to those they trust, such as friends, associates, and those with whom they conduct business, but California still recognizes a substantial privacy interest in their right to make that choice for themselves. *Planned Parenthood*, 83 Cal. App. 4th at 359.

IV.

THE ORDER GRANTING INTERVENTION SHOULD BE REVERSED.

For the numerous reasons explained above, the TRO and OSC must be reversed. That leaves for review the order allowing Maxon to intervene. It should also be reversed so that ILG is not subjected to further proceedings beyond the court's jurisdiction on remand.

A. ILG Has Standing To Appeal The Order Allowing Maxon To Intervene.

Maxon contends that ILG lacks standing to appeal the intervention order because ILG was not a "party" who was "aggrieved" by that order. RB 16; *see* CODE CIV. PROC. § 902 ("Any party aggrieved may appeal in the cases prescribed in this title"). But Maxon does not contest that ILG has standing to appeal the TRO, which compelled the firm to deposit nearly $5 million into a court-controlled trust account, restricted ILG's ability to communicate with its former clients, and prohibited ILG from petitioning the courts. AA 1048-51. The intervention order was the foundation of, and Maxon's stepping stone to, the TRO and is appealable for that reason, a point Maxon does not contest. AOB 17-20.

Maxon's attempt to use Section 902 to deny ILG standing to appeal an order that had the sole purpose of commencing proceedings against ILG conflicts with the statute's purpose. Section 902 is a "remedial statute, which should be liberally construed, with any doubts resolved in favor of the right to appeal." *Ajida Techs., Inc. v. Roos Instruments, Inc.*, 87 Cal. App. 4th 534, 540 (2001) (citation and internal quotation marks omitted).

Maxon's contention that the intervention order caused no adverse consequences to "bef[a]ll ILG" (RB 16) is false. Maxon acknowledges that his complaint in intervention was filed for the sole purpose of seeking relief against ILG, not Wells Fargo. AA

422 ¶ 39 ("I am moving to intervene for the purpose of challenging ILG Attorneys' unlawful collection and retention of $5.5 million from the Supplemental Settlement"); *see also* AA 376:17-19, 388:10-11, 472-79. ILG is aggrieved by being subjected to proceedings in which it is not a party, cannot properly be made a party and in which the court has acted beyond its jurisdiction. *Ajida Techs.*, 87 Cal. App. 4th at 540 (prospect of further arbitration proceedings that appellant contended were unauthorized supported standing to appeal).

The cases Maxon cites do not involve a party like ILG haled into an action over its objection and subjected to adverse orders. Maxon cites cases in which third parties *wanted* to join an action, not where the appellant *objected* to having been joined. *E.g.*, *In re Miguel E.*, 120 Cal. App. 4th 521, 542-43 (2004) (grandparents attempted to appeal from an order granting custody of their grandchildren to another relative, but the governing statute excluded them as parties); *County of Alameda v. Carleson*, 5 Cal. 3d 730, 738 (1971) (where defendant state official failed to appeal ruling that caused reduction of AFDC benefits, advocacy group that moved to vacate the judgment had standing to appeal).

There is no question that ILG was aggrieved by the intervention order entered for the sole purpose of seeking relief against ILG. As *Estate of Sloan*, 222 Cal. App. 2d 283 (1963), explained, "the 'parties of record' requirement was usually applied to exclude parties who were not 'properly aggrieved' and whose interest with the particular litigation was not clearly established or . . . [was] . . . remote." *Id.* at 292; *see also* RB 16 (Maxon equates "party of record" requirement with being "aggrieved").

B. Maxon Did Not Have An Absolute Right To Intervene.

An order granting intervention based on an unconditional right to intervene is reviewed de novo (*Hodge v. Kirkpatrick Dev. Co.*, 130 Cal. App. 4th 540, 548-50 (2005)), not for abuse of

discretion as Maxon argues. RB 17. Maxon argues that he had an absolute right to intervene under the Consumer Legal Remedies Act ("CLRA"), CIV. CODE §§ 1750 *et seq.* However, this action was not governed by the CLRA because Maxon does not assert a consumer cause of action encompassed within that act. CIV. CODE §§ 1770, 1780.

Maxon cites no decision (and ILG is aware of none) in which intervention has been allowed as of right under the CLRA in a non-CLRA case. The only case Maxon cites—*Civil Service Employees Insurance Co. v. Superior Court*, 22 Cal. 3d 362 (1978)—holds that a trial court should look to the CLRA for "guid[ance]" in deciding whether to impose class notice costs on a defendant in a non-CLRA case. *Civil Service Emps.*, 22 Cal. 3d at 376. Holding that trial courts may look to *some* provisions of the CLRA for guidance in non-CLRA class actions, however, does not make CLRA binding on all class action litigation. To the contrary, Maxon's own authority recognizes that absent class members' requests to intervene may be denied (*Rebney v. Wells Fargo Bank*, 220 Cal. App. 3d 1117, 1146 (1990)), which establishes that class members do not have an absolute right to intervene in non-CLRA cases.

C. Maxon Did Not Meet The Requirements For Permissive Intervention.

A court may not allow intervention where the issues before the court would be enlarged. *Kuperstein v. Superior Court*, 204 Cal. App. 3d 598, 600-01 (1988); *see also Bame v. City of Del Mar*, 86 Cal. App. 4th 1346, 1364 (2001) (affirming denial of intervention where intervener sought new and different relief). Maxon's stated purpose for intervention is not to obtain relief against the defendant, Wells Fargo, but to recover the fees non-party ILG received for its representation of approximately 600 individual clients. AA 376:17-19, 622-59. That is an expansion of the issues beyond Lofton's employment-related claims against Wells Fargo.

Maxon's submission of substantial evidence for the court's consideration, albeit almost entirely inadmissible, confirmed that his intervention would enlarge the issues before the court. AA 272-326, 335-50, 439-713; *see, e.g.*, *Hibernia Sav. & Loan Soc'y v. Churchill*, 128 Cal. 633, 636 (1900) (no intervention where additional evidence required); *see also People ex rel. State Lands Comm'n v. City of Long Beach*, 183 Cal. App 2d 271, 274 (1960) (accord).

CONCLUSION

For the foregoing reasons, the orders allowing Maxon to intervene, and granting the TRO and the OSC should all be reversed.

DATED: September 10, 2013.

Respectfully,

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CERTIFICATE OF COMPLIANCE PURSUANT TO CAL. R. CT. 8.204(c)(1))

Pursuant to California Rule of Court 8.204(c)(1), and in reliance upon the word count feature of the software used, I certify that the attached **[Corrected] Appellant's Reply Brief** contains 13,775 words, exclusive of those materials not required to be counted under Rule 8.204(c)(3).

DATED: September 10, 2013.

SEAN M. SELEGUE

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PROOF OF SERVICE

I, Jane Rustice, declare:

I am a resident of the State of California and over the age of eighteen years, and not a party to the within action; my business address is Three Embarcadero Center, 10th Floor, San Francisco, California 94111-4024. On September 10, 2013, I served the following document(s) described as:

[CORRECTED] APPELLANT'S REPLY BRIEF

by placing the document(s) described above for deposit in the United States Postal Service through the regular mail collection process at the law offices of Arnold & Porter LLP, located at Three Embarcadero Center, Tenth Floor, San Francisco, California, on the parties addressed as follows.

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I declare under penalty of perjury that the foregoing is true and correct. Executed at San Francisco, California on September 10, 2013.

Jane Rustice