

No. 12-A694

In the
Supreme Court of the United States

CHARLES E. YEAGER, aka Chuck,
GENERAL CHUCK YEAGER
FOUNDATION,
Petitioners,

v.

CONNIE BOWLIN; ED BOWLIN; AVIATION AUTOGRAPHS,
a non-incorporated Georgia business entity; BOWLIN &
ASSOCIATES,
Respondents.

**On Petition for a Writ of Certiorari to the United States Court
of Appeals for the Ninth Circuit**

PETITION FOR A WRIT OF CERTIORARI

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February 22, 2013

QUESTION PRESENTED

1. Does California's single-publication rule govern the accrual of a Lanham Act claim arising from a web-based merchant's refusal to remove a celebrity's unauthorized endorsement from the merchant's website?

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February 22, 2013

PETITION FOR WRIT OF CERTIORARI

Petitioners, General Charles E. Yeager and the General Chuck Yeager Foundation (collectively “General Yeager”), respectfully petition the Court for a writ of certiorari to review a Memorandum opinion issued by the United States Court of Appeals for the Ninth Circuit affirming the grant of summary judgment in favor of Respondents (collectively “the Bowlins”) on a claim arising under Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a).

STATEMENT OF JURISDICTION

This Court’s jurisdiction rests on 28 U.S.C. § 1254(1). On October 25, 2012, the Ninth Circuit denied rehearing of the challenged order. App. D. This Court extended the time for filing this petition to February 22, 2013.

DECISIONS BELOW

The Ninth Circuit Court of Appeals issued an Opinion on September 10, 2012, affirming the entry of summary judgment in favor of Respondents on claims brought under California law. That Opinion is published at 693 F.3d 1076 and reproduced in the appendix attached hereto (“App.”) at App. 1. On the same day, the Ninth Circuit issued an unpublished Memorandum opinion, in which it affirmed the district court’s disposition of a claim brought under the Lanham Act. That opinion is available at 2012 WL 3900671 and reproduced at App. 15.

The underlying Memorandum and Order of the United States District Court for the Eastern District of California is also unpublished, but it is available on Westlaw at 2010 WL 95242 and is reproduced at App. 22.

**CONSTITUTIONAL AND STATUTORY
PROVISIONS INVOLVED**

Title 15 United States Code, Section 1125(a)

(a) Civil action

(1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which—

(A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or

...

shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such an act.

STATEMENT OF THE CASE

General Yeager is a towering figure in American aviation. He served as a decorated pilot in the Air Force during World War II and Vietnam and flew the first aircraft in history to break the sound barrier. His exploits provided inspiration for Tom Wolfe's bestselling novel, *The Right Stuff*, and an eponymous film. Over the years, General

Yeager has carefully cultivated his name and image, using it sparingly in well-known and longstanding marketing endorsements for AC Delco car batteries and Rolex watches.

The Bowlins are retired Delta Airlines pilots who market and sell aviation memorabilia through their website, www.aviationautographs.com. Beginning in 2000, the Bowlins began selling Yeager memorabilia on their website through a series of arrangements with General Yeager. General Yeager initially gave the Bowlins limited permission to use his name.

However, according to General Yeager, his relationship with the Bowlins deteriorated when he became concerned that the Bowlins were retaining profits for themselves instead of devoting proceeds to charity, as they had previously agreed. General Yeager rescinded his permission to use his name, image and likeness on August 16, 2005, when his attorney sent the Bowlins a cease and desist letter demanding that they discontinue their unauthorized and unlawful use of General Yeager's name, image and likeness on their website. The Bowlins refused to comply.

On January 14, 2008, General Yeager filed suit in the United States District Court for the Eastern District of California, invoking its diversity and federal question jurisdiction. In his amended pleadings, General Yeager alleged, *inter alia*, that the Bowlins violated the Lanham Act by using Yeager's name, likeness, identity or feats without his authorization to market memorabilia on their website.

Specifically, General Yeager complained that the website contained a claim that the Bowlins were "best of friends" with General Yeager and sold items from Yeager's

“personal collection.” General Yeager also cited a photograph that purportedly showed Yeager “inspecting” merchandise. According to General Yeager, such representations, and others on the website, falsely implied that: (1) he had an affiliation, connection or association with the Bowlins; (2) he endorsed their products; and (3) he guaranteed or vouched for the veracity and authenticity of their merchandise.

General Yeager maintained that the Bowlins continued to use his name, image and likeness on their website well after he rescinded his permission. General Yeager also alleged that the Bowlins continued to use his name in their website’s “metadata,” which is hidden information that internet search engines use to locate and prioritize websites in response to inquiries by search engine users.

On November 16, 2009, the Bowlins moved for summary judgment on all claims. The Bowlins argued the statute of limitations barred the Lanham Act claim. The Bowlins invoked California’s single-publication rule, under which:

No person shall have more than one cause of action for damages for . . . invasion of privacy or any other tort founded upon any single publication or exhibition or utterance, such as any one issue of a newspaper or book or magazine or any one presentation to an audience or any one broadcast over radio or television or any one exhibition of a motion picture

CAL. CIV. CODE § 3425.3. According to the Bowlins, the federal claim accrued in 2000, when the challenged content

first appeared on their website.

General Yeager disputed the applicability of the single-publication rule. He argued the rule should not apply to the ongoing infringement at issue because “each sale of a piece of memorabilia without General Yeager’s permission to use his trademark and name or likeness” constitutes a “separate act of infringement.” Relatedly, General Yeager contended that the single-publication rule should not apply because the Bowlins “republished” the communications at issue when they edited other portions of their website while leaving intact the unauthorized content. In addition, General Yeager distinguished the Bowlins’ website, which served solely to facilitate the sale of merchandise, from websites that served only to publish and disseminate information to the general public.

The district court granted summary judgment in favor of the Bowlins, holding that all claims were barred by the statute of limitations. With respect to the Lanham Act claim, the district court noted the “statute of limitations . . . is less certain since the Lanham Act does not contain its own statute of limitations provision.”

Nevertheless, the district court looked to the statutes of limitations under California law and held that either the two-year statute applicable to state-law right to privacy claims or the three-year statute applicable to state-law fraud claims applied to the Lanham Act claim. The court then held that the federal claim was time-barred because, under California’s single-publication rule, the claim accrued when the Bowlins first distributed the unauthorized content to the public, which, according to the court, occurred no later than October 2003, when the Bowlins last edited the portion of the website pertaining to General Yeager.

General Yeager appealed this decision to the Ninth Circuit Court of Appeals. On appeal, General Yeager challenged the accrual calculation employed by the district court, again maintaining that the unauthorized content was republished when the Bowlins revised other portions of the website, regardless of whether the unauthorized content remained unchanged. General Yeager also maintained that the causes of action could not have accrued prior to the cease and desist letter sent in 2005 because General Yeager had originally authorized the use of his name, image, and likeness. Thus, the initial publication was not tortious and could not possibly trigger the accrual of his claims. Additionally, he disputed the applicability of the state-law single-publication rule to the federal cause of action.

The Ninth Circuit Court of Appeals rejected these arguments in companion opinions, both issued on September 10, 2012. The Ninth Circuit addressed the republication argument in its published Opinion. The court invoked California's "single integrated publication" test, under which a "printed publication is republished when it is reprinted in something that is not part of the same 'single integrated publication.'" App. 10. (quoting *Christoff v. Nestle USA, Inc.*, 213 P.3d 132, 137 (Cal. 2009)). The Ninth Circuit observed that application of the single integrated publication test to non-traditional publications can be "tricky" and noted that California courts have not squarely addressed whether substantive modifications to authorized content on a website constitutes republication of the unauthorized content. App. 10-11.

Notwithstanding the uncertainty surrounding this body of law, the Ninth Circuit held that "under California law, a statement on a website is not republished unless the

statement itself is substantively altered or added to, or the website is directed to a new audience.” App. 11. Based on this holding, the Ninth Circuit affirmed the district court’s determination that the statute of limitations had run on the state-law right to privacy and right to publicity claims. App. 14.

In the unpublished Memorandum opinion, the Ninth Circuit separately addressed the arguments concerning the Lanham Act claim and two other claims arising under California law. App. 17. With respect to the Lanham Act claim, the court first recognized that it has not “resolved whether a statute of limitations defense applies to claims under the Lanham Act, which are of ‘equitable character.’” App. 17 (quoting *Jarrow Formulas, Inc. v. Nutrition Now, Inc.*, 304 F.3d 829, 836 (9th Cir. 2002)). The court declined to rule on the argument that the California single-publication rule should not apply to a federal Lanham Act claim because General Yeager did not raise that claim in opposition to summary judgment. App. 17. Nevertheless, the Ninth Circuit affirmed summary judgment on the Lanham Act claim, stating, if “the statute of limitations defense applies to a claim under the Lanham Act, the single-publication rule would apply to it.” App. 17-18.

This timely petition followed.

REASONS FOR GRANTING THE WRIT

General Yeager asks this Court to resolve a question of paramount importance: whether California’s single-publication rule governs the accrual of a Lanham Act claim arising from a web-based merchant’s refusal to remove a celebrity’s unauthorized endorsement from the merchant’s website.

Here, General Yeager requested that the Bowlins cease using his name, image and likeness on their website. The Bowlins declined to do so, and instead retained portions of the unauthorized content on their website. In so doing, the Bowlins continued to profit from an unauthorized endorsement by General Yeager.

Rather than applying the equitable doctrine of laches, a framework favored by most courts and one better suited to claims brought under 15 U.S.C. § 1125(a), the district court and the Ninth Circuit rigidly applied California's statutes of limitations. Additionally, in determining when the claim accrued, the courts applied a *state* single-publication rule to this *federal* cause of action.

General Yeager submits that the application of the single-publication rule, a doctrine designed to meet challenges associated with print media, makes little sense in the context of false endorsement claims stemming from marketing material displayed on a merchant's website. For the reasons set forth below, this Court should grant this petition and review the decisions below.

I. THIS COURT SHOULD RESOLVE A CONFLICT REGARDING THE APPLICABILITY OF STATE-LAW STATUTES OF LIMITATIONS TO LANHAM ACT CLAIMS.

As noted by the Ninth Circuit in its Memorandum opinion below, it is unclear whether claims brought under the Lanham Act are subject to state-law statutes of limitations. App. 17. Ordinarily, when Congress does not expressly provide a statute of limitations, courts generally presume the

most closely analogous state-law statute of limitations applies. *See, e.g., Reed v. United Transp. Union*, 488 U.S. 319, 324 (1989).

That presumption may be overcome, however, if “a rule from elsewhere in federal law clearly provides a closer analogy than available state law statutes, and when the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking.” *Id.* Claims for monetary relief under the Lanham Act are “subject to the principles of equity,” 15 U.S.C. § 1117(a), and a number of courts have found that the equitable defense of laches provides the more appropriate framework. *See, e.g., Conopco, Inc. v. Campbell Soup Co.*, 95 F.3d 187, 191 (2d Cir. 1996) (applying laches analysis, as informed by analogous state-law statute of limitations, instead of state-law statutory limitations); *Hot Wax, Inc. v. Turtle Wax, Inc.*, 191 F.3d 813 (7th Cir. 1999) (rejecting state statute of limitations analysis in favor of laches analysis).

In contrast, other appellate courts have adhered to the general rule and applied state-law statutes of limitations. *See, e.g., PBM Products, LLC v. Mead Johnson & Co.*, 639 F.3d 111, 121 (4th Cir. 2011) (“it is proper to use the analogous state limitations period for Lanham Act suits because the Act provides no express statute of limitations”). The Ninth Circuit has recognized the uncertainty regarding the applicability of state statutes of limitations, but has declined to resolve the question. *Jarrow Formulas, Inc. v. Nutrition Now, Inc.*, 304 F.3d 829, 836 (9th Cir. 2002) (recognizing uncertainty regarding the applicability of state statutes of limitations but declining to resolve the question).

This uncertainty has led to uneven results. *See* Christopher Bucklin, *Trademarking “Jeet Kune Do”*, 40

SANTA CLARA L. REV. 511, 526 (2000) (collecting cases and noting that “[L]aches defenses have been rejected for delays ranging from four months to thirteen years. Conversely, other cases found laches defenses valid for delays ranging from three to sixty-nine years.”); 4 CALLMAN ON UNFAIR COMPETITION, TRADEMARKS AND MONOPOLIES § 23:31 n.9 (4th Ed.) (surveying cases where district courts applied state statutes of limitations ranging from one year to six years).

The greater weight of scholarly opinion supports the view that laches is the more appropriate analytical framework, with analogous state limitations providing benchmarks regarding the timeliness of a claim. *See, e.g.* CALLMAN ON UNFAIR COMPETITION, TRADEMARKS AND MONOPOLIES § 23:31 n.9 (4th Ed.) (stating laches provides “better rule”); Malla Pollack, *Suing for False Advertising Under Federal Lanham Act*, 111 AM. JUR. TRIALS 303 (“The better rule . . . is to use the analogous state limitations period to set presumptions regarding laches. If the claim is filed within the analogous state statute of limitations, the defendant has the burden of persuading the court that laches [applies]”); *see also* David C. Stimson, *Statute of Limitations in Trademark Actions*, 71 TRADEMARK REP. 605, 611-14 (1981) (statute of limitations defense likely inapplicable because § 43(a) claims are equitable in nature); 6 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 31:33 (4th ed.) (noting that, in Lanham Act cases, most federal courts will use the closest state statute of limitations to establish a guide or presumption as to whether the delay is sufficient to establish the defense of estoppel by laches). General Yeager adopts this reasoning and submits that the lower tribunals should have conducted a laches analysis, rather than rigidly applying California’s statutes of limitations.

This Court should take this opportunity to clarify

whether Lanham Act claims are subject to the equitable defense of laches or to analogous state-law statutes of limitations.

II. THIS COURT SHOULD ADDRESS THE PROPRIETY OF EMPLOYING A STATE-LAW SINGLE-PUBLICATION RULE TO DETERMINE WHEN A FEDERAL LANHAM ACT CLAIM ACCRUES.

In addition, the Court should address the propriety of employing state-law single-publication rules to determine when a federal Lanham Act claim accrues. While there is a dearth of authority on the applicability of single-publication rules to Lanham Act claims, federal appellate courts have applied single-publication rules to determine the accrual of state-law tort claims. *See, e.g., Nationwide Bi-Weekly Admin., Inc. v. Belo Corp.*, 512 F.3d 137, 142 (5th Cir. 2007) (applying Texas single-publication rule to resolve state-law libel claim); *Van Buskirk v. The New York Times Co.*, 325 F.3d 87, 89 (2d Cir. 2003) (similar). The Ninth Circuit has extended the applicability of the single-publication rule to federal causes of action. *Oja v. U.S. Army Corps of Engineers*, 440 F.3d 1122, 1129 (9th Cir. 2006) (applying single-publication rule as set forth in Restatement (Second) of Torts § 577A(3) (1977) to federal claim brought under the Privacy Act of 1974, 5 U.S.C. § 552(a)).

In this case, however, unlike *Oja*, the Ninth Circuit affirmed the application of *state* single-publication rule to determine when a *federal* cause of action accrues. In this respect, the holding of this case conflicts with the reasoning of *Wallace v. Kato*, 549 U.S. 384 (2007), where this Court held that the “accrual date of a § 1983 cause of action is a

question of federal law that is *not* resolved by reference to state law.” *Id.* at 388 (emphasis in original). By granting certiorari in this case, the Court could clarify how, if at all, the Ninth Circuit’s rule cases can be reconciled with the rule for § 1983 cases, as set forth in *Wallace v. Kato*.

III. THIS COURT SHOULD DISAPPROVE THE APPLICATION OF THE SINGLE-PUBLICATION RULE TO BAR LANHAM ACT CLAIMS ARISING FROM THE CONTINUING USE OF MARKETING CONTENT ON A MERCHANT’S WEBSITE.

This Court should grant this petition to provide guidance regarding the applicability of the single-publication rule to website operators, whose marketing content gives rise to false endorsement claims under the Lanham Act. A number of federal appellate courts have held that the single-publication rule applies to online publications. *See, e.g., Van Buskirk*, 325 F.3d at 89 (applying single-publication rule to internet publication of letter on website for non-profit veterans organization); *Oja*, 440 F.3d at 1129 (applying single-publication rule to an internet publication on an Army Corps of Engineers public affairs website); *Belo Corp.*, 512 F.3d at 142 (applying single-publication rule to an internet publication of column which was simultaneously published in print edition of newspaper). The overwhelming majority of these cases arise in the context of libel or defamation claims. *See id.*

In those contexts, there is a strong policy justification for the application of the single-publication rule: to “protect defendants from harassment through multiple suits and to reduce the drain of libel cases on judicial resources.” *Oja*,

440 F.3d at 1131 (citing *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 777 (1984)). Without the single-publication rule, the “endless retriggering of statute of limitations” would inevitably have a “serious inhibitory effect on the open, pervasive dissemination of information and ideas over the Internet, which is, of course, its greatest beneficial promise.” *Oja*, 440 F.3d at 1131-32 (quoting *Firth v. State*, 98 N.Y.2d 365, 747 N.Y.S.2d 69, 775 N.E.2d 463 (2002)).

The policy concerns that animate such decisions are not present in Lanham Act claims. Claims under the Lanham Act necessarily entail commercial speech, which is not afforded the same protection as journalistic or expressive publication. See *San Francisco Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522 (1987). Here, the Bowlins did not publish the disputed content to disseminate information or ideas. They published it to sell merchandise. Thus, the disputed content in this case is more like a commercial billboard than a book. As such, liability for its publication under the Lanham Act poses a far less serious threat to the free flow of ideas than in cases stemming from the publication of expressive or journalistic content on the internet.

Likewise, the concern regarding the endless retriggering of statutes of limitations is absent here. The facts of this case present a continuing wrong, one which the statute of limitations would not ordinarily bar, except as to damages flowing from a period outside of the statute of limitations. See *Lyons Partnership, L.P. v. Morris Costumes, Inc.*, 243 F.3d 789, 797 (4th Cir. 2001) (“[T]he statute of limitations does not shield the defendant from liability for wrongful acts actually committed during the limitations period, and ... [this] rationale applies equally to trademark infringement claims brought under the Lanham Act.”); 6 MCCARTHY ON

TRADEMARKS AND UNFAIR COMPETITION § 31:33 (4th ed.)
("Usually, infringement is a continuing wrong, and a statute of limitations is no bar except as to damages beyond the statutory period.")

Under the rule advocated by General Yeager, each sale of goods made through the use of an unauthorized endorsement is actionable, notwithstanding that the applicable statute of limitations may have run on claims stemming from the initial publication. However, once the disputed content is removed from the website, the statute of limitations would begin to run on all claims. Thus, there is no danger of an endless retriggering of the statute of limitations, unless the defendant renews the conduct that violates the Lanham Act.

Moreover, broad application of the single-publication rule to Lanham Act claims carries its own policy concerns. For instance, a website operator could theoretically publish a celebrity's false endorsement on a website that does not permit search engines such as Google to list the website in search results. *See generally Field v. Google Inc.*, 412 F. Supp. 2d 1106, 1113 (D. Nev. 2006) (describing manner in which website operators can disallow Google access to "crawl" their webpage). In this way, the website operator has "published" the content on the internet for the general public to see, thereby triggering the statute of limitations under the single-publication rule, regardless of whether the celebrity has discovered the false endorsement.

Then, after the applicable period, the web-based merchant could use the false endorsement in perpetuity without any fear of legal reprisal on the part of the celebrity. This countervailing policy concern outweighs the concerns that the single-publication rule was meant to address.

Accordingly, this Court should seize this opportunity to declare the inapplicability of the single-publication rule to false endorsement claims brought against web-based merchants for false endorsements on their websites.

CONCLUSION

For the reasons described herein, the Petitioners respectfully request that this Court grant their petition for a writ of certiorari, and review the proceedings below.

Respectfully submitted on this 22nd day of February, 2013.

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APPENDIX

App. 1

APPENDIX A

FOR PUBLICATION

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

No. 10-15297

DC No. 2:08 cv-0102 WBS

[Filed September 10, 2012]

CHARLES E. YEAGER, aka Chuck;)
GENERAL CHUCK YEAGER)
FOUNDATION,)
)
<i>Plaintiffs-Appellants,</i>)
)
v.)
)
CONNIE BOWLIN; ED BOWLIN;)
AVIATION AUTOGRAPHS, a)
non-incorporated Georgia business)
entity; BOWLIN & ASSOCIATES, INC.,)
)
<i>Defendants-Appellees.</i>)

App. 2

No. 10-16503

DC No. 2:08 cv-0102 WBS

CHARLES E. YEAGER, aka Chuck;)
GENERAL CHUCK YEAGER)
FOUNDATION,)
)
Plaintiffs-Appellants,)
)
v.)
)
CONNIE BOWLIN; ED BOWLIN;)
AVIATION AUTOGRAPHS, a)
non-incorporated Georgia business)
entity; BOWLIN & ASSOCIATES, INC.,)
)
Defendants-Appellees.)

Appeal from the United States District Court
for the Eastern District of California
William B. Shubb, Senior District Judge, Presiding

Argued and Submitted
October 12, 2011—San Francisco, California
Submission Vacated and Deferred October 13, 2011
Resubmitted July 30, 2012

Filed September 10, 2012
Before: Betty B. Fletcher, Stephen Reinhardt, and
Wallace Tashima, Circuit Judges.

Opinion by Judge Tashima

App. 3

COUNSEL

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Todd M. Noonan, Stevens, O'Connell & Jacobs LLP, Sacramento, California, for the defendants-appellees.

OPINION

TASHIMA, Circuit Judge:

Plaintiffs, retired General Charles E. “Chuck” Yeager and his foundation, appeal the district court’s order granting summary judgment to Defendants Ed and Connie Bowlin. Yeager contends that the district court should not have struck his declaration, which contains comprehensive details he did not remember at his deposition. He also contends that, under California’s single-publication rule, the Bowlins “republished” statements about him on their website — and thereby restarted the statute of limitations — when they modified unrelated information on their website. We reject both arguments and affirm the district court.¹

¹ We address Yeager’s remaining contentions and affirm the district court in a memorandum disposition filed concurrently with this opinion.

I. Background

Yeager is a recognized figure in aviation history. The Bowlins are retired commercial airline captains who became friends with Yeager in the 1980s. The Bowlins own Aviation Autographs, which sells aviation-related memorabilia, including items related to or signed by Yeager.

In 2008, Yeager brought eleven claims against the Bowlins, including violations of the federal Lanham Act, California's common law right to privacy and California's statutory right to publicity, Cal. Civ. Code § 3344. At his deposition in this action, Yeager did not recall answers to approximately two hundred questions, including questions on topics central to this action. Approximately three months later, on the same day that he filed his opposition to the Bowlins' motion for summary judgment, Yeager filed a declaration. The declaration contains many facts that Yeager could not remember at his deposition, even when he was shown exhibits in an attempt to refresh his recollection.

The district court held that Yeager's declaration was a sham and, for summary judgment purposes, disregarded it where it contained facts that Yeager could not remember at his deposition. The district court granted the Bowlins' motion for summary judgment on all claims. It held that Yeager's claims under California's common law right to privacy and California's statutory right to publicity, Cal. Civ. Code § 3344, were time-barred.

Yeager timely appealed.

II. Standards of Review

Questions of law decided on summary judgment are reviewed de novo. *Sullivan v. Dollar Tree Stores, Inc.*, 623 F.3d 770, 776 (9th Cir. 2010). We must determine, viewing the evidence in the light most favorable to [the non-movant], whether there are any genuine issues of material fact and whether the district court correctly applied the substantive law.” *Olsen v. Idaho State Bd. of Med.*, 363 F.3d 916, 922 (9th Cir. 2004).

We, apparently, have not yet decided the standard which governs our review of a district court’s invocation of the sham affidavit rule. We have, however, implied that review is for abuse of discretion. *See Van Asdale v. Int’l Game Tech.*, 577 F.3d. 989, 998 (9th Cir. 2009) (noting “two important limitations on a district court’s discretion to invoke the sham affidavit rule”). Moreover, we review for abuse of discretion “[r]ulings regarding evidence made in the context of summary judgment” *Wong v. Regents of the Univ. of Cal.*, 410 F.3d 1052, 1060 (9th Cir. (2005)). We thus conclude that a district court’s decision whether to apply the sham affidavit rule should be reviewed for abuse of discretion. Under that standard, we first “determine de novo whether the trial court identified the correct legal rule to apply to the relief requested.” *United States v. Hinkson*, 585 F.3d 1247, 1262 (9th Cir. 2009) (en banc). If it did we then “determine whether the trial court’s application of the correct legal standard was (1) illogical, (2) implausible, or (3) without support in inferences that may be drawn from the facts in the record.” *Id.* (internal quotation marks omitted).

III. Sham Declaration

Yeager argues that his declaration cannot be a sham because he did not declare facts which contradict facts he testified to at his deposition. We disagree.

[1] “The general rule in the Ninth Circuit is that a party cannot create an issue of fact by an affidavit contradicting his prior deposition testimony.” *Van Asdale*, 577 F.3d at 998 (quoting *Kennedy v. Allied Mut. Ins. Co.*, 952 F.2d 262, 266 (9th Cir. 1991)). This sham affidavit rule prevents “a party who has been examined at length on deposition” from “rais[ing] an issue of fact simply by submitting an affidavit contradicting his own prior testimony,” which “would greatly diminish the utility of summary judgment as a procedure for screening out sham issues of fact.” *Kennedy*, 952 F.2d at 266 (internal quotation marks omitted); *see also Van Asdale*, 577 F.3d at 998 (stating that some form of the sham affidavit rule is necessary to maintain the principle that summary judgment is an integral part of the federal rules). But the sham affidavit rule “should be applied with caution” because it is in tension with the principle that the court is not to make credibility determinations when granting or denying summary judgment. *Id.* (quoting *Sch. Dist. No. 1J v. ACandS, Inc.*, 5 F.3d 1255, 1264 (9th Cir. 1993)), In order to trigger the sham affidavit rule, the district court must make a factual determination that the contradiction is a sham, and the “inconsistency between a party’s deposition testimony and subsequent affidavit must be clear and unambiguous to justify striking the affidavit.” *Id.* at 998-99.

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According to the district court, “the deponent remember[ed] almost nothing about the events central to the case during his deposition, but suddenly recall[ed] those same events with perfect clarity in his declaration in opposition to summary judgment without any credible explanation as to how his recollection was refreshed.” During his deposition, Yeager responded that he did not recall answers to approximately 185 different questions. For example, Yeager stated that he did not recall significant or difficult-to-forget events in the recent past, such as testifying in court or his involvement in a plane crash. In his declaration, Yeager provided no reason for his sudden ability to recall specific facts that he could not recall during his deposition other than stating that since his deposition he “reviewed several documents that have refreshed [his] recollection about some things [he] did not recall. The district court found this explanation to be “unbelievable given that Yeager was shown over twenty exhibits during his deposition in an attempt to refresh his recollection.”

[2] Several of our cases indicate that a district court may find a declaration to be a sham when it contains facts that the affiant previously testified he could not remember. In *Scamihorn v. General Truck Drivers*, we implied this result in dicta when we noted that a declaration could be considered a sham if the declarant provides information which he had testified he could not recall. 282 F.3d 1078, 1085 n.7 (9th Cir. 2002). We have also held that a witness can be punished for contempt of court when he refuses to give information “which in the nature of things [he] should know.” *Collins v. United States*, 269 F.2d 745, 750 (9th Cir. 1959). In *Collins*, we quoted Learned Hand’s example

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that to evade contempt of court “it could not be enough for a witness to say that he did not remember where he had slept the night before, if he was sane and sober” *Id.* (quoting *United States v. Appel*, 211 F. 495, 495-96 (S.D.N.Y. 1913)). The utility of the sham affidavit rule to maintain summary judgment as integral to the federal rules, *Van Asdale*, 577 F.3d at 998, would be undermined if we were to hold that the rule did not apply in this case.

[3] We caution that newly-remembered facts, or new facts, accompanied by a reasonable explanation, should not ordinarily lead to the striking of a declaration as a sham. *See Cleveland v. Policy Mgmt. Sys. Corp.*, 526 U.S. 795, 806-07 (1999) (stating the general rule that parties may explain or attempt to resolve contradictions with an explanation that is sufficiently reasonable). “[T]he non-moving party is not precluded from elaborating upon, explaining or clarifying prior testimony elicited by opposing counsel on deposition and minor inconsistencies that result from an honest discrepancy, a mistake, or newly discovered evidence afford no basis for excluding an opposition affidavit.” *Van Asdale*, 577 F.3d at 999 (quoting *Messick v. Horizon Indus.*, 62 F.3d 1227, 1231 (9th Cir. 1995)). This is not a case in which a deponent’s memory could credibly have been refreshed by subsequent events, including discussions with others or his review of documents, record, or papers.

[4] In this case, the district court found that “the disparity between the affidavit and deposition is so extreme that the court must regard the differences between the two as contradictions.” This finding was not clearly erroneous. The district court could

reasonably conclude that no juror would believe Yeager's weak explanation for his sudden ability to remember the answers to important questions about the critical issues of his lawsuit. It is implausible that Yeager could refresh his recollection so thoroughly by reviewing several documents in light of the extreme number of questions to which Yeager answered he could not recall during his deposition and the number of exhibits used during the deposition to try to refresh his recollection. Thus, the district court's invocation of the sham affidavit rule to disregard the declaration was not an abuse of discretion.²

IV. Republication on the Internet

Yeager filed this lawsuit in January 2008. He alleges that statements on the Aviation Autographs website violate his common law right to privacy and California's statutory right to publicity, Cal. Civ. Code § 3344. Both claims are subject to a two-year statute of limitations. *See Christoff v. Nestle USA, Inc.*, 213 P.3d 132, 135 (Cal. 2009). There is no evidence in the record that the Bowlins added any information about Yeager, or changed any of the challenged statements about Yeager on their website, after October 2003. The district court applied the single-publication rule, determined that the statute of limitations accrued in October 2003, and dismissed these two claims as

² Yeager also asks us to generally "scrutinize" the district court's evidentiary rulings, but does not ask us to overturn any ruling other than the finding of a sham declaration. Accordingly, we do not address any of Yeager's other arguments related to the district court's evidentiary rulings.

untimely. Yeager challenges the district court's accrual calculation.

[5] "The single-publication rule limits tort claims premised on mass communications to a single cause of action that accrues upon the first publication of the communication, thereby sparing the courts from litigation of stale claims when an offending book or magazine is resold years later." *Roberts v. McAfee, Inc.*, 660 F.3d 1156, 1166-67 (9th Cir. 2011) (internal quotation marks omitted); *see also* Cal. Civ. Code § 3425.3. The single-publication rule applies to the internet. *Roberts*, 660 F.3d at 1167. In print and on the internet, statements are generally considered "published" when they are first made available to the public. *Id.*

[6] Under the single-publication rule, the statute of limitations is reset when a statement is republished. *See id.* A statement in a printed publication is republished when it is reprinted in something that is not part of the same "single integrated publication." *Christoff*, 213 P.3d at 137. For example, a statement made in a daily newspaper is not republished when it is repeated in later editions of that day's newspaper, *Belli v. Roberts Bros. Furs*, 49 Cal. Rptr. 625, 629 (Ct. App. 1966), but a statement made in a hardcover book is republished when it is repeated in a later paperback version of the book, *Kanarek v. Bugliosi*, 166 Cal. Rptr. 526, 530 (Ct. App. 1980).

[7] Applying the single-integrated-publication test to non-traditional publications can be tricky. *See, e.g., Christoff*, 213 P.3d at 141 (remanding to the trial court to develop record on whether different components of

advertising campaign constitute a single integrated publication). One “general rule” is that a statement is republished when it is ‘repeat[ed] or recirculate[d] . . . to a new audience.’ *Hebrew Acad. of S.F. v. Goldman*, 173 P.3d 1004, 1007 (Cal. 2007). And we have previously held that, under California’s single-publication rule, once a defendant publishes a statement on a website, the defendant does not republish the statement by simply continuing to host the website. *See Roberts*, 660 F.3d at 1169 (continuing to host a press release on a website is “inaction” which “is not a republication”).

[8] Yeager argues that the website was republished, and the statute of limitations restarted, each time the Bowlins added to or revised content on their website, even if the new content did not reference or depict Yeager. For example, the reference to Yeager on the “News and Events” page was added in 2003, but that webpage also contains entries on other topics that were apparently added through the fall of 2009. Although one California Court of Appeal has noted in dicta that “[t]he modification to a Web site does not constitute a republication,” *Christoff v. Nestle USA*, 62 Cal. Rptr. 3d 122, 138 (Ct. App. 2007), *rev’d in part*, *Christoff*, 213 P.3d 132, the California appellate courts have not squarely addressed this question. We reject Yeager’s argument and hold that, under California law, a statement on a website is not republished unless the statement itself is substantively altered or added to, or the website is directed to a new audience. This holding is consistent with cases in which we have applied the single-publication rule to federal statutes and with decisions of other courts, and prevents freezing websites in anticipation of litigation.

In *Oja v. United States Army Corps of Engineers*, we rejected a plaintiff's argument that a defendant continuously republished information by hosting the information on a website. 440 F.3d 1122, 1132 (9th Cir. 2006). One reason, we explained, was that the website host "did not modify the substance of the published information following the initial posting of the private information." *Id.* In a footnote, we cautioned that "[o]f course, substantive changes or updates to previously hosted content that are not 'merely technical' may sufficiently modify the content such that it is properly considered a new publication." *Id.* at 1132 n.14 (citing *In re Davis*, 334 B.R. 874 (Bankr. W.D. Ky. 2005)). The case we cited in support held that the defendants republished defamatory material when they added substantive information regarding the plaintiffs to their website. *In re Davis*, 334 B.R. at 884, *aff'd in relevant part*, *Davis v. Mitan*, 347 B.R. 607, 612 (W.D. Ky. 2006).

Our holding is also consistent with *Canatella v. Van De Kamp*, 486 F.3d 1128 (9th Cir. 2007). In that case, we held the defendant did not republish the plaintiff's disciplinary summary when he added a "verbatim copy" of the summary to a different URL within the same domain name. *Id.* at 1135. If adding a verbatim copy of a statement to a different URL does not trigger republication, then leaving a statement unchanged while modifying other information on the URL should not trigger republication.

Other courts that have considered this question have reached the same conclusion. In *Firth v. State*, the New York Court of Appeals rejected plaintiff's argument that the defendant republished an allegedly

defamatory report when it posted an unrelated report to its website because “it is not reasonably inferable that the addition was made either with the intent or the result of communicating the earlier and separate defamatory information to a new audience.” 775 N.E. 2d 463, 466 (N.Y. 2002); *see also Atkinson v. McLaughlin*, 462 F. Supp. 2d 1038, 1051, 1055 (D.N.D. 2006) (updating names and addresses of the board of directors listed on a website was not a republication because the “modification did not change the content or substance of the website that [plaintiff] alleges is defamatory in nature” and “did not reasonably result in communicating the alleged defamatory information to a new audience”). *Firth* has been cited with approval in two opinions of the California Courts of Appeal. *See Traditional Cat Ass’n, Inc. v. Gilbreath*, 13 Cal. Rptr. 3d. 353, 361 (Cal. Ct. App. 2004) (extensively quoting *Firth*’s holding that the single-publication rule applies to the internet); *Christoff*, 62 Cal. Rptr. 3d at 138 (citing *Firth* for its statement in dicta that “modification to a Web site does not constitute a republication”).

In *Firth*, the New York Court of Appeals explained that allowing any modification of a website to trigger republication “would either discourage the placement of information on the Internet or slow the exchange of such information” by forcing a publisher “to avoid posting on a Web site or use a separate site for each new piece of information.” 775 N.E. 2d at 467. We agree, and add that Yeager’s suggested rule would encourage websites to be frozen in anticipation of and during potentially lengthy litigation. For example, Connie Bowlin notes in her declaration that “[b]ecause of this lawsuit, we have not edited [the “About Aviation

Autographs” page] to update it, but intend to do so once this lawsuit is complete.” We recognized in *Oja* that refusing to apply the single-publication rule to the internet would have “a serious inhibitory effect on the open, pervasive dissemination of information and ideas over the Internet, which is, of course, its greatest beneficial promise.” 440 F.3d at 1132 (quoting *Firth*, 775 N.E.2d at 466). This reasoning would be undermined if the standard for republication is too easily met.

[9] Yeager suggests, citing Justice Werdegar’s concurring opinion in *Christoff*, that republication is triggered when a publisher makes a conscious deliberate choice to reissue a publication. 213 P.3d at 143 (Werdegar, J., concurring). Yeager argues that when the Bowlins edited some parts of the website, but left the challenged statements intact, they made a conscious choice to continue publishing the challenged statements. We reject this argument for two reasons. First, “Justice Werdegar’s concurrence was not adopted by the majority and therefore is not the law of California.” *Roberts*, 660 F.3d at 1168. Second, “even if it were, it would not help” Yeager. *Id.* If a defendant does not make a conscious choice to republish a statement by continuing to host the statement on a website, *id.*, the defendant does not make a conscious choice to republish the statement by continuing to host the statement and also modifying other parts of the website.

V. Conclusion

The judgment of the district court granting summary judgment to Defendants is **AFFIRMED**.

APPENDIX B

NOT FOR PUBLICATION

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

No. 10-15297

DC No. 2:08 cv-0102 WBS

[Filed September 10, 2012]

CHARLES E. YEAGER, aka Chuck;)
GENERAL CHUCK YEAGER)
FOUNDATION,)
)
Plaintiffs-Appellants,)
)
v.)
)
CONNIE BOWLIN; ED BOWLIN;)
AVIATION AUTOGRAPHS, a)
non-incorporated Georgia business)
entity; BOWLIN & ASSOCIATES, INC.,)
)
Defendants-Appellees.)

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No. 10-16503

DC No. 2:08 cv-0102 WBS

CHARLES E. YEAGER, aka Chuck;)
GENERAL CHUCK YEAGER)
FOUNDATION,)
)
Plaintiffs-Appellants,)
)
v.)
)
CONNIE BOWLIN; ED BOWLIN;)
AVIATION AUTOGRAPHS, a)
non-incorporated Georgia business)
entity; BOWLIN & ASSOCIATES, INC.,)
)
Defendants-Appellees.)

Appeal from the United States District Court
for the Eastern District of California
William B. Shubb, Senior District Judge, Presiding

Argued and Submitted October 12, 2011
San Francisco, California
Submission Vacated and Deferred October 13, 2011
Resubmitted July 30, 2012

Before: B. FLETCHER, REINHARDT, and
TASHIMA, Circuit Judges.

MEMORANDUM*

Plaintiffs Charles E. “Chuck” Yeager and his foundation challenge the district court’s grant of summary judgment to Defendants Ed and Connie Bowlin and the award to them of attorneys’ fees. We affirm.¹

1. The district court concluded that the single-publication rule bars as untimely Yeager’s claims under the Lanham Act, 15 U.S.C. § 1051, California’s Unfair Competition Law, Cal. Bus. & Prof. Code § 17200, and California’s False Advertising Act, *id.* § 17500. We agree.

We have not resolved whether a statute of limitations defense applies to claims under the Lanham Act, which are of “equitable character.” *See Jarrow Formulas, Inc. v. Nutrition Now, Inc.*, 304 F.3d 829, 836 (9th Cir. 2002). On appeal, Yeager argues that the statute of limitations does not apply to Lanham Act claims. However, Yeager waived this argument by failing to raise it in the district court in his opposition to the Bowlins’ motion for summary judgment. *Hillis v. Heineman*, 626 F.3d 1014, 1019 (9th Cir. 2010). We therefore decline to reverse the district court on this basis. If the statute of limitations defense applies to a

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

¹ In this memorandum we address and decide all of Yeager’s claims, except his claims for violations of California’s common law right to privacy and statutory right of publicity, which we address in an opinion filed concurrently with this memorandum.

claim under the Lanham Act, the single-publication rule would apply to it. *See, e.g., Canatella v. Van De Kamp*, 486 F.3d 1128, 1133 (9th Cir. 2007) (applying single-publication rule to a suit under 42 U.S.C. § 1983); *Oja v. U.S. Army Corps of Eng'rs*, 440 F.3d 1122, 1130-33 (9th Cir. 2006) (applying single-publication rule to the federal Privacy Act);. Therefore, we affirm the district court's dismissal of Yeager's Lanham Act claim as untimely.

Yeager also argues that California's statutory single-publication rule, Cal. Civ. Code § 3425.3, cannot be applied to his claims under the California Unfair Competition Law and the California False Advertising Act because they are both actions in equity. Yeager also waived these arguments by failing to advance them in the district court. *Hillis*, 626 F.3d at 1019.

2. Yeager also challenges the district court's rejection of equitable tolling and estoppel for his common law claims for fraud and breach of oral contract. Yeager asserts that core factual disputes remain that are relevant to his equitable tolling and estoppel claims. He also argues that the district court did not sufficiently analyze his equitable tolling and estoppel claims regarding his breach of oral contract and fraud claims on his "Leiston Legends" prints.

"[F]ederal courts exercising diversity jurisdiction are to use state statutes of limitation." *Nev. Power Co. v. Monsanto Co.*, 955 F.2d 1304, 1306 (9th Cir. 1992). "Federal courts must abide by a state's tolling rules, which are integrally related to statutes of limitations." *Albano v. Shea Homes Ltd. P'ship*, 634 F.3d 524, 530 (9th Cir. 2011).

In California, equitable tolling applies “when an injured person has several legal remedies and, reasonably and in good faith, pursues one.” *McDonald v. Antelope Valley Cmty. Coll. Dist.*, 194 P.3d 1026, 1031 (Cal. 2008) (internal quotation marks and alterations omitted). Yeager does not point to any evidence of this type of situation in the record, related to his Leiston Legends prints or otherwise. Equitable estoppel applies when the party asserting the statute of limitations defense “induced another into forbearing suit within the applicable limitations period.” *Lantzy v. Centex Homes*, 73 P.3d 517, 532 (Cal. 2003). Yeager does not point to any evidence in the record that the Bowlins induced him into forbearing suit within the applicable limitations period for any of his claims. The district court did not err in rejecting the application of equitable tolling and estoppel to these claims.

3. The Bowlins moved for attorneys’ fees and costs under the Lanham Act, 15 U.S.C. § 1117(a), and California’s statutory right of publicity, Cal. Civ. Code § 3344(a). The district court initially rejected the motion because over eighty percent of the entries were “block-billed.”² The district court later granted the motion after the Bowlins submitted an amended billing statement, which the district court determined was “sufficiently reliable.” Based in part on these amended billing statements, the district court granted the

² “Block billing is the time-keeping method by which each lawyer and legal assistant enters the total daily time spent working on a case, rather than itemizing the time expended on specific tasks.” *Welch v. Metro. Life Ins. Co.*, 480 F.3d 942, 945 n.2 (9th Cir. 2007) (internal quotation marks and citation omitted).

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Bowlins \$268,677.50 in attorneys' fees and \$6,919.08 in costs.

A federal court should generally follow state law on attorneys' fees when exercising its jurisdiction over a state law claim. *See MRO Commc'ns, Inc. v. AT&T Corp.*, 197 F.3d 1276, 1281 (9th Cir. 1999). In this case, we consider both federal and California law because the attorneys' fees and costs were granted under both federal and state law. Under both federal and California law, awards of attorneys' fees are reviewed for abuse of discretion. *See Transgo, Inc. v. Ajac Transmission Parts Corp.*, 768 F.2d 1001, 1014 (9th Cir. 1985); *Serrano v. Priest*, 569 P.2d 1303, 1317 (Cal. 1977).

First, we disagree with Yeager's assertion that the district court allowed the Bowlins leave to reconstruct their counsel's time entries because it mistakenly believed that it had no discretion to disallow the fee request. The district court did not express this belief. Second, we reject Yeager's argument that the district court abused its discretion by permitting the Bowlins' counsel to reconstruct its block billing. A district court may allow a party seeking attorneys' fees to amend its billing statements. *Davis v. City & Cnty. of S.F.*, 976 F.2d 1536, 1542 (9th Cir. 1992); *Bell v. Vista Unified Sch. Dist.*, 98 Cal. Rptr. 2d 263, 275 (Ct. App. 2000). Once the Bowlins submitted their reconstructed records, the district court made a "detailed analysis of the time records presented and a finding as to the reasonable hourly rate." *Frank Music Corp. v. Metro-Goldwyn-Mayer Inc.*, 886 F.2d 1545, 1557 (9th Cir. 1989).

In his reply brief, Yeager argues that he should not be charged for fees generated from the Bowlins' defense of non-fee bearing claims. We do not address this argument because Yeager failed to include it in his opening brief. *See Quality Loan Serv. Corp. v. 24702 Pallas Way*, 635 F.3d 1128, 1135 n.11 (9th Cir. 2011); Fed. R. App. Proc. 28(a)(9). The district court did not abuse its discretion in its award of attorneys' fees.

The judgment of the district court and its post-judgment award of attorneys' fees are **AFFIRMED**.

APPENDIX C

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA**

NO. CIV. 2:08-102 WBS JFM

[Filed January 6, 2010]

GENERAL CHARLES "CHUCK"
YEAGER, (RET.), and GENERAL
CHUCK YEAGER FOUNDATION,

Plaintiffs,

v.

CONNIE BOWLIN, ED BOWLIN,
DAVID MCFARLAND, AVIATION
AUTOGRAPHS, a non-incorporated
Georgia business entity, BOWLIN
& ASSOCIATES, INC., a Georgia
corporation, INTERNATIONAL
ASSOCIATION OF EAGLES, INC.,
an Alabama corporation, SPALDING
SERVICES, INC., and DOES 1
through 100, inclusive,

Defendants.

**MEMORANDUM AND ORDER RE:
MOTION FOR SUMMARY JUDGMENT**

Plaintiffs General Charles “Chuck” Yeager, (Ret.) (“Yeager”) and the General Chuck Yeager Foundation (“Foundation”) filed this lawsuit alleging various claims against defendants Connie Bowlin, Ed Bowlin, David McFarland, Aviation Autographs, Bowlin and Associates, Inc. (“B&A”), Spalding Services, Inc., and International Association of Eagles, Inc. Currently before the court is defendants Connie Bowlin, Ed Bowlin, Aviation Autographs, and B&A’s motion for summary judgment pursuant to Federal Rule of Civil Procedure 56.¹

I. Summary Judgment Standard

Summary judgment is proper “if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c). A material fact is one that could affect the outcome of the suit, and a genuine issue is one that could permit a reasonable jury to enter a verdict in the non-moving party’s favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The party moving for summary judgment bears the initial burden of establishing the

¹ Defendants David McFarland, International Association of Eagles, Inc., and Spalding Services, Inc. have not been served in this action. As it has been well over 120 days since the Second Amended Complaint was filed, discovery is closed, and the law and motion deadline has passed, these defendants must be dismissed from this action. See Fed. R. Civ. P. 4(m).

absence of a genuine issue of material fact and can satisfy this burden by presenting evidence that negates an essential element of the non-moving party's case. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). Alternatively, the moving party can demonstrate that the non-moving party cannot produce evidence to support an essential element upon which it will bear the burden of proof at trial. Id.

Once the moving party meets its initial burden, the non-moving party “may not rely merely on allegations or denials in its own pleading,” but must go beyond the pleadings and, “by affidavits or as otherwise provided in [Rule 56,] set out specific facts showing a genuine issue for trial.” Fed. R. Civ. 56(e); Celotex Corp., 477 U.S. at 324; Valandingham v. Bojorquez, 866 F.2d 1135, 1137 (9th Cir. 1989). In its inquiry, the court must view any inferences drawn from the underlying facts in the light most favorable to the nonmoving party, but may not engage in credibility determinations or weigh the evidence. Anderson, 477 U.S. at 255; Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

II. Evidentiary Objections

Despite the frustrations repeatedly expressed by this and other courts,² the practice of cluttering the record with unnecessary evidentiary objections in connection with summary judgment motions appears to

² See Burch v. Regents of Univ. of Cal., 433 F. Supp. 2d 1110, 1118-22 (E.D. Cal. 2006); Marceau v. International Broth. Of Elec. Workers, 618 F. Supp. 2d 1127, 1141 (D. Ariz. 2009).

have become institutionalized. In this case for example, plaintiffs filed 86 separate evidentiary objections to defendants' proffered evidence and declarations in support of the motion, contending that many of the submitted facts are "irrelevant," lack personal knowledge, or are supported by evidence which is hearsay. Not to be outdone, in reply, defendants filed 57 evidentiary objections to the declarations submitted by plaintiffs in their opposition.

At trial, most lawyers do not object to questions when the answers are not likely to be damaging to their client's position in the case or where it is clear that the information sought by the question can eventually be elicited by proper questioning. Not so in the context of a summary judgment motion. In that context, lawyers routinely make every conceivable objection to the statements contained in a declaration submitted by the other party. Just as an example, in this case defendants object to the statements in Yeager's declaration to the effect that Dave McFarland made the F-15 print and First Day Covers, that Yeager sent McFarland the prints so that McFarland could sell them for Yeager, and that the Bowlins found the warehouse where McFarland stored the Hey Pard and F-15 prints and First Day Covers. All of these statements are perfectly consistent with, and indeed would tend to support, defendants' interpretation of the facts.

The court perceives at least two reasons for this difference in practice. First, in the setting of a jury trial, counsel run the risk of antagonizing the jury by repeatedly making unnecessary objections. An irritated jury might retaliate by deciding the case

against their client. In the context of a summary judgment motion, however, lawyers are entitled to assume that even an irritated judge will decide the motion on its merits and will not retaliate against them.

Second, particularly in the larger law firms, the lawyer or lawyers who prepare the materials in support of, or in opposition to, motions for summary judgment are typically not the same lawyers who will try the case. The task of combing through the opponent's declarations and looking for evidentiary objections may seem to be one that is easily turned over to an associate who does not need to have any trial experience or particular knowledge of the case. Even when the trial attorney does have a hand in preparing the motion or opposition, that attorney typically has not fully developed his or her trial strategy by the time the motion for summary judgment is briefed. Accordingly, not wishing to waive any conceivable objection the trial attorney may want to eventually make at trial, the attorneys heed the admonition of the Rutter Group:

Failure to object as waiver: Evidentiary objections must be raised, either orally or in writing, at or before the hearing. Otherwise such objections are deemed waived.³

³ That advice, as this court reads it, refers to whether the objection will be waived on appeal, not to whether it will be waived at trial. See FDIC v. New Hampshire Ins. Co., 953 F.2d 478, 484-85 (9th Cir. 1991). To this court's knowledge, failure to object to evidence presented in connection with a summary judgment motion does not waive any objection to that evidence at trial. See Amnesty Am. v. Town of W. Hartford, 361 F.3d 113, 118 (2d Cir. 2004) (noting in

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William W. Schwarzer, et al., California Practice Guide: Federal Civil Procedure Before Trial § 14:111 (2009).

The problem with this practice is not just that it frustrates judges. It frustrates the very purpose of Rule 56 of the Federal Rules of Civil procedure by turning summary judgment practice from an inquiry into whether there are truly disputed issues of material fact into a contest to determine which side can come up with the most sustainable evidentiary objections. If the rulings on the evidentiary objections result in the motion being denied, the case will of course proceed to trial. If those rulings result in the motion being granted, the matter will proceed to appeal, where the trial court's rulings on each of the objections can be scrutinized, presumably under *de novo* review, by the Court of Appeals.

While this focus on the technical compliance of the declarations with the Federal Rules of Evidence does not appear to be in the spirit of Rule 56, or what the Supreme Court contemplated when it clarified the summary judgment procedure in Celetex, Anderson, and Matsushita, it is what has evolved in practice and what the parties have invited in this case. Accordingly, the court will proceed to rule upon the parties' evidentiary objections.

connection with an appeal from an order granting summary judgment that on remand "at trial, plaintiffs are free to reiterate their objections to [the district court's evidentiary] rulings").

In the interest of brevity, as the parties are aware of the substance of their objections and the grounds asserted in support of each objection, the court will not review the substance or grounds of all the objections here. Plaintiffs' objections 1-5, 7, 9-12, 14-18, 20-23, 26-28, 30-33, 35, 38, 40, 42, 44, 46-47, and 49-86 are overruled. Plaintiffs' objections 4, 8, 13, 19, 24-25, 29, 34, 36-37, 41, 43, 45, and 48 are sustained. Defendants' objections to the Declaration of General Yeager 1, 2, 10, and 22-23 are overruled. Defendants' objections to the Declaration of Charles Yeager 3-9, and 11-21 are sustained. Defendants' objections to the Declaration of Victoria Yeager 1-4, 6, 14, 31, and 35 are overruled. Defendants' objections to the declaration of Victoria Yeager 5, 7-13, 15-30, and 32-34 are sustained.

III. The Sham Affidavit Rule

In addition to their evidentiary objections, defendants contend that certain portions of plaintiffs' declarations should be excluded from consideration by the "sham affidavit rule." "The general rule in the Ninth Circuit is that a party cannot create an issue of fact by an affidavit contradicting his prior deposition testimony." Kennedy v. Allied Mut. Ins. Co., 952 F.2d 262, 266 (9th Cir. 1991). This is because "if a party who has been examined at length on deposition could raise an issue of fact simply by submitting an affidavit contradicting his own prior testimony, this would greatly diminish the utility of summary judgment as a procedure for screening out sham issues of fact." Id. at 266 (quoting Foster v. Arcata Assocs., Inc., 772 F.2d 1453, 1462 (9th Cir. 1985)).

The sham affidavit rule may be invoked only if a district court makes “a factual determination that the contradiction was actually a sham” and “the inconsistency between a party’s deposition testimony and subsequent affidavit . . . [is] clear and unambiguous.” Van Asdale v. Int’l Game Tech., 577 F.3d 989, 998-99 (9th Cir. 2009) (internal quotations marks, citations omitted). Accordingly, “the non-moving party is not precluded from elaborating upon, explaining or clarifying prior testimony elicited by opposing counsel on deposition [and] minor inconsistencies that result from an honest discrepancy, a mistake, or newly discovered evidence afford no basis for excluding an opposition affidavit.” Messick v. Horizon Indus., 62 F.3d 1227, 1231 (9th Cir. 1995). Yeager and Victoria Yeager each submitted a declaration in opposition to defendants’ motion for summary judgment portions of which defendants contend ought to be stricken as sham.

A. Yeager Declaration

At his deposition, Yeager stated that he did not recall answers to approximately 185 different questions, including questions that go to the heart of this action. (See Noonan Decl. Ex. B.) For instance, Yeager indicated he did not recall what concerns he had about the Bowlins selling the Gathering of the Eagles prints, whether any agreement existed between himself and the Bowlins, whether the Bowlins made any misrepresentations to him concerning their sale of his memorabilia, whether he entered an agreement with the Bowlins concerning the development of the Leiston Legends print or attended the Tribute to the Aces, whether the Bowlins are selling the Hey Pard

print, what is illegal about the Bowlins' use of his name, and other critical issues in the case.⁴ (Gen. Yeager Depo. 13:17-19, 20:10-21, 21:1-5, 29:21-30:11, 31:13-22, 42:11-17, 66:7-17, 94:19-22.)

However, in Yeager's Corrected Declaration, he now states that he is able to recall these same matters in detail after "having his recollection refreshed," including the amount he typically charged for signing items, the oral agreements he made with the Bowlins, and his participation in the Tribute to Aces. (See Gen. Yeager Corrected Decl. ¶¶ 16, 21, 22-26, 27.) It is clear that Yeager's declaration is a sham. In his declaration, Yeager gives no explanation as to why he suffered from such extensive memory loss at his deposition, other than to say his recollection was refreshed by a series of documents which are not attached to his declaration. (Id. ¶ 14.) This claim is unbelievable given that Yeager was shown over twenty exhibits during his deposition in an attempt to refresh his recollection, but was consistently unable to recall any of the matters now elaborated on in his declaration. (See, e.g., Yeager Depo. 14:7-25; 19:7-20:6; 21: 10-22:2; 23:17-26:20; 38:24-40:3; 41:1-42:17; 44:9-25; 45:10-46:22; 55:7-21; 57:9-58:2; 62:14-63:7; 65:7-17; 66:7-17; 67:10-68:3; 69:9-70:17; 70:21-71:11; 71:15-72:17; 72:20-73:10; 73:13-74:4; 78:4-24; 83:22-84:12; 94:2-95:10.) This is not a case of a simple misunderstanding of a few

⁴ Especially troubling is that Yeager seemed to be unable to recall significant, and what would be unforgettable events for many, such as testifying in the earlier state court action against his children, his initial complaint in this action, or even his involvement in a plane crash in the Bowlins' aircraft. (Gen. Yeager Depo. 14:7-15:13, 22:17-23:10, 46:19-22.)

questions that requires additional explanation, but instead one where Yeager repeatedly refused to answer hundreds of material questions.

Just because Yeager's responses at his deposition were to the effect that he did "not recall" certain events does not mean those responses do not contradict his later recollection of those same events. Courts have found that the sham affidavit rule may be applied when a matter that a witness fails to remember during a deposition is then remembered with clarity in an affidavit used to defeat summary judgment. Mitchael v. Intracorp, Inc., 179 F.3d 847, 854-55 (10th Cir. 1999); (finding an affidavit from a witness that "more clearly recalled discussions and meetings" that the witness could not remember during his deposition "arguably contradicted his deposition" and therefore "represent[ed] an attempt to create a sham issue of fact"); accord Juarez v. Utah, 263 Fed. Appx. 726, 735-36 (10th Cir. 2008) (excluding plaintiff's affidavit referencing racial slurs used against her as a sham affidavit because she stated she could not recall any such slurs at her deposition); see also Gilani v. GNOC Corp., No. 04-CV-2935 (ILG), 2006 WL 1120602, at *3 (E.D.N.Y. April 26, 2006) (applying the sham affidavit rule when plaintiff "admitted in her deposition she did not recall seeing the cleaning staff before she entered the restroom" but then recalled that she did see a staff member in an affidavit with "no other evidence corroborating the recollection.") Yeager's declaration is far more questionable than any of the aforementioned affidavits excluded by courts under the sham affidavit rule. In a case such as this, where the deponent remembers almost nothing about the events central to the case during his deposition, but suddenly

recalls those same events with perfect clarity in his declaration in opposition to summary judgment without any credible explanation as to how his recollection was refreshed, the disparity between the affidavit and deposition is so extreme that the court must regard the differences between the two as contradictions. See Mitchael, 179 F.3d at 854-55.

Yeager has failed to “provide [] a sufficient explanation for the contradiction” between his deposition testimony, where he was unable to remember almost anything about the details of this action, and his declaration where those details are suddenly perfectly clear. Martinez v. Marin Sanitary Serv., 349 F. Supp. 2d 1234, 1242 (N.D. Cal. 2004). There was nothing confusing about the questions posed to Yeager. The clear disparity between the sweeping lack of knowledge of Yeager at his deposition and the information presented in his declaration leaves no conclusion other than that his declaration is a self-serving attempt to manufacture issues of fact to defeat summary judgement. Accordingly, the court will disregard the contradictions between Yeager’s deposition testimony and his Declaration when evaluating defendants’ motion for summary judgment.

B. Victoria Yeager Declaration

Defendants additionally contend that various statements made by Victoria Yeager in her Declaration in opposition to the motion for summary judgment contradict both her earlier statements and plaintiffs’ responses to interrogatories during discovery. Throughout the various iterations of their complaint, plaintiffs have consistently alleged that defendants

agreed to provide plaintiffs with one-third of the Leiston Legends prints signed at the Gathering of Aces event. (See Original Compl. ¶¶ 24, 27; First Am. Compl. ¶¶ 24, 27; SAC ¶¶ 25, 28.) In addition, in their interrogatory responses plaintiffs continued to advocate that the agreement between the Bowlins and Yeager “provided that GENERAL YEAGER would appear and speak at the [Tribute to Aces] . . . and would be entitled to retain one-third (1/3) of [the] signed lithographs for his own use.” (Noonan Decl. Ex. E.) Plaintiffs did not supplement or correct these discovery responses pursuant to Rule 26(e).

In her Declaration, Victoria Yeager now contends that she knew at the time of the signing of the Leiston Legends prints that the Bowlins wanted to give the Yeagers 100 prints and that in response the Yeagers “said to hold onto the other 200 and maybe [the Bowlins] could sell them for” the Yeagers. (V. Yeager Decl. ¶ 15.) While there is tension between this statement and the previous allegations by plaintiffs, Victoria Yeager is not a named plaintiff in this action. As such, unlike in Wasco Products, Inc. v. Southwall Technologies, Inc., 25 F.3d 989 (9th Cir. 2006), plaintiffs have not presented a new theory of liability based upon Victoria Yeager’s declaration. In fact, at no point in plaintiffs’ Opposition to this motion do they advance Victoria Yeager’s theory of the Leiston Legends agreement. Accordingly, the court finds it unnecessary to strike this portion of Victoria Yeager’s declaration. Plaintiffs remain bound by their responses to defendants’ interrogatories and admissions, irrespective of Victoria Yeager’s declaration. See Wasco Products, 25 F.3d at 992; Conlon v. U.S., 474 F.3d 616, 621-22 (9th Cir. 2007); School Dist. No. 1J,

Multnomah County, Or. v. AC&S, Inc., 5 F.3d 1255, 1264 (9th Cir. 1993).

IV. Relevant Facts

Excluding the evidence to which the court has sustained the parties' objections above, and disregarding those portions of the Yeager declaration which are contradicted by his deposition testimony as discussed above, the following facts are undisputed.

Yeager is a well-known figure in American aviation history. (Second Am. Compl. ("SAC") ¶¶ 15-17.) Connie and Ed Bowlin ("the Bowlins") are retired Delta Airlines captains who are active in the aviation community. (Bowlin Decl. ¶¶ 5-13.) The Bowlins are owners of Aviation Autographs, a non-incorporated Georgia business entity that sells and markets aviation memorabilia, and B&A, a Georgia corporation in the business of aviation sales and consulting. (SAC ¶¶ 7, 11-12.) The Bowlins met Yeager in the mid 1980s and became friends with him. (Bowlin Decl. ¶¶ 18-20; Gen. Yeager Dep. 56:23-57:3, 60:20-61:14, 61:20-62:9.)

Defendant David McFarland met Yeager through the "Gathering of the Eagles" program, which was initiated and organized by McFarland beginning in 1982. (McFarland Decl. ¶¶ 12-20.) The Gathering of the Eagles brought distinguished aviators to the Air Command and Staff College ("ACSC") at Maxwell Air Force Base to give talks to the ACSC class. (*Id.*) Yeager attended all of the Gathering of the Eagles events coordinated by McFarland as an "Eagle." (*Id.* ¶ 20; Gen. Yeager Depo. 25:11-28:24.) The program was funded through the painting, production, and sale

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of a limited number of lithographic prints signed by Eagles. (SAC ¶ 20; McFarland Decl. ¶ 14.) Additional financial support for the program was provided not by the ACSC itself, but by the ACSC Foundation and the International Association of Eagles, Inc. (“IAE”). (Statement of Undisputed Facts (“UF”) 14-19.)

McFarland accumulated a substantial collection of aviation memorabilia through the Gathering of Eagles and did not have the means to market the merchandise. (McFarland Decl. ¶ 32; Bowlin Decl. ¶ 23.) As a result, the Bowlins and McFarland began discussing selling the memorabilia through a website in 2000. (*Id.*) The Bowlins created Aviation Autographs and its website, www.aviationautographs.com, in the summer of 2000. (Bowlin Decl. ¶ 23.) In June 2000, IAE and McFarland entered into a marketing agreement with Aviation Autographs with respect to the Gathering of the Eagles lithographs. (McFarland Decl. ¶ 33, Ex. D; Bowlin Decl. ¶ 24.)

During this time period, Yeager wanted to market three items that he developed and signed in conjunction with McFarland and Yeager, Inc.⁵: a lithograph known as the “Hey Pard” print, which depicts Yeager breaking the sound barrier; a lithograph known as the “F-15” print, which depicts this same event; and a series of commemorative stamped envelopes known as the “First Day Covers,” which were letters with a canceled stamp from Edwards Air Force

⁵ Yeager, Inc. was a corporation set up by Yeager and his first wife, Glennis Yeager, for the benefit of their children. The corporation is presently run by the children of Yeager.

Base, where an event celebrating the 50th anniversary of the breaking of the sound barrier was held. (McFarland Decl. ¶¶ 28-31; Bowlin Decl. ¶ 27, Donald Yeager Decl. ¶ 6, Exs. A, B; Noonan Decl. ¶¶ 17, 19 Exs. O, Q.) Yeager originally authorized McFarland to market these items until Yeager reached an oral agreement with Aviation Autographs to sell them for a fifty-fifty split of the proceeds.⁶ (Bowlin Decl. ¶ 26.) Aviation Autographs then began marketing and selling these prints on their website and provided Yeager with regular summaries concerning sales of these prints from 2000 through 2004. (Bowlin Decl. ¶¶ 52-54, 75-81; Noonan Decl. ¶ 18, Ex. P.)

In 2003, Yeager was invited to an event coordinated by the Bowlins called the “Tribute to Aces.” The idea for the Tribute to Aces developed from discussions between the Bowlins, a Georgia developer Mike Ciochetti, and famed aviator General Tex Hill. (V. Yeager Depo. 44:10-45:25.) Ciochetti and Hill arranged for famous aviators, including Yeager, to come to Georgia to dedicate roads named after each of them in a housing development planned by Ciochetti. (Anderson Decl. ¶ 9; V. Yeager Depo. 44:10-47:6.)

The Bowlins formally coordinated the Tribute to Aces, which included the dedication of the roads, a symposium at which the “Aces”--the aviation legends in attendance--would speak, and the signing of a number

⁶ A discrete number of prints were sold to a collector in bulk and were subject to slightly different terms, with 40% of proceeds going to Yeager, 40% to Aviation Autographs, and 20% to McFarland. (Bowlin Decl. ¶ 26.)

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of lithographic prints by the attending Aces. (Bowlin Decl. ¶ 41; Anderson Decl. ¶ 9.) Connie Bowlin sent each attending Ace a two-page letter explaining the background of the event, that an artist would be creating prints for each Ace to sign, and that Aviation Autographs would sell these prints. (Bowlin Decl. ¶¶ 31-32, Ex. 9.) Each Ace negotiated his own deal with respect to the prints. Victoria Yeager, Yeager's current wife, claims that Yeager made a deal to receive one-third of the lithographs Connie Bowlin said were being produced. (V. Yeager Depo. 106:16-18.) The Bowlins contend the agreement was actually for Yeager to receive 100 prints, which Connie Bowlin confirmed with Yeager at an air show in Detroit in August 2003. (Bowlin Decl. ¶¶ 38-39.) Plaintiffs also contend that the Bowlins indicated the money from these lithographs would be used to pay the Aces travel expenses and the rest would go to charity, while defendants argue that plaintiffs have not shown any indication of the existence of such an agreement. (V. Yeager Depo. 107:13-18; Bowlin Decl. ¶¶ 38-39.)

Yeager attended the Gathering of Aces event in October 2003, including the symposium and dedication of a street sign bearing his name. (Bowlin Decl. ¶¶ 40-42, Ex. 25; Anderson Decl. ¶ 9; V. Yeager Depo. 46:7-47:6.) Yeager signed approximately 900 prints of the lithograph made for him at the event, known as the Leiston Legends print, at the Bowlins' home. (SAC ¶ 26; Bowlin Decl. ¶ 43; V. Yeager Depo. 39:24-41:4.) Yeager was provided with 100 prints from the event, which were shipped to him directly from the artist. (Bowlin Decl. ¶ 43, Ex. 26.)

The Yeagers were reimbursed for a number of travel expenses associated with the Gathering of Aces event by October of 2003. (V. Yeager Depo. 35:9-36:14.) On October 14, 2003, Victoria Yeager sent an email to the Bowlins concerning the disposition of the extra prints signed by Yeager. (Bowlin Decl. ¶ 44; Exs. 27, 28; V. Yeager Depo. 141:11-143:6.) Connie Bowlin responded that 100 of the prints went to Yeager, 100 went to Jack Roush, who made two air craft available for the Tribute to Aces, 200 went to the Bowlins, and the rest were distributed among volunteers or kept by the artist. (*Id.*) In December 2003, Yeager acknowledged that he received 100 Leiston Legends prints in a letter to Connie Bowlin. (Bowlin Decl. ¶ 45, Ex. 29.)

In 2004, the Yeagers became involved in litigation between themselves and Yeager's children and Yeager, Inc. in California state court over the use of funds by Yeager, Inc. In this litigation, Yeager v. D'Angelo, et al., No. 68834, whether Yeager or Yeager, Inc. owned the Hey Pard and F-15 prints and First Day Covers was directly in dispute.⁷ (Noonan Decl. ¶¶ 17, 19, Exs. O, Q; D. Yeager Decl. ¶ 6, Exs. A, B.) Between 2004 and 2005, Victoria Yeager sent several emails to Connie Bowlin requesting delivery of the Hey Pard, F-15, and First Day Covers, which were in the possession of Aviation Autographs, to Yeager. (Bowlin Decl. ¶¶ 55-81.) In January 2005, the Bowlins refused to

⁷ The court will grant defendants' Request for Judicial Notice and Supplemental Request for Judicial Notice, as the documents are all public documents of related court proceedings whose accuracy cannot be questioned. See United States ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc., 971 F.2d 244, 248 (9th Cir. 1992).

provide these items to the Yeagers, stating that given the ongoing litigation over ownership of the items they would prefer to maintain possession of the items until the final resolution of the state court action and would remove them for sale from the Aviation Autographs website. (Bowlin Decl. ¶¶ 63-69.)

On February 7, 2005, the Bowlins received a letter from Steven Thomas, an attorney retained by the Yeagers from Sullivan & Cromwell LLP, who requested that the Bowlins deliver the prints in dispute as well as “all other merchandise with General Yeager’s likeness to him” in exchange for indemnity. (Bowlin Decl. ¶ 68, Ex. 47.) In June 2005, Victoria Yeager sent the Bowlins a series of emails demanding to remove the First Day Covers as for sale from the Aviation Autographs website, as well as all pictures of Yeager and references to Yeager’s name from the site. (Bowlin Decl. ¶¶ 71-74. Exs. 51-57.) On August 16, 2005, Sullivan & Cromwell sent a cease and desist letter to the Bowlins, accusing them of “continued unauthorized and unlawful use of General Chuck Yeager’s name, image and likeness” (Bowlin Decl. Ex. 58.)

On October 11, 2005, the referee in the state court action involving the Yeagers preliminarily ruled that Yeager, Inc., not Yeager, owned the Hey Pard and F-15 prints and the First Day Covers. (D. Yeager Decl. ¶ 6, Exs. A, B.) The state court entered a final judgment adopting the referee’s Statement of Decision in Yeager v. D’Angelo on March 29, 2006. (D. Yeager Decl. ¶ 6, Exs. A, B; Noonan Decl. ¶¶ 17, 19, Exs. O, Q.) Yeager, Inc.’s ownership of the Hey Pard and F-15 prints and First Day Covers was affirmed by the California Court of Appeal on August 22, 2008. (Noonan Decl ¶ 20, Ex.

R.) The Bowlins subsequently ceased selling these products and returned them to Yeager, Inc. (Bowlin Decl. ¶ 54; D. Yeager Decl. ¶ 7.)

Victoria Yeager continued to send emails requesting that the Bowlins remove all references to Yeager from the Aviation Autographs website through October 2005. (Bowlin Decl. ¶¶ 80-81.) The Aviation Autographs website contains several references to Yeager. The Aviation Autographs home page contains one such reference to Yeager:

www.AviationAutographs.com proudly offers rare lithographs, books, prints, photos and “one of a kind” collectables to aviation enthusiasts, all of which contain the original signatures of the history’s most famous people! Commissioned and/or collected over the past 20 years by a single collector. There are several hundred historic items, offered for the first time to the public. Don’t miss the opportunity to own a piece of history! Famous aviators autographs add priceless value to these unique items. You will find aviation heroes, such as General Charles E Chuck Yeager, Col. C.E. Bud Anderson, General Tex Hill, Gunther Rall, Bob Hoover and more. Our personal friendship with many of these living legends gives us a unique opportunity to bring them closer to you.

(Bowlin Decl. ¶ 85; Noonan Decl. ¶ 8, Ex. G.) The home page also makes reference to the Tribute to Aces event, and contains a picture of “[f]our of the five Aces who attended,” but does not mention Yeager or contain his picture. (Bowlin Decl. ¶ 86.) The home page previously

had displayed a statement, added in October 2003, which mentioned Yeager's attendance at the Tribute to Aces event. (Id.) The home page was last edited with respect to Yeager in August 2005, when Connie Bowlin cropped a picture to remove Yeager from the photograph and deleted the reference to him as an attending Ace. (Id.)

The "About Aviation Autographs" page contains a picture of Yeager and Gunther Rall with the caption "Left, Chuck Yeager and Gunther Rall sort through our selection of signature edition collectibles on other combat aces." (Bowlin Decl. ¶ 87; Noonan Decl. ¶ 8, Ex. G.) The page also mentions that the Bowlins "are best of friends with aviation legend Gen. Chuck Yeager and are selling items from his personal collection." (Id.) The text on the page was authored by Ray Fowler, an F-16 fighter pilot, and has not been changed since June 2000, when the website first went online. (Bowlin Decl. ¶ 87.)

The "Tribute to Aces" page contains one reference to Yeager, thanking him and the other aviation legends who attended the Tribute to Aces. (Bowlin Decl. ¶ 88; Noonan Decl. ¶ 8, Ex. G.) The page also describes the Tribute to Aces event and identifies the four prints for sale from the event, including the Leiston Legends print. (Id.) The last revision of the page that made reference to Yeager was made in October 2003, when the Bowlins added the aforementioned sentence thanking Yeager for his attendance at the Tribute to Aces. (Id.)

Yeager is additionally referenced on the "News and Current Events" page on defendants' website. The

page refers to Yeager directly once in an entry describing the Tribute to Aces, listing him as an attendee of the event. (Bowlin Decl. ¶ 90.) This entry was added in 2003 and has not been changed since that time. (Id.) The page also references the crash of the Bowlins' T-6 airplane. (Id.) Although Yeager was flying the Bowlins' plane when it crashed, he is not mentioned by name in the entry. (Id.)

Yeager is lastly referenced on pages selling various memorabilia relating to Yeager that are not owned by Yeager. (SAC ¶¶ 54, 59.) Plaintiffs have admitted they have no right to restrict the sale of these items and are not entitled to damages in connection with the sale of these products. (Noonan Decl. ¶¶ 6-7, Exs. E, F.)

Yeager's name also appears in the metadata of the Aviation Autographs website. (Bowlin Decl. ¶ 89.) Metadata entries are not displayed to the viewers of the website, but are contained in the source script of a web page and utilized by internet search engines to locate and organize internet websites in response to inquiries by search engine users. Defendants have made no changes to the references to Yeager in the metadata of their site since October 2001. (Id.)

On January 14, 2008, plaintiffs filed their initial complaint in this action. (Docket No. 1.) After this court granted in part defendants' motion to dismiss the Complaint, plaintiffs filed their SAC on March 3, 2009. (Docket Nos. 17, 77.) The SAC alleges eleven causes of action against defendants relating to their sale of lithographs for plaintiffs and usage of the likeness and image of Yeager: 1) breach of the California common law right to privacy/right to control publicity and

likeness; 2) violation of California Civil Code section 3344 (statutory right of publicity); 3) violation of the Lanham Act, 15 U.S.C. § 1125(a), for false endorsement; 4) violation of the California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code §§ 17200-17210; 5) violation of the California False Advertising Act, Cal. Bus. & Prof. Code § 17500; 6) fraud; 7) breach of oral contract; 8) breach of written contract; 9) unjust enrichment; 10) accounting; and 11) equitable rescission. The Bowlins, Aviation Autographs, and B&A now move for summary judgment on all claims pursuant to Rule 56.

V. DISCUSSION

A. Time-Barred Claims

Plaintiffs' action was filed in January of 2008, while many of the events giving rise to the claim occurred between 2000 and 2004. Defendants have accordingly challenged many of plaintiffs' claims as time-barred. The statute of limitations generally begins to run at "the time when the cause of action is complete with all its elements. An exception is the discovery rule, which postpones accrual of a cause of action until . . . [the plaintiff] suspects, or has reason to suspect, a factual basis for its elements." Nogart v. Upjohn Co., 21 Cal. 4th 383, 389 (1999); Apple Valley Unified School Dist. v. Vavrinek, Trine, Day & Co., 98 Cal. App. 4th 934, 943 (2002).

1. Breach of Oral Contract

The statute of limitations for breach of oral contract under California law is two years. Cal. Civ. Proc. Code

§ 339. A cause of action on an oral contract accrues, and the statute of limitations begins to run, at the time the contract is breached. Cochran v. Cochran, 56 Cal. App. 4th 1115, 1124 (1997). Plaintiffs allege breaches of multiple oral agreements with defendants. Specifically, plaintiffs allege that they were inadequately compensated for the Leiston Legends prints and travel to the Tribute to Aces weekend, that defendants breached an oral agreement that all proceeds from the Tribute to Aces weekend would go to charity, and that plaintiffs were not adequately compensated with regards to the profits and proceeds of the Hey Pard prints and First Day Covers. (SAC ¶ 118.)

These breaches all should have been apparent to plaintiffs between 2000 and at the latest in July 2004, putting plaintiffs' claim well outside the statute of limitations. Plaintiffs allege that defendants breached an oral contract with Yeager with respect to the Legion Legends prints and the Gathering of Aces when they (1) failed to provide one-third of the Legion Legends prints to plaintiffs (2) did not pay plaintiffs the royalties owed from the prints, (3) did not reimburse Yeager for travel and lodging, and (4) did not give funds from the lithograph to a charity as promised. (Id. ¶ 118(a).) Plaintiffs would have been aware of any breaches relating to the these events as early as October 2003, when Yeager only received 100 prints from defendants, was not paid any royalties, and did not allegedly receive adequate reimbursement for travel expenses. Victoria Yeager specifically asked about what the Bowlins planned to do with the extra prints signed by Yeager on October 14, 2003, putting her on notice of the Bowlins' alleged breaches of the

oral contract surrounding the Tribute to Aces event such that she should have pursued litigation. See Nogart, 21 Cal 4th at 398 n.2. As such, plaintiffs' breach of oral contract claims related to the Leiston Legends prints and Gathering of Aces events are time-barred.

Plaintiffs' breach of oral contract claims related to the Hey Pard and F-15 prints and First Day Covers are similarly time-barred. Plaintiffs allege that they were not provided with adequate accounting of the profits from these prints and were not adequately compensated for them by defendants. (SAC ¶¶ 118 (c), (d).) However, defendants have provided evidence that plaintiffs received regular accounting from the Bowlins through January of 2004, and that Victoria Yeager corresponded with the Bowlins about Aviation Autographs's inventory at that time. (Bowlin Decl. ¶¶ 52-54, 75-81; Noonan Decl. ¶ 18, Ex. P.) Additionally, as previously noted by the court in its August 6, 2008 Order re: defendants' motion to dismiss, plaintiffs themselves contended that they were on notice of the breach of contract claim no later than July 2004, well outside of the two year statute of limitations period. (See Docket No. 17; Docket No. 11, Pls.' Mem. in Opp'n to Defs.' Mot. to Dismiss 7:4-6 ("The documents attached and incorporated by [] [d]efendants show that [] [p]laintiffs were not provided with a detailed inventory and report on commissions paid by [d]efendants until July 6, 2004"); id. at 2:19-20 ("[T]he [judicially noticed] documents clearly demonstrate [d]efendants did not provide the information serving to put [p]laintiffs on notice of their [breach] claim until July, 2004"); id. at 7:7-8 (stating plaintiffs "would not have been aware of the

improper accounting and financial underpayments until this point in time”).⁸

At the latest the statute of limitations began running for defendants’ alleged breaches of oral contract in July 2004, and accordingly plaintiffs’ oral contract claim is time-barred.

2. Fraud and Unjust Enrichment

The statute of limitations for fraud and unjust enrichment is three years. Cal. Civ. Code § 338(d); First Nationwide Sav. v. Perry, 11 Cal. App. 4th 1657, 1670 (1992). Plaintiffs’ fraud claims are based upon the same actions by defendants as those outlined in plaintiffs’ breach of oral contract claim. In fact, plaintiffs do not distinguish their arguments as to why plaintiffs satisfy the statute of limitations for the contract claim and the fraud claim in their own Opposition. (See Pls.’ Corrected Opp’n Mot. Summary Judgment 33:1-35:6.) As previously discussed, plaintiffs were well aware that they may have a fraud claim against defendants based on the accountings they received, and communications with the Bowlins in October 2003. Plaintiffs even went so far as to hire counsel to deal with the very issues before the court in August 2005. Although plaintiffs may not have been

⁸ Plaintiffs contend that the Bowlins’ ongoing retention of sales proceeds for the Leiston Legends prints is an ongoing breach and that therefore that the statute of limitations continues to run until their wrongful conduct is ceased. This is clearly incorrect, since the statute of limitations period would never run on any fraud or breach of contract case until a plaintiff’s money was refunded, effectively nullifying the statute of limitations.

aware of all facts underlying their fraud claim, a plaintiff need not be aware of all these specific facts and “may seek to learn such facts through . . . pretrial discovery” Norgart, 21 Cal. 4th at 398. Accordingly, defendants were on notice of the facts underlying the fraud at issue well over three years ago, and their claims are time-barred as a result.

3. Privacy Claims

Defendants contend that plaintiffs’ first, second, and third claims--breach of the California common law right to privacy/right to control publicity and likeness; violation of California Civil Code section 3344 (statutory right of publicity); and violation of the Lanham Act, 15 U.S.C. § 1125(a), for false endorsement--are time-barred because of the single publication rule.

The single publication rule provides that “[n]o person shall have more than one cause of action for damages for . . . invasion of privacy or any other tort founded upon any single publication or exhibition or utterance, such as any one issue of a newspaper or book or magazine or any one presentation to an audience or any one broadcast over radio or television or any one exhibition of a motion picture.” Cal. Civ. Code § 3425.3. “Under the single-publication rule, with respect to the statute of limitations, publication generally is said to occur on the ‘first general distribution of the publication to the public’ the period of limitations commences, regardless of when the plaintiff secured a copy or became aware of the publication.” Shively v. Bozanich, 31 Cal. 4th 1230, 1245 (2003) (citations omitted).

The applicable statute of limitations as to the first and second claims regarding plaintiffs' right to privacy is two years. Cal. Civ. Proc. Code § 339; Long v. Walt Disney Co., 116 Cal. App. 4th 868, 873 (2004); Cusano v. Klein, 264 F.3d 936, 949-50 (9th Cir. 2001). The statute of limitations for plaintiffs' third claim is less certain since the Lanham Act does not contain its own statute of limitations provision. The general rule in the absence of such a provision is to borrow the most analogous statute of limitations from state law. See Polar Bear Prods., Inc. v. Timex Corp., 384 F.3d 700, 720 n. 17 (9th Cir. 2004); Jarrow Formulas, Inc. v. Nutrition Now, Inc., 304 F.3d 829, 836-37 (9th Cir. 2002). Given the nature of plaintiffs' allegations, the most analogous statute of limitations from state law would be either the two-year statute applicable to right to privacy claims, or the three-year statute applicable to fraud claims.

Plaintiffs' claims are based on statements on defendants' website--which has been in existence since 2000. The single publication rule has been held to apply to statements published on the internet. Traditional Cat Ass'n, Inc. v. Gilbreath, 118 Cal. App. 4th 392, 394 (2004); see Oja v. U.S. Army Corps of Engineers, 440 F.3d 1122, 1131 (9th Cir. 2006). Plaintiffs' website is a "single integrated publication" for marketing aviation memorabilia and providing aviation related news and information, and accordingly is protected by the single-publication rule. See Christoff v. Nestle USA, Inc., 47 Cal. 4th 468, 482-83 (2009). Many of the references to Yeager on plaintiffs' website have been in existence since 2000, including the references to Yeager on the home page, the "About

Aviation Autographs” page, and the references to Yeager in the website’s metadata.

Plaintiffs contend that the single publication rule does not apply in this case because the rule does not apply when a defendant engages in ongoing sales of a product for commercial gain. Plaintiffs argue that each sale of a product as to which Yeager was mentioned restarted the statute of limitations.⁹ In support of this contention, plaintiffs cite Miller v. Collectors Universe, in which an authenticator’s name was used without his consent on 14,000 separate certificates of authenticity. 159 Cal. App. 4th 988, 998-99 (2008). Miller held that each certificate was intended for a different consumer in connection with different products and therefore was not an “identical communication or display of identical content to multiple persons” protected by the single publication rule. Id. at 999. However, this case is distinguishable because Aviation Autographs does not display different individualized content to different consumers, but rather displays an identical set of content to all viewers of its website.

Furthermore, California courts have explicitly found that the repeated sale of identical products is subject to the single publication rule. For example, in Kanarek v. Bugliosi, the court noted that the sale of copies of the same edition of a book is subject to the single publication rule. 108 Cal. App. 3d at 332; see also

⁹ At oral argument and in the declaration submitted by Yeager, plaintiffs contend that the sale of the Leiston Legends print violated a trademark of Yeager. However, plaintiffs have presented no evidence of the existence of any trademarks supposedly held by Yeager.

Christoff, 47 Cal. 4th at 479 (noting the reason for the single publication rule is that under a rule where the statute of limitations restarts when each copy of a book is sold would create the absurd result that “the Statute of Limitation would never expire so long as a copy of such book remained in stock and is made by the publisher the subject of a sale or inspection by the public.” (citations omitted)); Hebrew Acad. of San Francisco v. Goldman, 42 Cal. 4th 883, 892 (2007) (“The statute of limitations could be tolled indefinitely, perhaps forever, under this approach.”).

The end result of plaintiffs’ interpretation would be that the statute of limitations would never run on their claim so long as the Bowlins’ website remained in existence with plaintiffs’ items for sale. This is the exact result the single publication rule seeks to avoid. Plaintiffs’ argument that the single publication rule is inapplicable is therefore without merit.

Nevertheless, courts have held that the single publication rule may not be available when a defendant republishes information. Kanarek v. Bugliosi, 108 Cal. App. 3d 327, 332 (1980). Defendants admit that they altered their website in October 2003 to add information about the Tribute to Aces event, which constituted a republication of the information about Yeager so as to restart the statute of limitations. Id. However, plaintiffs have provided no other evidence indicating that defendants republished the information about Yeager at any point in time after October 2003, when defendants added information

about the Tribute to Aces event.¹⁰ Accordingly, the statute of limitations has run as to all of plaintiffs' privacy causes of action relating to the use of plaintiffs' name on the Aviation Autographs website.

Even if the single publication rule did not apply, plaintiffs' privacy based claims are still time barred. Defendants have proven that plaintiffs had actual notice of the alleged privacy violations in August 2005, when plaintiffs had an attorney from Sullivan & Cromwell send a cease and desist letter to defendants and threaten litigation over the very same issues before this court. It is therefore clear that plaintiffs' claims are well outside the statute of limitations, and accordingly the court must grant defendants' motion for summary judgment on plaintiffs' first, second, and third causes of action.

4. Equitable Tolling

Plaintiffs also contend that their claims are subject to equitable tolling because defendants induced plaintiffs not to sue by promising to take the Hey Pard and F-15 prints and First Day Covers off their website and entering into an agreement that the Bowlins could use Yeager's name and image until the state court proceedings involving the Yeagers were resolved. (Pls.' Opp'n Mot. Summary Judgment 37:7-13.) Generally,

¹⁰ While defendants removed Yeager's name from a discussion of the Tribute to Aces event on Aviation Autograph's home page and cropped him out of a photograph, such minimal editing of information does not constitute a republication. See Traditional Cat Ass'n, 118 Cal. App. 4th at 404; Oja, 440 F.3d at 1128, 1130-33.

federal courts grant equitable relief from the statute of limitations in only two kinds of situations: (1) when delay in filing a claim is excusable and does not unduly prejudice the defendant (equitable tolling); or (2) when the defendant prevented the plaintiff from asserting her claim by some kind of wrongful conduct (equitable estoppel). See Santa Maria v. Pacific Bell, 202 F.3d 1170, 1178 (9th Cir. 2000).

Plaintiffs' argument for equitable estoppel is based on the defendants' allegedly misleading conduct. Indeed, plaintiffs are not entitled to equitable tolling because equitable tolling ceases once a claimant retains counsel because the claimant "has gained the means of knowledge of her rights and can be charged with constructive knowledge of the law's requirements." Leorna v. United States Dep't of State, 105 F.3d 548, 551 (9th Cir. 1997). Since plaintiffs had counsel at least as early as August 2005 when a letter was sent from Sullivan & Cromwell to defendants, the statute of limitations could not be tolled beyond August 2005 in any event. Additionally, as previously addressed, plaintiffs were well aware of the actions at issue in the SAC well over four years ago, and as such have not presented a legitimate basis for equitable tolling.

Courts will toll the statute of limitations based on equitable estoppel when the plaintiff is prevented from asserting his claim due to the wrongful conduct of the defendant. See Irwin v. Department of Veteran Affairs, 498 U.S. 89, 96 (1990); Santa Maria, 202 F.3d 1170 at 1178. Factors which the court should consider when deciding whether equitable estoppel should be applied include:

(1) the plaintiff's actual and reasonable reliance on the defendant's conduct or representations, (2) evidence of improper purpose on the part of the defendant, or of the defendant's actual or constructive knowledge of the deceptive nature of its conduct, and (3) the extent to which the purposes of the limitations period have been satisfied.

Santa Maria, 202 F.3d at 1176; see also Johnson v. Henderson, 314 F.3d 409, 414 (9th Cir. 2002). Equitable estoppel, then, may come into play "if the defendant takes active steps to prevent the plaintiff from suing in time." Santa Maria, 202 F.3d at 1176-77.

While plaintiffs contend they need not show bad faith on the part of defendants to invoke equitable estoppel, citing Shaffer v. Debbas, 17 Cal. App. 4th 33 (1993), this court is not bound by that decision. The California Courts of Appeal are rife with contradictory decisions, where judges openly disagree with decisions by judges from other districts. See, e.g., Lobrovich v. Georgison, 144 Cal. App. 2d 567, 573-74 (1956) (finding the presence of settlement negotiations does not entitle a party to equitable estoppel). This court instead is bound by the Ninth Circuit's interpretation of the doctrine of equitable estoppel under California law and accordingly will abide by it. Moreover, even if plaintiffs' interpretation is correct, defendants have produced clear evidence indicating that plaintiffs did not rely on any actions by defendants which "induced the plaintiff[s] to refrain from instituting legal proceedings." Shaffer, 17 Cal. App. 4th at 43.

Plaintiffs have not shown that defendants took active steps to prevent them from suing before the statute of limitations period ended. Plaintiffs have not provided any evidence evincing the existence of any agreement between the Bowlins and plaintiffs where plaintiffs promised to delay suing until after the Yeagers' state court action was final. In fact, the evidence indicates that Victoria Yeager continued to aggressively confront the Bowlins over ownership issues relating to the Hey Pard and F-15 prints and First Day Covers and accused the Bowlins of behaving unlawfully while the state court litigation was ongoing. (Bowlin Decl. Exs 34, 35, 37, 50, 53.) The Yeagers obtained representation and continued to ask that the items in the state court action be delivered to them throughout 2004 and 2005. (Id. Exs. 47, 48.) Victoria Yeager also repeatedly insisted that the Bowlins cease to use any reference to Yeager on their website. (Id. Exs. 52-54, 56.) Plaintiffs were not waiting to pursue litigation against the Bowlins based on their representations, but rather were continually objecting to the Bowlins' practices and actively preparing for litigation against them with the assistance of an attorney.

There is also no evidence that the defendants misled the plaintiffs into waiting for the statute of limitations to run before suing. The Bowlins did not instruct the Yeagers not to take action against them, but simply stated that they would wait for the state lawsuit to end before delivering the Hey Pard and F-15 prints and First Day Covers to any party. (Id. Ex. 49.) Defendants did not engage in any aggressive action to induce plaintiffs not to sue them that would warrant tolling the statute of limitations. See, e.g., Union Oil

Co. of Cal. v. Greka Energy Corp., 165 Cal. App. 4th 129, 138 (2008) (finding equitable estoppel appropriate where defendant repeatedly engaged in settlement talks with plaintiff and asked plaintiff to withhold litigation until defendant resolved the matter). The Bowlins simply articulated their views on the legality of their position to plaintiffs, which in no way deceived the plaintiffs into delaying this action.

The alleged violations of plaintiffs' privacy rights were vividly apparent on defendants' website since its inception and plaintiffs were well aware of any contractual breaches by defendants throughout 2003 and 2004. Plaintiffs have presented no evidence that indicates they reasonably relied on any representations by defendants that induced them to delay from filing this action until the statute of limitations had run. In fact, all evidence indicates that plaintiffs were preparing for litigation and did not delay the filing of this action based on the Bowlins' statements. Accordingly, equitable tolling and estoppel are inappropriate.

B. Breach of Written Contract

Under California law, the elements of a claim for breach of written contract are (1) the existence of a contract; (2) plaintiffs' performance or excuse for nonperformance of the contract; (3) defendants' breach of the contract; and (4) resulting damages. Armstrong Petroleum Corp., 116 Cal. App. 4th at 1390. Plaintiff has not provided any evidence indicating that any written contract ever existed between plaintiffs and defendants. Plaintiff testified at his deposition that he usually did business on a handshake basis and did not

recall any written contracts with defendants. (Gen. Yeager Depo. 12:12-13:15.) Plaintiffs in fact conceded during discovery that no such contracts exist, and neither General nor Victoria Yeager could identify any such contract at their depositions. (Noonan Decl. Exs. E, F; Gen. Yeager Depo 12:12-13:15; V. Yeager Depo. 191:10-194:3.) Accordingly, the court will grant defendants' motion for summary judgment as to plaintiffs' breach of written contract claim.

C. Derivative Claims

1. UCL Claim

The UCL prohibits any “unlawful, unfair or fraudulent business act or practice.” Cal. Bus. & Prof. Code § 17200. It incorporates other laws and treats violations of those laws as unlawful business practices independently actionable under state law. Chabner v. United Omaha Life Ins. Co., 225 F.3d 1042, 1048 (9th Cir. 2000). Plaintiffs' fourth claim for violation of the UCL and is dependent on proof of a predicate violation of plaintiffs' first three claims for breach of the common law right to privacy, breach of California Civil Code section 3344, or of the Lantham Act. See Chabner v. United Omaha Life Ins. Co., 225 F.3d 1042, 1048 (9th Cir. 2000). As these cause of action are time-barred, they cannot be used at the basis for plaintiffs' UCL claim.

In addition, a business practice may be “unfair or fraudulent in violation of the UCL even if the practice does not violate any law.” Olszewski v. Scripps Health, 30 Cal. 4th 798, 827 (2003). With respect to fraudulent conduct, the UCL prohibits any activity that is “likely

to deceive” members of the public. Puentes v. Wells Fargo Home Mortg., Inc., 160 Cal. App. 4th 638, 645 (2008). Plaintiffs argue that even if their other derivative claims fail, defendants’ practices are still “unfair” because their harm to plaintiffs outweighs the utility to defendants.

However, any such claim would be time-barred as well, as plaintiffs claims fail to meet the statute of limitations for the UCL. The UCL has a four-year statute of limitations. Cal. Bus. & Prof Code § 17208. The UCL is subject to the single publication rule, as it is based on the same publications that underlie plaintiffs’ privacy causes of action. See Baugh v. CBS, Inc., 828 F. Supp. 745, 755-56 (N.D. Cal. 1993); see also, Long v. Walt Disney Co., 116 Cal. App. 4th 868, 873 (2004) (finding that plaintiffs have not been allowed to circumvent the statute of limitation based on the single publication rule by simply pursuing another theory of relief based on the same publication). Accordingly, as discussed previously, the statute of limitations for plaintiffs’ UCL claim began running in 2003, after the information concerning the Tribute to Aces was added to defendants’ website. See Karl Storz Endoscopy-Am., Inc. v. Surgical Tech., Inc., 285 F.3d 848, 857 (9th Cir. 2002) (finding UCL claims “are subject to a four-year statute of limitations which [begins] to run on the date the cause of action accrue[s], not on the date of discovery.”); see also Rambus Inc. v. Samsung Elecs. Co., Nos. C-05-02298 & C-05-00334, 2007 WL 39374, at *3 (N.D. Cal. Jan. 4, 2007). As such, plaintiffs’ claim is time barred, as plaintiff may only have one cause of action to pursue their claims based on plaintiffs’ single publication, beginning at the time of the last republication.

2. False Advertising

California's False Advertising Law prohibits the dissemination in any advertising media of any "statement" concerning real or personal property offered for sale, "which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading." Cal. Bus. & Prof. Code § 17500. The statements underlying plaintiffs' false advertising claim are the same references to Yeager on the Aviation Autographs website that are involved in the plaintiffs' first three causes of action. As such, plaintiffs' false advertising claim is also subject to the single publication rule. See Baugh, 828 F. Supp. at 755-56; Long, 116 Cal. App. 4th at 873. As the False Advertising Law has a statute of limitations of three years, Cal. Code Civ. Proc. § 338(a), plaintiffs' false advertising claim is also time-barred for the same reason as plaintiffs' UCL claim.

3. Accounting and Equitable Rescission

Plaintiffs' accounting and equitable rescission claims are merely derivative of their fraud and contract claims. See Janis v. Cal. State Lottery Com., 68 Cal. App. 4th 824, 833-834 (1998) ("A right to an accounting is derivative; it must be based on other claims."); Nakash v. Superior Court, 196 Cal. App. 3d 59, 70 (1987) (finding rescission is a remedy that is dependant on another claim). As defendants' motion for summary judgment will be granted on those claims, the court must also grant defendants' motion for summary judgment on these claims as well.

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IT IS THEREFORE ORDERED that defendants' motion for summary judgment be, and hereby the same is, GRANTED.

IT IS FURTHER ORDERED that plaintiffs' complaint be, and the same hereby is, DISMISSED as to the remaining defendants. DATED: January 6, 2010

/s/ _____
William B. Shubb
United States District Judge

APPENDIX D

NOT FOR PUBLICATION

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

No. 10-15297

**DC No. 2:08 cv-0102 WBS
E.D. Cal., Sacramento**

[Filed October 25, 2012]

CHARLES E. YEAGER, aka Chuck;)
GENERAL CHUCK YEAGER)
FOUNDATION,)
)
<i>Plaintiffs-Appellants,</i>)
)
v.)
)
CONNIE BOWLIN; ED BOWLIN;)
AVIATION AUTOGRAPHS, a)
non-incorporated Georgia business)
entity; BOWLIN & ASSOCIATES, INC.,)
)
<i>Defendants-Appellees.</i>)

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No. 10-16503

DC No. 2:08 cv-0102 WBS
E.D. Cal., Sacramento

CHARLES E. YEAGER, aka Chuck;)
GENERAL CHUCK YEAGER)
FOUNDATION,)
)
Plaintiffs-Appellants,)
)
v.)
)
)
CONNIE BOWLIN; ED BOWLIN;)
AVIATION AUTOGRAPHS, a)
non-incorporated Georgia business)
entity; BOWLIN & ASSOCIATES, INC.,)
)
Defendants-Appellees.)
)

ORDER

Before: B. FLETCHER*, REINHARDT, and
TASHIMA, Circuit Judges.

The panel has voted to deny the petition for panel rehearing. Judge Reinhardt votes to deny the petition for rehearing en banc and Judges Fletcher and Tashima so recommend. The full court has been advised of the petition for rehearing en banc and no

* Judge Fletcher cast her vote before her death.

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judge of the court has requested a vote on en banc rehearing. *See* Fed. R. App. P. 35(f). The petition for panel rehearing and the petition for rehearing en banc are denied.

APPENDIX E

15 USC § 1125 - False designations of origin, false descriptions, and dilution forbidden

Current through Pub. L. 112-238. (See Public Laws for the current Congress.)

(a) Civil action

(1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which—

(A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or

(B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities,

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shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

(2) As used in this subsection, the term “any person” includes any State, instrumentality of a State or employee of a State or instrumentality of a State acting in his or her official capacity. Any State, and any such instrumentality, officer, or employee, shall be subject to the provisions of this chapter in the same manner and to the same extent as any nongovernmental entity.

(3) In a civil action for trade dress infringement under this chapter for trade dress not registered on the principal register, the person who asserts trade dress protection has the burden of proving that the matter sought to be protected is not functional.

(b) Importation

Any goods marked or labeled in contravention of the provisions of this section shall not be imported into the United States or admitted to entry at any customhouse of the United States. The owner, importer, or consignee of goods refused entry at any customhouse under this section may have any recourse by protest or appeal that is given under the customs revenue laws or may have the remedy given by this chapter in cases involving goods refused entry or seized.

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(c) Dilution by blurring; dilution by tarnishment

(1) Injunctive relief

Subject to the principles of equity, the owner of a famous mark that is distinctive, inherently or through acquired distinctiveness, shall be entitled to an injunction against another person who, at any time after the owner's mark has become famous, commences use of a mark or trade name in commerce that is likely to cause dilution by blurring or dilution by tarnishment of the famous mark, regardless of the presence or absence of actual or likely confusion, of competition, or of actual economic injury.

(2) Definitions

(A) For purposes of paragraph (1), a mark is famous if it is widely recognized by the general consuming public of the United States as a designation of source of the goods or services of the mark's owner. In determining whether a mark possesses the requisite degree of recognition, the court may consider all relevant factors, including the following:

(i) The duration, extent, and geographic reach of advertising and publicity of the mark, whether advertised or publicized by the owner or third parties.

(ii) The amount, volume, and geographic extent of sales of goods or services offered under the mark.

(iii) The extent of actual recognition of the mark.

(iv) Whether the mark was registered under the Act of March 3, 1881, or the Act of February 20, 1905, or on the principal register.

(B) For purposes of paragraph (1), “dilution by blurring” is association arising from the similarity between a mark or trade name and a famous mark that impairs the distinctiveness of the famous mark. In determining whether a mark or trade name is likely to cause dilution by blurring, the court may consider all relevant factors, including the following:

(i) The degree of similarity between the mark or trade name and the famous mark.

(ii) The degree of inherent or acquired distinctiveness of the famous mark.

(iii) The extent to which the owner of the famous mark is engaging in substantially exclusive use of the mark.

(iv) The degree of recognition of the famous mark.

(v) Whether the user of the mark or trade name intended to create an association with the famous mark.

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(vi) Any actual association between the mark or trade name and the famous mark.

(C) For purposes of paragraph (1), “dilution by tarnishment” is association arising from the similarity between a mark or trade name and a famous mark that harms the reputation of the famous mark.

(3) Exclusions

The following shall not be actionable as dilution by blurring or dilution by tarnishment under this subsection:

(A) Any fair use, including a nominative or descriptive fair use, or facilitation of such fair use, of a famous mark by another person other than as a designation of source for the person’s own goods or services, including use in connection with—

(i) advertising or promotion that permits consumers to compare goods or services; or

(ii) identifying and parodying, criticizing, or commenting upon the famous mark owner or the goods or services of the famous mark owner.

(B) All forms of news reporting and news commentary.

(C) Any noncommercial use of a mark.

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(4) Burden of proof

In a civil action for trade dress dilution under this chapter for trade dress not registered on the principal register, the person who asserts trade dress protection has the burden of proving that—

(A) the claimed trade dress, taken as a whole, is not functional and is famous; and

(B) if the claimed trade dress includes any mark or marks registered on the principal register, the unregistered matter, taken as a whole, is famous separate and apart from any fame of such registered marks.

(5) Additional remedies

In an action brought under this subsection, the owner of the famous mark shall be entitled to injunctive relief as set forth in section 1116 of this title. The owner of the famous mark shall also be entitled to the remedies set forth in sections 1117(a) and 1118 of this title, subject to the discretion of the court and the principles of equity if—

(A) the mark or trade name that is likely to cause dilution by blurring or dilution by tarnishment was first used in commerce by the person against whom the injunction is sought after October 6, 2006; and

(B) in a claim arising under this subsection—

(i) by reason of dilution by blurring, the person against whom the injunction is sought

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willfully intended to trade on the recognition of the famous mark; or

(ii) by reason of dilution by tarnishment, the person against whom the injunction is sought willfully intended to harm the reputation of the famous mark.

(6) Ownership of valid registration a complete bar to action

The ownership by a person of a valid registration under the Act of March 3, 1881, or the Act of February 20, 1905, or on the principal register under this chapter shall be a complete bar to an action against that person, with respect to that mark, that—

(A) is brought by another person under the common law or a statute of a State; and

(B)

(i) seeks to prevent dilution by blurring or dilution by tarnishment; or

(ii) asserts any claim of actual or likely damage or harm to the distinctiveness or reputation of a mark, label, or form of advertisement.

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(7) Savings clause

Nothing in this subsection shall be construed to impair, modify, or supersede the applicability of the patent laws of the United States.

(d) Cyberpiracy prevention

(1)

(A) A person shall be liable in a civil action by the owner of a mark, including a personal name which is protected as a mark under this section, if, without regard to the goods or services of the parties, that person—

(i) has a bad faith intent to profit from that mark, including a personal name which is protected as a mark under this section; and

(ii) registers, traffics in, or uses a domain name that—

(I) in the case of a mark that is distinctive at the time of registration of the domain name, is identical or confusingly similar to that mark;

(II) in the case of a famous mark that is famous at the time of registration of the domain name, is identical or confusingly similar to or dilutive of that mark; or

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(III) is a trademark, word, or name protected by reason of section 706 of title 18 or section 220506 of title 36.

(B)

(i) In determining whether a person has a bad faith intent described under subparagraph (A), a court may consider factors such as, but not limited to—

(I) the trademark or other intellectual property rights of the person, if any, in the domain name;

(II) the extent to which the domain name consists of the legal name of the person or a name that is otherwise commonly used to identify that person;

(III) the person's prior use, if any, of the domain name in connection with the bona fide offering of any goods or services;

(IV) the person's bona fide noncommercial or fair use of the mark in a site accessible under the domain name;

(V) the person's intent to divert consumers from the mark owner's online location to a site accessible under the domain name that could harm the goodwill represented by the mark, either for commercial gain or with the intent to tarnish or disparage the mark, by

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creating a likelihood of confusion as to the source, sponsorship, affiliation, or endorsement of the site;

(VI) the person's offer to transfer, sell, or otherwise assign the domain name to the mark owner or any third party for financial gain without having used, or having an intent to use, the domain name in the bona fide offering of any goods or services, or the person's prior conduct indicating a pattern of such conduct;

(VII) the person's provision of material and misleading false contact information when applying for the registration of the domain name, the person's intentional failure to maintain accurate contact information, or the person's prior conduct indicating a pattern of such conduct;

(VIII) the person's registration or acquisition of multiple domain names which the person knows are identical or confusingly similar to marks of others that are distinctive at the time of registration of such domain names, or dilutive of famous marks of others that are famous at the time of registration of such domain names, without regard to the goods or services of the parties; and

(IX) the extent to which the mark incorporated in the person's domain name registration is or is not distinctive and

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famous within the meaning of subsection (c).

(ii) Bad faith intent described under subparagraph (A) shall not be found in any case in which the court determines that the person believed and had reasonable grounds to believe that the use of the domain name was a fair use or otherwise lawful.

(C) In any civil action involving the registration, trafficking, or use of a domain name under this paragraph, a court may order the forfeiture or cancellation of the domain name or the transfer of the domain name to the owner of the mark.

(D) A person shall be liable for using a domain name under subparagraph (A) only if that person is the domain name registrant or that registrant's authorized licensee.

(E) As used in this paragraph, the term "traffics in" refers to transactions that include, but are not limited to, sales, purchases, loans, pledges, licenses, exchanges of currency, and any other transfer for consideration or receipt in exchange for consideration.

(2)

(A) The owner of a mark may file an in rem civil action against a domain name in the judicial district in which the domain name registrar, domain name registry, or other domain name

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authority that registered or assigned the domain name is located if—

(i) the domain name violates any right of the owner of a mark registered in the Patent and Trademark Office, or protected under subsection (a) or (c) of this section; and

(ii) the court finds that the owner—

(I) is not able to obtain in personam jurisdiction over a person who would have been a defendant in a civil action under paragraph (1); or

(II) through due diligence was not able to find a person who would have been a defendant in a civil action under paragraph (1) by—

(aa) sending a notice of the alleged violation and intent to proceed under this paragraph to the registrant of the domain name at the postal and e-mail address provided by the registrant to the registrar; and

(bb) publishing notice of the action as the court may direct promptly after filing the action.

(B) The actions under subparagraph (A)(ii) shall constitute service of process.

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(C) In an in rem action under this paragraph, a domain name shall be deemed to have its situs in the judicial district in which—

(i) the domain name registrar, registry, or other domain name authority that registered or assigned the domain name is located; or

(ii) documents sufficient to establish control and authority regarding the disposition of the registration and use of the domain name are deposited with the court.

(D)

(i) The remedies in an in rem action under this paragraph shall be limited to a court order for the forfeiture or cancellation of the domain name or the transfer of the domain name to the owner of the mark. Upon receipt of written notification of a filed, stamped copy of a complaint filed by the owner of a mark in a United States district court under this paragraph, the domain name registrar, domain name registry, or other domain name authority shall—

(I) expeditiously deposit with the court documents sufficient to establish the court's control and authority regarding the disposition of the registration and use of the domain name to the court; and

(II) not transfer, suspend, or otherwise modify the domain name during the

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pendency of the action, except upon order of the court.

(ii) The domain name registrar or registry or other domain name authority shall not be liable for injunctive or monetary relief under this paragraph except in the case of bad faith or reckless disregard, which includes a willful failure to comply with any such court order.

(3) The civil action established under paragraph (1) and the in rem action established under paragraph (2), and any remedy available under either such action, shall be in addition to any other civil action or remedy otherwise applicable.

(4) The in rem jurisdiction established under paragraph (2) shall be in addition to any other jurisdiction that otherwise exists, whether in rem or in personam.