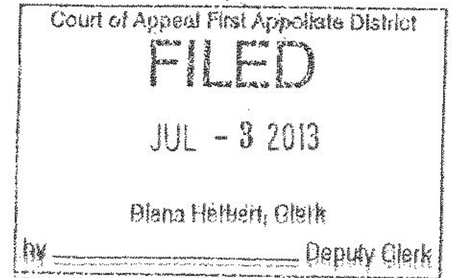
CASE NO. A136626

IN THE COURT OF APPEAL OF
THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT, DIVISION THREE

DAWN LOFTON, individually, on behalf of all others similarly situated,
Plaintiff,

And

DAVID MARK MAXON,
Intervenor Plaintiff and Respondent



vs.

WELLS FARGO HOME MORTGAGE, a division of WELLS FARGO BANK, NATIONAL ASSOCIATION,
Defendant

INITIATIVE LEGAL GROUP APC,
Appellant

Appeal from an Order of the San Francisco Superior Court,
Case No. CGC-11-509502
The Hon. Harold E. Kahn, Judge

RESPONDENT'S BRIEF

Mark A. Chavez (Bar No. 90858)
Nance F. Becker (Bar No. 99292)
CHAVEZ & GERTLER LLP
42 Miller Ave.
Mill Valley, CA 94941
Telephone: (415) 381-5599

David C. Anderson (Bar No. 83146)
ANDERSON LAW
50 San Francisco Street, Suite 450
San Francisco, CA 94133
Telephone: (415) 395-9898

Richard Zitrin (Bar No. 63300)
ZITRIN LAW OFFICE
353 Sacramento St., 16th Floor
San Francisco, CA 94111
Telephone: 415) 391-3911

Attorneys for Intervenor Plaintiff and Respondent

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INTRODUCTION

Initiative Legal Group, APC, Initiative Legal Group, LLP, and Attorneys Marc Primo Pulisci (a/k/a Marc Primo), G. Arthur Meneses, Monica Balderrama and Joseph S. Liu (collectively, "ILG") individually represented 600 Home Mortgage Consultants ("HMCs") in pursuing their wage and hour claims against Defendant Wells Fargo Bank, N.A. ("Wells Fargo"). When another group of attorneys representing Plaintiff Dawn Lofton entered into settlement negotiations with Wells Fargo on behalf of a proposed HMC class that included ILG's Clients, ILG covertly, without the knowledge or permission of its Clients, negotiated a $6 million "Supplemental Settlement" with Wells Fargo. ILG agreed to ensure that its Clients' wage and hour claims would be extinguished by the *Lofton* settlement by secretly bargaining away the due process rights of its Clients to opt out of the class settlement and agreeing to dismiss their individual lawsuits. ILG then took 92% of the Supplemental Settlement funds as "attorneys' fees."

In addition to acting with an irreconcilable conflict of interest and breaching its professional and fiduciary duties, ILG flaunted the rules mandating judicial review of any attorneys' fee payment made in connection with the settlement of a class action. (CRC Rule 3.769(b).) Despite attending the hearing at which the court granted preliminary approval of the *Lofton* class settlement, despite extensive class action experience, and despite the fact that its claim to attorneys' fees was based solely on its litigation of wage and hour claims that were resolved in the class settlement, ILG *never disclosed the fee payment or any other terms of the Supplemental Settlement to the court. Nor did Wells Fargo*.

To remedy this misconduct, ILG Client and *Lofton* settlement class member David Maxon ("Maxon") moved to intervene and for a temporary restraining order to prevent ILG from dissipating the Supplemental Settlement funds. The trial court was appalled by the uncontroverted evidence:

> What appears to me based on the record is there has been egregious misconduct and bad faith on the part of ILG. And I say that recognizing those are serious words.
>
> I am troubled by what appears to be either turning a blind eye to or participation in that egregious misconduct by class counsel who was paid over $6 million, and a distinguished law firm that represents one of the great banking institutions of this country.

(RT 9/13/12, 13:4-13.) After argument and briefing, the court granted the motion to intervene and then issued a temporary restraining order and order to show cause (collectively, "TRO") designed to preserve the Supplemental Settlement *res* and protect the interests of the ILG Client Class Members pending adjudication of the dispute. Of the four individual attorneys and two entities against whom Maxon sought and the court ordered injunctive relief, only one, Initiative Legal Group APC, opposed the motions, and it is the only one that has appealed.

As a preliminary matter, ILG's appeal of the Intervention Order should be dismissed because ILG is not a party to this case and was not "aggrieved by" the Order as required by Code of Civil Procedure §902. Accordingly, ILG lacks standing to appeal the Intervention Order.[1]

---

[1] Respondent raised this issue in his Motion to Dismiss Appeal In Part For Lack Of Standing filed April 19, 2013. On May 24, 2013, this Court denied the Motion "without prejudice to his arguing the issue in his respondent's brief."

ILG's other contentions fare no better. As an absent class member, Maxon had a right to intervene in the proceedings pursuant to Code of Civil Procedure §387 subdivisions (a) and (b) and Civil Code §1781(e)(3). That judgment had been entered pursuant to the class settlement is not, as ILG contends, determinative of the court's authority to permit intervention; rather, "intervention is possible, if otherwise appropriate, at any time, even after judgment." (*Mallick v. Superior Court* (1979) 89 Cal.App.3d 434, 437.) Here, intervention was appropriate because the court had both ongoing statutory authority (Code Civ. P. §664.6) to administer the settlement of the class members' wage and hour claims, and inherent power to take all actions necessary – including ordering injunctive relief – to protect the class members and the integrity of the proceedings before it. (*See*, *e.g.*, *Gulf Oil Co. v. Bernard* (1981) 452 U.S. 89, 99; *Howard Gunty Profit Sharing Plan v. Superior Court* (2001) 88 Cal.App.4th 572, 581.)

The TRO should be affirmed because the injunctive relief was narrowly tailored to address the specific violations of law and ethics committed by ILG, and ILG has utterly failed to make a "clear showing of an abuse of discretion." (*Shoemaker v. County of Los Angeles* (1995) 37 Cal.App.4th 618, 624, *rev. den'd*.) The TRO serves not only the private interests of Maxon and ILG's other injured Clients, but also the important public interests in protecting the integrity of these judicial proceedings and the class action device – interests which the court appropriately considered in evaluating the propriety of the injunction. (*Caribbean Marine Services Co. v. Baldrige* (9th Cir. 1988) 844 F.2d 668, 674.)

ILG's allegation that the court committed evidentiary error by admitting documents protected by the mediation privilege also lacks merit, and does not warrant reversal. First, ILG has completely failed to identify the particular evidence it contends was wrongfully considered. Second, the alleged error is immaterial because there was substantial public record evidence before the court to support its decision to issue the TRO. Indeed, as ILG admits, the judge expressly stated he had relied only on admissible evidence. (AOB 21.) Third, ILG's contention that the documents at issue – *post-settlement* communications to Wells Fargo regarding the allocation of the Supplemental Settlement – are privileged should be rejected, because no mediation was ongoing at the time the documents were created. (Ev. Code §1119.) To the contrary, ILG, Class Counsel, and Wells Fargo all consistently represented to the court that the Supplemental Settlement was agreed to on the same day as the class settlement – February 15, 2011 – eleven months before ILG disclosed the agreement to its Clients, and four months before the documents at issue were exchanged. Further evidence that the mediation privilege is the belated tactical invention of ILG's litigation attorneys is that the disputed documents were *voluntarily disclosed* to Maxon by ILG's former counsel before Maxon moved to intervene. (AA481:2-26; AA 484.) Maxon had every right to present that evidence to the court.

STATEMENT OF FACTS

ILG's presentation of the facts studiously ignores key conduct and communications necessary to demonstrate why Maxon's intervention was appropriate

and indeed necessary, and why the court properly exercised jurisdiction over ILG. The following is a more complete description of the case history and the evidence presented.[2]

I. The Wage And Hour Litigation Against Wells Fargo

On February 10, 2005, attorney Kevin McInerney filed a wage and hour class action, *Mevorah v. Wells Fargo,* against Wells Fargo on behalf of all California HMCs. The case later became part of *In Re Wells Fargo Home Mortgage Overtime Pay Litigation* (N.D.Cal. No. CV-06-01770-MHP), which was certified as a class action in October 2007. (AA883.)

ILG subsequently filed two other wage and hour class actions on behalf of the HMCs: *Strickler v. Wells Fargo* (San Diego Superior Court No. GIN 052537, filed May 15, 2006), and *Hollander v. Wells Fargo* (Alameda Superior Court No. RG-07-360701, filed Dec. 7, 2007). (AA918, ¶¶3-6.)[3]

When *Mevorah* was decertified, ILG used contact information obtained through discovery in *Strickler* to solicit HMCs to sign up as individual clients of ILG. (AA463-64, 991.) In May 2010, ILG secured authorization from Maxon to represent him on his wage and hour claims against Wells Fargo on a contingency fee basis. (AA884, 417.) ILG entered into similar individual arrangements with approximately 600 other Wells Fargo

[2] "AA" refers to Appellant's Appendix and "RA" refers to Respondent's Appendix. Maxon herewith moves the Court to supplement the record with the documents included in the RA – all of which were filed by the parties below and are well-known to Appellant – because they provide important background information and further demonstrate that the Superior Court's findings were correct.

[3] ILG abandoned the *Strickler* class claims by amending the complaint to delete the class allegations without seeking or obtaining the court approval required by CRC Rule 3.770(a). (*Ibid*.) The Superior Court denied class certification of the *Hollander* action, and ILG appealed. (AA918:18-21))

HMCs and, commencing in July 2010, filed a series of mass actions on behalf of groups of HMCs raising wage and hour claims against Wells Fargo. (AA467, 682-789, 827-857.)

Faced with the prospect of litigating multiple ILG lawsuits in different courts raising the same wage and hour claims, Wells Fargo petitioned for coordination and requested a stay of the first four mass actions pending consideration of the petition. The petition was granted, and ultimately all of the actions were transferred to the coordination proceeding. (AA467, 986-91.)

On November 15, 2010, ILG founder and former partner Mark Yablonovich filed yet another HMC class action, *Peña v. Wells Fargo Bank, N.A.,* Los Angeles Superior Court No. BC449501, on behalf of one of ILG's Clients in an existing mass individual action.[4] The claims alleged in *Peña* "mirrored" the claims alleged in the mass individual actions filed by ILG. (RA148; *see also Pena* Complaint, RA15*ff*.)

On November 24, 2010, ILG filed a final mass individual action against Wells Fargo: *Mather v. Wells Fargo,* San Francisco Superior Court No. CGC-10-505630. (AA584-604.) *Mather* sought a $750 penalty under Labor Code §226(c) for Wells Fargo's alleged failure to provide the employment records of the HMCs in the other actions. At the time *Mather* was filed, Wells Fargo had already petitioned for coordination and requested a stay, and *Mather* was subsequently added as a "tag along" action. (AA523-26.)

[4] Primo and Yablonovich were co-founders of Initiative Legal Group LLP, defendant below. Although the partnership was formally dissolved in 2009, Yablonovich had an ongoing relationship with Primo and ILG including a financial interest in cases filed before the dissolution, such as *Hollander* and *Strickler*. (RA1-14.)

II. The Settlement

On February 15, 2011, attorney McInerney on behalf of the proposed class of HMCs, ILG/Yablonovich purportedly representing their 600 individual Clients, and Wells Fargo participated in a mediation concerning all of the wage and hour claims alleged on behalf of the HMCs. (AA885:24-886:7.) McInerney negotiated a $19 million settlement on behalf of all the HMCs, and the parties agreed that class settlement would be presented to the court for approval in *Lofton*. (AA870:3-10.) The settlement class encompassed all of the ILG Clients, including Ms. Peña and Mr. Maxon ("ILG Client Class Members"). (AA945, ¶5.) The class settlement provided compensation to all HMCs who submitted claims; a broad release of all statutory and common law claims relating to the HMCs' employment at Wells Fargo; a right to opt out; and $6.33 million in attorneys' fees to Class Counsel. (AA949-956.)

All thirteen cases controlled by ILG, including the three filed as class actions, were handled together at the mediation. Attorneys Primo and Yablonovich used their collective leverage to negotiate an unallocated $6 million Supplemental Settlement of their separate cases, with payment contingent on ILG's and Yablonovich's agreement to abandon and dismiss their thirteen actions, and to induce their Clients to participate in and not opt out of the *Lofton* class settlement. (AOB 5.) As Wells Fargo belatedly admitted to the court:

> Also on February 15, 2011, Wells Fargo tentatively settled with ILG on behalf of its individual clients who had filed the thirteen separate lawsuits between May 2006 and February 2011. [Citing Porter Decl. ¶ 3.] That settlement amount was $6 million and was contingent on two important conditions. First, because that settlement was for damages, attorneys' fees and costs for the 600 individual plaintiffs in their separate actions, Wells Fargo required releases from 95% of them before any of the $6 million

> would be paid in those actions. *See id.* Second, Wells Fargo required that ILG's clients, in settling their individual actions, not opt out of the *Lofton* class settlement.

(Wells Fargo Memo. in Opp. to OSC at RA227:8-15; Porter Decl. ¶3, RA234; McInerney Decl. ¶6, RA198.)

ILG had no authority to mediate its Clients' claims or to enter into the Supplemental Settlement. It acted solely on its own. *ILG did not notify its Clients of the mediation; did not invite its Clients to participate in the settlement negotiations; did not request its Clients' consent prior to agreeing to the Supplemental Settlement; did not request its Clients' authorization to dismiss the lawsuits filed on their behalf; did not obtain consent to bargain away the Clients' opt out rights;* ***and did not even inform Clients of the existence or terms of the Supplemental Settlement for eleven months.*** (AA419:23-420:18.)

On April 27, 2011, attorneys from ILG and the Yablonovich firm appeared at the preliminary approval hearing for the class settlement. (RT 4/27/11, AA559:9-15.) ILG Attorney Meneses acknowledged that ILG's 600 Clients were "encompassed by the settlement" (*ibid*), and Class Counsel and Wells Fargo agreed all thirteen lawsuits filed by ILG and Yablonovich had been settled at the mediation. (AA560:27-562:26.) However, *the terms of the Supplemental Settlement – including that it would be used to pay ILG attorneys' fees without judicial approval and, equally important, that ILG had agreed that its Clients would* ***not*** *opt out of the settlement class – were not disclosed to the court.*

The court granted preliminary approval, and ordered class notice. The notice advised the class members that their participation in the settlement would release Wells

Fargo from liability for "all applicable state and federal law wage-and-hour claims," known or unknown, including statutory, contractual, and common law claims. (AA426, 429.) *The notice said nothing about the Supplemental Settlement*.

Class members had until June 27, 2011 to object to or opt out of the *Lofton* settlement, and the required claim forms were due July 12, 2011. (AA427-29.) While continuing to conceal the existence and terms of the Supplemental Settlement, ILG repeatedly urged its Clients to submit their claim forms, and reminded them of the deadline to do so. (AA418:6-419:1, AA434, 438.) According to ILG, all Clients complied, and none opted out.

III. ILG's Misappropriation Of the Supplemental Settlement Funds

It is undisputed that (1) ILG appropriated $5.5 million of the Supplemental Settlement as attorneys' fees for litigating its Clients' wage and hour claims, and (2) ILG did not inform the court overseeing the settlement of its Clients' wage and hour claims of the fee payment. Additional evidence that ILG voluntarily produced but later sought to exclude as privileged, reveals the great lengths to which ILG went to conceal its fee payment from its Clients and the court.

On June 22, 2011, Primo sent a letter to Wells Fargo counsel Lindbergh Porter purporting to memorialize the Supplemental Settlement. He stated that ILG would abandon all of its Clients' individual claims, dismiss the thirteen lawsuits, and retain the entire $6 million as attorneys' fees. (AA485-86.) Primo enclosed a "confidential" draft agreement (AA487-91) "proposing various non-material terms to flesh out the details of the agreement," including a strict confidentiality provision that prohibited any disclosure

of the settlement terms "either publicly or privately, to any entity, person, party or court," enforceable with a $500,000 liquidated damages penalty. (AA488-89.) This expansive secrecy provision would have blocked any revelation of the settlement terms *to ILG's own Clients,* as well as the court.

Since the bargain it had struck with ILG included the purchase of the ILG Client Class Members' opt out rights and the dismissal of their individual claims, Wells Fargo balked at allocating all of the Supplemental Settlement to attorneys' fees. Porter confirmed that Wells Fargo would "pay six million dollars to ILG *and its named 600+ plaintiffs-clients* in the 13 actions for compensation, attorneys' fees, costs and expenses as part of the overall *Lofton* class action settlement." (AA493, emphasis added.)

ILG persisted. That same night, and despite the fact ILG had not informed its Clients about the Supplemental Settlement, Primo responded that "[o]ur clients' compensation from the *Lofton* settlement appears to be acceptable to my clients as none of them have instructed me to opt them out *** My clients find the compensation from the *Lofton* settlement sufficient in large part because Wells Fargo is separately paying our firm's attorneys' fees and costs and thus my clients need not do so." (AA492.) Primo went on to assure Porter that "[s]ince none of our firm's clients are opting-out…, the pending actions will be dismissed with prejudice releasing Wells Fargo of the alleged claims in those pending cases…," and he again attempted to confirm that the entire $6 million would be paid to ILG as attorneys' fees. (*Ibid.*)

On July 27, 2011, the court – acting without any knowledge of the terms of the Supplemental Settlement – entered an order finally approving the *Lofton* settlement and

extinguishing the ILG Client Class Members' wage and hour claims. (AA571*ff*.) The court explicitly retained jurisdiction over the action pursuant to CRC Rule 3.769(h) and Code of Civil Procedure §664.6. (AA574.)

On August 11, 2011, Primo wrote Porter that "pursuant to the agreement to pay six million dollars to [ILG] in exchange for a release of our firm's right to fees and costs related to the settlement of the Wells Fargo litigation, I have attached a draft stipulation to dismiss the pending actions now that the Lofton class settlement has been approved." (AA492.) The stipulation states that the Clients' wage and hour claims against Wells Fargo are dismissed with prejudice "based upon the Plaintiffs' participation in and recovery for the claims made as part of the class action settlement in… *Lofton*…." (AA495-98.)

Wells Fargo did not execute ILG's "confidential" agreement. Instead, Wells Fargo washed its hands of the matter and allowed ILG to work out the allocation of the $6 million with its Clients. (AA870.) So, ILG devised a fraudulent scheme to induce its Clients to bless the allocation of most of the $6 million to attorneys' fees in exchange for token payments of $750. On January 30, 2012, Attorney Meneses sent a form letter to each Client purporting to disclose for the first time the terms of the Supplemental Settlement. The letter (AA440-41) conceals that ILG negotiated the settlement eleven months previously, that ILG had sold the Clients' opt out rights and agreed to dismiss their individual lawsuits, and that the Supplemental Settlement included compensation for Clients' wage and hour claims. Instead, ILG falsely represented that Clients were only entitled to $750 for a failure-to-produce-employment-records claim that somehow had not

been released by *Lofton*, and that ILG was entitled to the remainder as attorneys' fees for six years of work litigating Clients' wage and hour claims.

Through its misleading letter, ILG induced most Clients to execute the "Confidential Individual Release and Acknowledgement" enclosed with the letter, and then presented the forms to Wells Fargo as evidence Clients had approved ILG's allocation of $5.5 million of the $6 million Supplemental Settlement as attorneys' fees. (AA920:8-9.) Wells Fargo elected not to ask any questions about the disproportionate allocation and authorized the *Lofton* settlement administrator to make the payments. (AA499, AA920:10-11.) ILG then dismissed its lawsuits with prejudice as to the Clients who had signed the release, and without prejudice as to the Clients who had not returned the release. (*E.g.*, AA706-20.) Yablonovich also dismissed the *Peña* action. (AA443.) In doing so, he represented to the court that no attorneys' fees were being paid in connection with the dismissal of the action.

IV. ILG's Scheme To Induce Its Clients To Release Their Malpractice Claims

In July 2012, Maxon's counsel Richard Zitrin contacted ILG to discuss the Supplemental Settlement, to obtain documents relating to it, and to explore resolution. (AA481:2-18.) On July 17, 2012, ILG's counsel James Banks of Banks & Watson wrote Zitrin as follows:

> Pursuant to your July 12, 2012 email, enclosed please find emails, correspondence and draft documents exchanged between Mr. Marc Primo of Initiative Legal Group and Mr. Lindbergh Porter, counsel to Wells Fargo, pertaining to Wells Fargo's payments to ILG in connection with settlement of the above-referenced litigation, which have been Bates-stamped ILG1-ILG45.

(AA481:19-20.) The documents Banks produced included the June 22, 2011 correspondence and emails between Primo and Porter, as well as Primo's August 11, 2011 email to Porter regarding the dismissal of the ILG Clients' claims. (AA485-527.)

In a subsequent telephone conversation on August 15, 2012, Banks informed Zitrin that he would discuss Maxon's claims on behalf of the ILG Clients with ILG and get back to him shortly. (AA481:27-482:7.) Instead, ILG launched another scheme to prevent its Clients from learning the truth about its activities and to shield its conduct from judicial scrutiny.

On August 17, 2012, ILG sent each Client a letter, a "Disclosure Statement," and a check for $1,000. (AA482:8-9; 421:25-422:8; 458-70.) The correspondence purported to disclose the claims Maxon had raised; denied liability; and offered to settle each Client's claims against ILG for $1,000 – check enclosed. By cashing the check, the Client purportedly released any and all claims, known or unknown, against ILG, and agreed to individual arbitration of "any disputes." In this thinly-disguised attempt to obstruct judicial inquiry into and oversight of its activities, ILG once again concealed the terms of the Supplemental Settlement, reiterated the false representations in the January 30, 2012 letter, and falsely represented that "ILG obtained an additional $750 payment" which was "apart" from *Lofton*.

V. Maxon's Claims

On September 5, 2012, Maxon filed a class action complaint against ILG and the ILG Attorneys, on behalf of himself and the class of HMCs previously represented by ILG, in San Francisco Superior Court. (AA622-59) The complaint alleges causes of

action for breach of fiduciary duty, declaratory relief, and violations of Business and Professions Code §17200.[5]

Two days later, on September 7, 2012, Maxon filed a motion to intervene and an application for an order to show cause and TRO in this case. The court granted Maxon's *ex parte* motion for a shortened briefing schedule, and held a noticed hearing on September 13, 2012. As ILG's counsel, Ms. Vance, rose to contest the tentative ruling in Maxon's favor, Judge Kahn greeted her as follows:

> **THE COURT:** Do you realize the depth of the misconduct that it appears that your clients engaged in? Members of the bar who owe highest ethical obligations? Let me tell you what I think they did, and you tell me if I'm right or wrong.
>
> I think your clients negotiated a $6 million settlement to cover the individual cases and the … 600 clients that they represented. And that they contemplated, along with Wells Fargo and class counsel, that they would -- the 600 clients would opt out. I think none of your client's clients, the 600 people, were informed that there was settlement negotiations going on, nor were they informed that there was even the 6 million pot of money until after the final approval, until after every one of them was asked and complied with the request to send in their claim forms to ILG. And ILG held on to those claim forms as a negotiating tool to determine what was in their best financial interest and only their best financial interest. And then when this broke, ILG came up with a ridiculous scheme of paying $750 to each one of them out of the 600, and then only to be compounded by last month's activity of sending out another thousand dollars and seeking to get claims – get releases. ***
>
> And there's knowing misrepresentations to Judge Giorgi. This -- they are taking class-action attorneys' fees without having ever presented them to the Court. They are class-action lawyers. This could not have been a mistake. And it's clear it wasn't a mistake by the correspondence and other documents I have reviewed.

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[5] ILG has derailed this action through a petition to compel arbitration and subsequent appeal. (RA55*ff*, 267.)

(R.T. 9/13/12, 14:18-16:4.)

In the absence of any substantive response or plausible explanation for ILG's glaring misconduct, the judge adopted his tentative ruling. The TRO entered September 14, 2012 compelled ILG to deposit the funds taken from the Supplemental Settlement into a trust account and provide a full accounting; enjoined ILG from taking any further action to induce Clients to release their claims against ILG or to enforce any purported release already obtained; and ordered ILG to file and serve a list containing names and contact information for each Client and to file a compliance declaration. (AA1048-51.)[6]

On September 19, 2012, Attorney Primo filed the required declaration, averring that ILG induced 575 of its 600 Clients to sign the Confidential Individual Release forms in exchange for $750 payments and that out of $5,448,000 in attorneys' fees, ILG had directed payment of $22,500 to three Clients; paid $504,391 to 501 Clients who cashed the $1,000 checks; and paid another $9,391 to 5 other Clients for unspecified reasons. (AA1052-54.) The net amount, $4,921,109, was deposited into a trust account.

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[6] Of the four individual attorneys and two ILG entities subject to the TRO, only one – Initiative Legal Group APC – has filed Notice of Appeal. Even if this Court were inclined to grant relief for the named appellant, it does not have jurisdiction to act with respect to the other five parties, whose time to appeal has long expired. "The time for appealing a judgment is jurisdictional; once the deadline expires, the appellate court has no power to entertain the appeal." (*Van Beurden Ins. Services, Inc. v. Customized Worldwide Weather Ins. Agency, Inc*. (1997) 15 Cal.4th 51, 56.) The filing requirement is jurisdictional, and neither mistake, inadvertence, accident, misfortune, estoppel or waiver can excuse the failure to file timely appeal. (*Bohan v. Wong* (1998) 61 Cal.App.4th 401, 407.) Further, although the wording of notices of appeal is liberally construed to protect against inadvertent errors including the failure to list an intended appellant (*e.g., Beltram v. Appellate Department* (1977) 66 Cal.App.3d 711, 714-15), that rule does not apply where, as here, the affected parties have not participated in and are not even mentioned in the appellant's briefing.

ARGUMENT

I. The Appeal Of The Intervention Order Should Be Dismissed For Lack Of Standing, Or Else Affirmed On The Merits

A. ILG's Appeal Of The Intervention Order Should Be Dismissed Because ILG Was Not Aggrieved By The Order

This Court should reject ILG's appeal of the Intervention Order because ILG lacks standing to seek review. ILG's argument that the Intervention Order is *appealable* as an adjunct to the TRO (AOB 12) is irrelevant to this threshold question.

To have appellate standing, a person must generally be *both* a party of record, and sufficiently "aggrieved" by the ruling at issue. (*County of Alameda v. Carleson* (1971) 5 Cal.3d 730, 736; *In re Miguel E.* (2004) 120 Cal.App.4th 521, 539; Code Commission Notes to C.C.P. §902.) Only "[a] party who has an interest recognized by law that is adversely affected by the judgment or order is an aggrieved party. [Citations.] The interest must be immediate and substantial, and not nominal or remote. [Citations.]" (*Serrano v. Stefan Merli Plastering Co., Inc.* (2008) 162 Cal.App.4th 1014, 1026-27.) For example, in *County of Alameda*, the Supreme Court held that an organization and its members who would lose their AFDC benefits pursuant to the order appealed from were aggrieved by the order. Because no such similar consequences befell, or could have befallen, ILG as a result of the Intervention Order, it has no standing to appeal.

B. In The Alternative, The Court Should Affirm The Intervention Order As Properly Granted

In the alternative, this Court should affirm the Intervention Order because (1) as a member of the *Lofton* class, Maxon had an absolute right to intervene in the ongoing proceedings (Code Civ. P. §387(b)); and (2) intervention was also appropriate pursuant to

Code Civ. P. §387(a).[7] Indeed, Appellant has not attempted to argue that the court abused its discretion in permitting intervention under either the absolute or the permissive standard.

1. As a member of the *Lofton* class, Maxon had an absolute right to intervene

As a *Lofton* class member, Maxon had both standing and an unconditional right to intervene in this action in order to protect the interests of his fellow class members and the integrity of the class action process, and he sought intervention on that basis. (AA158.) Code of Civil Procedure §387(b) confers an absolute right to intervene in an action "[i]f any provision of law confers an unconditional right to intervene." The Consumers Legal Remedies Act ("CLRA") is such a law; it creates a statutory entitlement for the members of a class to intervene in actions on their behalf. (Civil Code §1781(e)(3); *see* Weil & Brown, *Civil Procedure Before Trial*, The Rutter Group (2001) ¶2.403.) The California Supreme Court has repeatedly instructed the lower courts to utilize the procedural provisions of the CLRA in all class actions. (*See, e.g., Civil Service Employees Ins. Co. v. Superior Court* (1978) 22 Cal.3d 362.) Because it is undisputed that Maxon is a member of the *Lofton* class and a person who had legal rights against Wells Fargo that were extinguished by the *Lofton* settlement, the Intervention Order should be affirmed on that basis.

[7] The Intervention Order (AA 1046) simply states that "the motion to intervene is GRANTED." Maxon sought intervention under both subdivisions of §387.

2. The Intervention Order should also be affirmed under the permissive standard of Code of Civil Procedure §387(a)

Maxon alternatively sought intervention under Civil Procedure §387(a) (AA158-59), which authorizes intervention when (1) the intervenor "has a direct interest in the lawsuit; (2) intervention would not enlarge the issues raised by the original parties; and (3) the intervenor would not 'tread on the rights of the original parties to conduct their own lawsuit.' [Citation.]" (*Bame v. City of Del Mar* (2001) 86 Cal.App.4th 1346, 1364; *see also Truck Ins. Exch. v. Superior Court* (1997) 60 Cal.App.4th 342, 346.) Under this discretionary standard, "[m]embers of a class or association are generally permitted to intervene in an action to which the class or association is a party." (Weil & Brown ¶2:421.) Because Maxon has a direct interest in this litigation, and his intervention did not enlarge the issues to be litigated or affect Lofton's and Wells Fargo's litigation of their claims, permissive intervention was appropriate.

Although ILG seeks to paint the intervention as a sly litigation maneuver, it was anything but that. There are compelling reasons for Maxon's intervention. The essence of Maxon's claim is that ILG committed a fraud on the court overseeing the *Lofton* settlement and evaded judicial scrutiny of the $5.5 million in attorneys' fees it took for litigating the wage and hour claims of the ILG Client Class Members. The law is absolutely clear that a trial court has a solemn obligation to ensure the fairness of a class action settlement, including evaluating any attorneys' fees to be paid. ILG's assertion that its deliberate violation of the rules can only be raised in front of a different court in a separate case – and that the *Lofton* court has no business being informed about or

evaluating the fees covertly paid to ILG as part of the resolution of the very claims released in the class settlement – is outlandish.

Intervention is also appropriate so that the Superior Court can evaluate the impact of the Supplemental Settlement on the 600 absent ILG Client Class Members. Those individuals received less than 10% of the Supplemental Settlement proceeds Wells Fargo paid to secure their participation in the class settlement and the dismissal of their individual lawsuits, and then were tricked by ILG into signing away their malpractice claims for a fraction of their worth. As the court concluded, it is entirely proper – and indeed necessary – for a trial court charged with the responsibility of protecting a group of class members, as well as the integrity of the class action process, to adjudicate such claims.

II. There Is No Merit To ILG's Contention That The Court Lacked Jurisdiction Over Maxon's Claims

ILG makes two jurisdictional arguments in its effort to reverse the Orders below. First, it argues that because the Orders were entered "after final judgment was entered," the court had no authority to act. (AOB 13-14.) Second, it argues that because Maxon did not "name ILG as a defendant" or "make a claim against ILG" in his Complaint in Intervention, "no judgment could be entered against ILG." (AOB 17-19.) From that premise, ILG concludes, "it follows that no TRO or preliminary injunction could issue against ILG…." (*Ibid.*) In essence, ILG contends that Superior Courts lack jurisdiction over attorneys who take secret fees as part of class action settlements, so long as those

attorneys refrain from making themselves parties to the proceedings. Neither of those arguments is supported by the law or the factual record.

A. The Fact That A "Final Judgment" Had Been Entered Pursuant To The Class Settlement Did Not Divest The Court Of Authority To Protect The Absent Class Members

ILG's argument that the court lacked authority to issue the Orders on appeal because final judgment had been entered is contrary to established law. As explained in *Mallick v. Superior Court* (1979) 89 Cal.App.3d 434:

> Section 387 of the Code of Civil Procedure formerly limited intervention to a time before trial, but this limitation was removed by the 1977 amendment to the section, which now reads "Upon timely application" rather than "At any time before trial." ***Thus intervention is possible, if otherwise appropriate, at any time, even after judgment***. (*Cf. Fallon v. Superior Court* [(1939) 33 Cal.App.2d 48], 50-51, holding class members may intervene after judgment to protect their interests.)

(89 Cal.App.3d at 437 [emphasis added].) *Mallick* represents the current state of California law. (*See* 4 Witkin, Cal.Proc.5th (2008) Plead. §224, p.298 [discussing *Mallick* and noting that, "C.C.P. 387(a) now merely requires a 'timely' application, and consequently intervention after judgment is possible in a proper case."]; Lambden, Moore

& Thomas, *Cal. Civil Practice Procedure* §3:59 ["If the court finds the application timely, and intervention is appropriate, leave may be granted even after judgment."])[8]

The court also retained jurisdiction over the settlement under Code of Civil Procedure §664.6. The Final Approval Order expressly retained the court's "continuing jurisdiction over the construction, interpretation, implementation, and enforcement of the Settlement in accordance with its terms and over the administration and distribution of the Settlement Sum pursuant to California Rule of Court 3.769(h) and California Code of Civil Procedure section 664.6." (AA154, ¶9.)

Section 664.6 authorizes a court to "retain jurisdiction to enforce the terms of the settlement, *until such time as all of its terms have been performed by the parties.* [Emphasis added]." (*Wackeen v. Malis* (2002) 97 Cal.App.4th 429, 439.) This includes jurisdiction "over both the parties and the case itself, that is, both personal and subject matter jurisdiction" (*ibid*), as well as the authority to issue orders that affect third parties, if necessary to effectuate the settlement. (*See In re Clergy Cases* (2010) 188 Cal.App.4th 1224, 1237 [court had jurisdiction to resolve dispute regarding dissemination of third

[8] ILG's contrary argument is based on two inapplicable cases, *Martorana v. Marlin & Saltzman* (2009) 175 Cal.App.4th 685 and *Louie v. BFS Retail & Comm'l Ops., LLC* (2009) 178 Cal.App.4th 1544, neither of which addresses the right of an injured class member to intervene in an *ongoing proceeding*, the issue here. In *Martorana,* a class member alleged the attorneys had negligently failed to investigate why he had not filed a claim form. Defendants' demurrer was sustained (and affirmed) on the ground plaintiff was collaterally estopped from challenging the reasonableness of the class notice procedures that had been approved by the court. In contrast, Maxon's claim is that the propriety of ILG's fee payment *was never litigated or determined* because the payment was hidden from both the court and the class. In *Louie*, the Court of Appeal held that the res judicata effect of an order implementing a consent decree in a class action under the ADA did not preclude plaintiff from bringing a subsequent damages claim under California's Disabled Persons Act.

parties' confidential records as part of enforcement of settlement agreement].) Because the Supplemental Settlement was inextricably intertwined with the *Lofton* class settlement, the court's authority here necessarily includes the power to oversee the proper interpretation and distribution of that settlement as well.

Settlement Administration was very much ongoing at the time the Intervention Order and TRO were issued. As customary, the *Lofton* Settlement contemplated that none of the funds would be distributed unless and until final approval was granted, the time to appeal had expired, and the approval was final. (AA39-40, ¶19, AA44, ¶30(e).) Wells Fargo was also obligated to take further action to pay the appropriate payroll taxes. (AA44, ¶30(b), AA48, ¶42, RA220.) In light of these ongoing obligations, the court set a Case Management Conference for August 26, 2011 (later continued to October 28 and then December 30, 2011). The court also heard an Ex Parte Application for an order to transfer the settlement sum to the claims administrator, resolve outstanding claim issues, and other matters, and the Claims Administrator submitted a Declaration regarding the settlement distribution. (Docket, AA1104-10; RA218-222.) Indeed as late as *April 2013* the parties informed the court that no final accounting had been filed. (RA221:20-25.) Thus, it is evident that the court continued to exercise jurisdiction over the case well after "Final Judgment" was entered.

In any event, even if the action had been *dismissed*, the Superior Court would still have had ancillary jurisdiction over issues such as attorneys' fees. (*See State ex rel Standard Elevator Co. v. West Bay Builders* (2011) 197 Cal.App.4th 963, 979 and cases cited therein.) To find otherwise would reward parties who are able to conceal illegal

fees until the day after a final judgment is entered, and undermine the inherent powers and obligations of the courts to ensure that absent class members are treated fairly.

B. The Court Had Inherent Authority To Oversee ILG's Conduct Whether Or Not It Was A Party

It is well-settled that "[o]nce jurisdiction is conferred upon a trial court it has all means necessary to carry its jurisdiction into effect. (Code Civ. Proc., § 187.) *** In addition to this general grant of authority courts are also authorized to issue temporary restraining orders and/or preliminary injunctions in class actions even before the class has been certified. (Code Civ. Proc., § 527.)" (*Patterson v. ITT Consumer Fin'l Corp.* (1993) 14 Cal.App.4th 1659, 1668, *rev. den'd, cert. den'd*, 510 U.S. 1176.) Here, that broad authority included the power to issue whatever injunctive relief the court deemed reasonably necessary to protect the ILG Client Class Members from further injury and damages due to ILG's self-serving allocation of the Supplemental Settlement funds. That ILG was not a named party to the proceedings did not and logically could not deprive the court of jurisdiction to enjoin ILG's conduct in connection with the settlement and to compel it to comply with the law.

California law, informed by the Due Process Clause of the U.S. Constitution, not only authorizes but *requires* that trial courts safeguard and protect the rights of absent class members against overreaching and collusive conduct by attorneys who purport to represent them. (*See*, *e.g.*, *Gulf Oil Co., supra,* 452 U.S. at 99; *Howard Gunty, supra,* 88 Cal.App.4th at 581 [in a class action, a trial court has the authority and the duty "to protect the rights of all parties, and to prevent abuses which might undermine the proper

administration of justice"]; *Neal v. Bank of America* (1949) 93 Cal.App.2d 678, 682 ["the courts have inherent power, by summary means, to prevent frustration, abuse, or disregard of their processes"].) That authority has been broadly interpreted to encompass the imposition of sanctions against attorneys who send misleading communications to class members in order to induce them to opt out of a class. (*Hernandez v. Vitamin Shoppe Industries, Inc.* (2009) 174 Cal.App.4th 1441, 1456 [affirming order barring plaintiff's attorney from further communicating with class members and directing that corrective notice be given]; *Gainey v. Occidental Land Research* (1986) 186 Cal.App.3d 1051,1057-59 [requiring that misleading exclusion forms be returned, and that class members be provided with new notices and additional time to determine whether to opt out].)

The court's supervisory authority also includes the power to issue orders affecting the rights of third parties whose actions and omissions impact the case at issue. For example, trial courts have the power:

- to examine and adjust individual contingent fee contracts implicated in a global settlement, even if not denominated a class action. (*In re Vioxx Products Liability Litig.* (E.D.La. 2009) 650 F.Supp.2d 549, 558-61, cited in *Gonzalez v. Chen* (2011) 197 Cal.App.4th 881, 888; *see also In re Zyprexa Products Liability Litigation* (E.D.N.Y. 2006) 424 F.Supp.2d 488, 491[reducing percentage contingent fee payment and holding that, "[w]hile the settlement … is in the nature of a private agreement between individual plaintiffs and the defendant, it has many of the characteristics of a class action and may be properly characterized as a quasi-class action subject to general equitable powers of

the court."]; *In re Oil Spill by the Oil Rig Deepwater Horizon* (E.D.La. June 15, 2012, MDL 2179) 2012 WL 2236737 [agreeing with *Vioxx* and capping contingent fee arrangements for all claimants' attorneys in MDL litigation].)

- to refuse to enforce a fee agreement that was not disclosed to the court in violation of Rule 3.769 (*Mark v. Spencer* (2008) 166 Cal. App. 4th 219);[9]

- to issue preliminary injunctive relief against parties and their attorneys requiring them to turn over documents taken, without authorization, from the defendant's offices. (*Pillsbury, Madison & Sutro v. Schectman* (1997) 55 Cal.App.4th 1279, 1288; *Conn v. Superior Court* (1987) 196 Cal.App.3d 774, 785.)

It is, likewise, well-settled that trial courts have authority to issue restraining orders against all persons "through whom an enjoined party may act," such as agents, employees, and representatives, and not just the parties to the litigation themselves. (*Berger v. Superior Court* (1917) 175 Cal. 719, 721; *see also People v. Saffell* (1946) 74 Cal.App.2d Supp. 967, 977-78 [overruling demurrer alleging court lacked jurisdiction to issue TRO against non-party, and holding that "[o]ne who is not a party to an action who has never been formally served with a restraining order made therein may, nevertheless, be guilty of contempt of court in violating such order…."].) As the attorneys for the 600 ILG Client Class Members, and also as the holder of funds paid by defendant Wells Fargo, ILG was an agent of the parties for purposes of this rule.

[9] California law in this respect is in keeping with the law of other jurisdictions. (*See, e.g., In re Ungar* (La. 2009) 25 So.3d 101 [attorney's conduct in withholding information from his clients regarding a class action settlement in order to facilitate collection of an excessive fee, which left a small fraction of the settlement for the clients, violated the professional rules].)

ILG's claim that it is immune from oversight because of its "non-party status" would lead to absurd results. Attorneys are never parties to the class actions (or other cases) they litigate. Under ILG's theory, a class member who discovers that an attorney has received an undisclosed fee in exchange for the release of claims resolved as part of a class settlement would have no means of obtaining relief against the attorney from the court overseeing the case. If party status were required, trial courts would never have the power to compel class counsel to comply with Rule 3.769(b) or any other procedural rules – an outcome directly contrary to the cases discussed above. To adopt such a rule would legitimize gamesmanship in which a single attorney might enter an appearance and take a reasonable fee, and then a host of unnamed attorneys might hide their role from the court and take excessive and undisclosed fees. It is self-evident that the court's jurisdiction must extend to all counsel receiving attorneys' fees tied to claims released in a class action settlement, not merely those who reveal themselves to the court.

ILG cites a single federal case, *Duhaime v. John Hancock Mut. Life Ins. Co.* (1st Cir. 1999) 183 F.3d 1, in support of its proposition that a class action court's authority "does not extend to attorneys who represent class members other than as class counsel." (AOB 16.) *Duhaime* is readily distinguishable, and not controlling here. The issue in *Duhaime* was whether the District Court had properly denied a motion to compel discovery into the terms of a "side settlement" between a group of objectors to a class action settlement and the defendant. In exchange for additional payments, the objectors had agreed to dismiss their appeal of the overruling of their objections, and their counsel withdrew her request for attorneys' fees. (183 F.3d at 2-3.) The First Circuit affirmed

the denial of the discovery motion, holding that "[w]here, as here, the class settlement is unaffected by the side settlement and there has been no demonstration of a fraud, absent class members … simply have no unconditional right to have a court review and approve as fair the terms of such a side settlement." (*Id.* at 4.)

That holding is inapposite. First, *Duhaime* was decided under Federal Rule of Civil Procedure 23(e), and does not address the impact of Rule 3.769(b), which is controlling here. Second, the Supplemental Settlement not only "affected" the class settlement, but was necessary and integral to the deal.

The Superior Court recognized this relationship and the significance of the Supplemental Settlement to the *Lofton* settlement approval process. At the outset of the TRO hearing, the judge noted that Class Counsel's motion for attorneys' fees had expressed what proved to be an incorrect understanding of the terms of the Supplemental Settlement. The motion had represented that:

> Approximately 600 HMCs filed individual suits using the offices of Initiative Legal Group, APC. The settlement negotiated on February 15, 2011, with ILG, called for a gross settlement of approximately $6 million, or an average gross distribution of $10,000 per individual plaintiff. Wells rationalized this higher figure by the fact that these individuals had been willing to sign a retainer and commence a separate lawsuit. *It was contemplated that the ILG clients would recover from the richer per capita fund secured by ILG for its individual clients and opt out of the $19 million class settlement.*

(RT 9/13/12, 7:22-8:9 [emphasis added].) The court stated, "That didn't happen did it?*** And Judge Giorgi was never informed of that?" (*Id*, 8:10-14.) Class Counsel McInerney answered "no" to both questions. (*Ibid.*) Although Wells Fargo was aware of the actual terms of the Supplemental Settlement, it had elected not to correct the record,

or to tell Judge Giorgi that the Supplemental Settlement actually precluded ILG's Clients from opting out, instead requiring them to accept the amount afforded by the class settlement as compensation for their wage and hour claims. The court's authority over the class settlement approval process thus necessarily included the authority to review both ILG's conduct in connection with the Supplemental Settlement, and Wells Fargo's decision to withhold the true terms of the Supplemental Settlement – and its impact on the ILG Client Class Members – from the court.

C. The Court Had Authority To Review And Decide Whether To Approve ILG's Attorneys' Fees Under Rule 3.769(b)

Because ILG's claim to attorneys' fees was based entirely on its litigation of the wage and hour claims resolved in the *Lofton* class settlement, ILG was required to disclose the proposed fee payment to the class and to the court, and to seek the court's approval pursuant to Rule of Court 3.769(b). Upon remand, the court will have discretion to determine whether to approve the payment, reduce it or reject it altogether. (*See Mark v. Spencer*, *supra,* 166 Cal.App.4th at 228 [attorney's failure to disclose fee-splitting agreement in obtaining approval of class action settlement barred later enforcement of the agreement]; *In re Vitamin Cases* (2003) 110 Cal.App.4th 1041, 1056 [reversing class counsel fee award in part because trial court failed to consider a term in the settlement agreement explaining how each plaintiff's counsel's share of the award would be determined].) Indeed, as the Ninth Circuit has explained:

> A district court's exercise of this broad discretion to review and modify a fee agreement is not limited to situations in which it finds windfall, adverse class impact, or other irregularity. Whenever a court finds good

reason to do so, it may reject an agreement as to attorneys' fees just as it may reject an agreement as to the substantive claim.

(*In re FPI/Agretech Securities Litig.* (9th Cir. 1997) 105 F.3d 469, 473 [internal citation omitted].)

1. The Rules of Court require any payment of attorneys' fees in connection with the settlement of a class action to be disclosed

Rule of Court 3.769(b) requires that: "Any agreement, express or implied, that has been entered into with respect to the payment of attorney's fees… must be set forth in full in any application for approval of the dismissal or settlement of an action that has been certified as a class action." ILG's failure to seek judicial approval before appropriating over 90% of the Supplemental Settlement as attorneys' fees was a flagrant violation of that black letter law, which admits of no exceptions. (*See* Weil & Brown, *supra,* ¶14:140.5 [because of the potential for fraud, collusion, and unfairness, "fee awards in class actions are *always* subject to court approval" (emphasis in original)]; *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1808 ["thorough judicial review of fee applications is required in all class action settlements"].) This is true regardless of whether the fee payment was negotiated or arrived at through mediation. (*See Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 131-32; *Garabedian v. L.A. Cellular Telephone Co.* (2004) 118 Cal. App.4th 123, 126-29.) Incredibly, ILG does not even mention this issue in its appellate brief.

As the Court of Appeal noted in *Mark v. Spencer*, one of the key purposes for judicial review of attorneys' fees is to protect class members from any conflict of interest with their attorneys. (166 Cal.App.4th at 228). That is precisely what happened here.

It is equally settled that as part of the oversight of class actions, the trial court is obligated to review and approve the class notice to ensure it adequately discloses the full amount of attorneys' fees that counsel are seeking. "'The principal purpose of notice … is the protection of the integrity of the class action process…. The notice "must fairly apprise the class members of the terms of the proposed compromise and of the options open to the dissenting class members."' [Citation.]" (*Cho v. Seagate Technology Holdings, Inc.* (2009) 177 Cal.App.4th 734, 745.) Litigants may not limit the power of the court to evaluate the adequacy of the notice by withholding crucial facts relevant to the fairness of the settlement. (*Hernandez,* 174 Cal.App.4th at 1454 [adequacy of notice is "'committed to the discretion of the court, not the whim of litigants.' [Citation.]"].)

Federal law is consistent. The Ninth Circuit has a strong policy in favor of requiring counsel to notify class members not only of the amount of attorneys' fees to be paid, but also the rationale for the payment, prior to the deadline for objecting to the settlement. (*In re Mercury Interactive Corp. Securities* (9th Cir. 2010) 618 F.3d 988, 993-94 [the failure to give such notice "borders on a denial of due process."])

By concealing from the court $5.5 million of the total attorneys' fees to be paid in connection with the release of the ILG Client Class Members' wage and hour claims, ILG made it impossible for the court to approve an accurate notice to the class.

2. Because ILG's claim to attorneys' fees was derived from its litigation of claims resolved through the class settlement, ILG was required to disclose and seek court approval of the fees

ILG readily admits that its claim to attorneys' fees derives from the prosecution of the wage and hour claims resolved in *Lofton*. It was required, therefore, to disclose the proposed fee payment to the court.[10]

The settlement process was well described by Class Counsel McInerney in his September 20, 2012 declaration filed "to explain the procedural history of the Lofton settlement and the relationship between the Lofton settlement and the $6 million settlement reached by Initiative Legal Group:"

> Mr. Porter informed me that Wells Fargo would not consider settling the HMC claims unless the claims brought by ILG's 600 individual clients were also resolved. Accordingly, ILG was invited to a February 15, 2011 mediation session before David Rotman. During the mediation, Mr. Clapp and I were placed in one room, Mark Primo… and Marc Yablonovich were in another, and Wells Fargo was in a third room. At that mediation, Mr. Clapp and I reached a tentative $19 million settlement on behalf of the class of HMCs. As a condition of that settlement, however, Wells Fargo insisted that the class be defined to include all HMCs, including those who were represented by ILG. Wells Fargo explained that it was concerned that ILG might not be able to deliver individual releases from each of its 600 clients.*** To ensure that the claims of all HMCs were resolved, Wells Fargo insisted that all HMC's, including those represented by ILG, would be given the right to make a claim under the Lofton settlement and be bound by

[10] Indeed, ILG explicitly sought to justify its claim to attorneys' fees on the basis of its "years" of work on the individual wage and hour actions ILG and Yablonovich filed against Wells Fargo. In the January 2012 letter disclosing the Supplemental Settlement, ILG describes it as resolving its fee claims "for the work performed on litigation involving Wells Fargo ***including three class actions***, a labor code private attorney general action, and the approximately 600 individual actions, including yours, that were resolved by *Lofton*." (AA440 [emph. added].) The accompanying Release identifies "four representative actions with claims that were released as the result of the *Lofton v. Wells Fargo* class action settlement in which you participated," listing *Peña, Hollander, Mather*, and *Strickler*. (AA443.) There is no evidence ILG ever advised the courts overseeing those other class cases about its attorneys' fee payment, either.

> the Lofton release. We were told also that ILG and Wells Fargo had agreed to set up a separate, $6 million fund for ILG's clients. We were told no other details about ILG's settlement at that time.

(RA198:6-20.) ILG's litigation counsel, Vance, similarly told the court it had been "ILG's belief that the deal that was going to be negotiated with Wells Fargo was going to be with respect to payment of fees to ILG." (RT 9/13/12, 22:22-25.) She stated: "Your Honor, the settlement that was contemplated was essentially among the 600 clients a $10,000 settlement per client, of which each client would receive $750, and the law firm would receive $9,250 per person." (*Id.,*19:17-21.) Ms. Vance suggested this was conscionable because it was less than the amount of fees the ILG group had actually expended *on the litigation of the wage and hour claims*. (*Id*., 19:21-23.)

The correspondence between ILG and Wells Fargo concerning the distribution of the Supplemental Settlement also demonstrates, conclusively, that the agreement was for the purpose of paying ILG attorneys' fees for its litigation of the wage and hour claims resolved as part of the *Lofton* class settlement. (*See, e.g.,* AA485 [Primo states the February 15, 2011 settlement included Wells Fargo's agreement to pay ILG $6 million "in satisfaction of the firm's fees, expenses and costs associated with all of the currently pending litigation," and notes the payment was "conditioned upon" final approval and dismissal of *Lofton* and the other pending cases]; AA492 [Primo represents the Clients found the "Lofton settlement sufficient in large part because Wells Fargo is separately paying our firm's attorneys fees and costs"]; AA493 [Wells Fargo confirms it will pay $6 million to ILG and the ILG Clients "as part of the overall Lofton class action settlement."]; AA492 [Primo references ILG's agreement to accept $6 million "in

exchange for a release of our firm's right to fees and costs related to the settlement of the Wells Fargo litigation."].) That evidence is more than sufficient to support the court's finding that Maxon is more than likely to prevail on his claims, and to warrant the issuance of temporary injunctive relief.

III. ILG's Effort To Hide Behind The Mediation Privilege Should Be Rejected

In addition to its jurisdictional challenge, ILG's other principal "defense" is that no matter how egregious, its conduct cannot be examined – much less redressed – by *any* court because not just its representations but also the very *terms* of the Supplemental Settlement are shielded from disclosure by the mediation privilege. This Court need not reach that issue, as there is ample public record evidence to support the TRO. (*See* Evidence Code §353 [a finding or decision shall not be set aside based on erroneous admission of evidence unless the reviewing court finds "that the error or errors complained of resulted in a miscarriage of justice."] ILG's evidentiary objections should also be rejected on the merits, because ILG has not met its burden of establishing there was any ongoing mediation to which the privilege might attach.

A. This Court Need Not Address ILG's Evidence Objections Because There Was Substantial Public Record Evidence Before The Superior Court To Justify The TRO

As discussed above, there was substantial public record evidence, all well outside the scope of the claimed mediation privilege, before the Superior Court to justify the TRO without regard to the additional evidence that ILG contends is subject to the mediation privilege. In fact – and as ILG admits – the judge expressly stated that he had

reviewed the objections and that "I have relied only on admissible evidence." (AOB 21; 9/13/12 RT, 59:5-10.) That evidence includes:

(1) ILG attorney Primo's Declaration in Opposition to Motion to Intervene, which supports Maxon's claim that the attorneys' fees retained by ILG derived entirely from the litigation of the wage and hour claims resolved in the *Lofton* class settlement (AA919:20-24) – substantiating Maxon's claim the fees required court approval;

(2) ILG's undisputed failure to apprise the court that the Supplemental Settlement included substantial attorneys' fees – evidencing ILG's violation of Rule 3.769(b);

(3) ILG's communications with the ILG Client Class Members urging them not to opt out of the *Lofton* class settlement; to submit claim forms; and to have their wage and hour claims extinguished by the *Lofton* settlement (AA418-19, 434, 438) – establishing ILG's conflict of interest and abandonment of its Clients' claims;

(4) ILG's undisputed failure to inform its Clients about the Supplemental Settlement until January 30, 2012 – *eleven months after the $6 million settlement payment had been agreed to*, after the court had approved both the *Lofton* settlement and Class Counsel's attorneys' fee award, and after the ILG Client Class Members' right to opt out or object to the *Lofton* settlement had expired (RT 9/13/12, 20:1-20) – evidencing ILG's self-dealing and breach of its professional obligations; and

(5) ILG's misleading correspondence to its Clients urging them to accept $1,000 in satisfaction of their potential malpractice claims, without providing any information about the terms of the Supplemental Settlement, ILG's fraudulent scheme or

the value of the individual wage and hour claims they had released (AA458-70) – evidencing ILG's breach of its fiduciary duties.

The TRO should be affirmed on the basis of that evidence alone.

B. ILG's Appeal Of The Evidence Issues Should Be Denied On Procedural Grounds

ILG's appeal of the evidence issues lacks merit because ILG has made no effort to inform Maxon or this Court which objections he claims were (1) wrongly overruled and (2) materially prejudicial. ILG made 63 evidentiary objections and moved to strike 18 factual statements in Maxon's Memorandum, on grounds ranging from relevance to hearsay, "secondary writing," lack of foundation, "settlement negotiations," and "improper opinion." Some of the materials encompassed in the objections, including statements made in open court and some of the documents ILG voluntarily produced to Mr. Zitrin (AA502-527), are already in the public record, and thus unaffected by any potential mediation privilege. (Ev. Code §1120(a).) Maxon cannot fairly be expected to respond, or this Court to rule, *en masse* on all 81 objections.

C. ILG's Communications With Wells Fargo Were Admissible Because ILG Failed To Establish Any Mediation Privilege Applied

Should this Court nevertheless decide to address the merits of ILG's privilege arguments, it should overrule ILG's objections because ILG failed to establish the mediation privilege applied.

The mediation privilege is a creature of statute. (*Saeta v. Superior Court* (2004) 117 Cal.App.4th 261, 272; Ev. Code §911(b).) "The burden of proving the privilege applies is on the party asserting it, [and] the privilege claimant has the initial burden of

proving the preliminary facts to show that the privilege applies." (31 Cal.Jur.3d Evidence § 508; *cf. State Farm Fire & Casualty Co. v. Superior Court* (1997) 54 Cal.App.4th 625, 639 ["When a party asserts the attorney-client privilege it is incumbent upon that party to prove the preliminary fact that a privilege exists"].) ILG did not, and it cannot, meet that burden because (1) the ILG Clients never authorized, participated in, or even had knowledge of any mediation, and (2) the communications ILG asserts were inadmissible took place after the mediation had terminated by operation of law.

1. The mediation privilege is inapplicable because the ILG Clients were excluded from the settlement discussions between ILG and Wells Fargo

Evidence Code § 1115(a) defines "mediation" as "a process in which a neutral person or persons facilitate communication between the disputants to assist them in reaching a mutually acceptable agreement." Participation of the "disputants" is, thus, a necessary prerequisite to any mediation confidentiality. (*See generally Wimsatt v. Superior Court* (2007) 152 Cal.App.4th 137, 164 [strict confidentiality is one of the consequences of "agreeing to mediate a dispute"].) The "disputants" in this case were the individual ILG Client Class Members and Wells Fargo. However – as ILG concedes – the HMCs who ILG purported to represent were never apprised of, did not agree to, and did not participate in the mediation. (Maxon Decl., AA419:23-420:11; RT 9/13/11, 20:1-20.)

Further, because ILG did not inform its Clients about the Supplemental Settlement that purported to resolve their individual claims for eleven months, and even then materially misrepresented the agreed terms, the Clients had no opportunity to, and they

did not, ratify or approve ILG's actions. Having violated its professional responsibilities to communicate material developments to its Clients and to obtain authorization before entering into an agreement materially affecting their Clients' rights (*see* California Practice Guide: Professional Responsibility (The Rutter Group 2012) ¶¶ 3:194, 3:198, 3:133), ILG cannot retroactively bind its Clients to an agreement to keep confidential ILG's *ultra vires* acts.

2. The mediation privilege is inapplicable to the communications between ILG and Wells Fargo because they occurred well after the mediation had been concluded

The mediation privilege is inapplicable in any case to the communications between ILG and Wells Fargo because they took place after the mediation had terminated by operation of law. While the correspondence evidences some initial disagreement as to how the Supplemental Settlement payment would be allocated, there is no evidence of any involvement by the mediator in those discussions.

For purposes of the mediation confidentiality statute, a mediation ends – and communications made thereafter are no longer privileged – when "*for 10 calendar days, there is no communication between the mediator and any of the parties to the mediation relating to the dispute*." (Ev. Code § 1122(a)(5) [emphasis added].) This means that if Wells Fargo and ILG did not communicate with the mediator for 10 days or more following the February 15, 2011 mediation, the mediation was terminated.

As the party asserting the privilege, the burden of proving both that the mediation was ongoing more than four months after the February 15, 2011 mediation, and that the material alleged to be privileged was exchanged pursuant to that ongoing mediation, rests

on ILG. The sole evidence proffered by ILG on this point is a self-serving declaration from ILG Attorney Primo, stating: "The continuing mediated negotiations eventually resulted in a proposed settlement to ILG and its clients." (AA919:28-920:1.) That assertion, which is unsupported by *any* documentary evidence, is woefully insufficient to meet ILG's burden. Rather, because none of the correspondence to which ILG objects was copied to the mediator, the evidence requires an inference to the contrary.[11]

ILG's position is also inconsistent with the parties' sworn statements to the court. ILG, Class Counsel, and Wells Fargo all consistently represented to the court that *all* of the HMC wage and hour cases, including the class and individual actions filed by ILG/Yablonovich, were settled on February 15, 2011. For example:

- Class Counsel stated at the Preliminary Approval hearing that ILG's mass actions had been "settled on the very same day in front of the very same mediator, David Rotman, back on February 15th…." (AA520:27-561:4.) Wells Fargo counsel Porter agreed: "all of the parties and their counsel, who are here resolved these cases in mediation and we are proceeding I think consistent with that resolution." (AA562:17-19.) Neither ILG attorney Meneses nor Yablonovich's associate, Coats, corrected them.

- At the final approval hearing, the parties again told the court: "The end of the day brought a settlement for the class of $19,000,000 and settlement of the individual ILG lawsuits of $6,000,000." (AOB 5, quoting AA133:21-25.)

[11] While ILG suggests documents exist that might support its position (AOB 24, fn. 9), it concedes that it failed to present any such documents to the Superior Court.

The parties' subsequent representations collaborate that the mediation concluded on February 15, 2011. In its publicly-filed Memorandum regarding the OSC, Wells Fargo makes clear its view that the Supplemental Settlement was negotiated and agreed to "on February 15, 2011," and that "ILG and its clients agreed a year later in January and February 2012 in individual releases to an allocation of $500,000 to the clients and $5.5 million to ILG. Wells Fargo did not determine that allocation." (RA220:18-21.) The real "negotiation" of the allocation was between ILG and its Clients.

The extent of ILG's overreaching is further demonstrated by the fact that it goes so far as to argue that materials that were voluntarily presented, *without objection and in open court,* in support of the *Lofton* settlement approval are privileged and should not have been submitted to the court in support of the TRO. (*See* AOB 25, contending that "class counsel's settlement motions" and "a transcript of proceedings from the class settlement approval hearing," "purported to disclose communications during the mediation process and also referenced facts regarding what allegedly transpired with regard to ILG's negotiations at the mediation" and were inadmissible.) These objections *were not raised below*, and such a position is in any case untenable. Documents and pleadings that are publicly filed, evidence voluntarily presented in open court, and any other evidence that is "otherwise admissible or subject to discovery outside of a mediation or a mediation consultation" does not become inadmissible by reason of its use in a mediation. (Ev. Code §1120 subdiv. (a).)

Further, although "the confidentiality of statements made and materials used during mediation are also confidential after the mediation ends," the court "may consider

oral statements of the settlement terms. [Citation.]" (*Long Beach Memorial Medical Center v. Superior Court* (2009) 172 Cal.App.4th 865, 875.) Nor do "the confidentiality rules…prohibit 'a party' from 'advising the court about *conduct* during mediation that might warrant sanctions.'" (*Campagnone v. Enjoyable Pools & Spas Service & Repairs, Inc.* (2008) 163 Cal.App.4th 566, 571, quoting *Foxgate Homeowners' Ass'n v. Bramalea California, Inc.* (2001) 26 Cal.4th 1,13-14, where the issue was the failure of an insurer to appear at mediation.) This includes, for example, the testimony before the court that ILG did not inform its Clients about the mediation or obtain their consent before entering into the Supplemental Settlement with Wells Fargo, and counsels' statements to the court about the Supplemental Settlement terms.

ILG's litigation position is also at odds with its own previous conduct, including its voluntary disclosure of every one of the documents Maxon put before the court in connection with his motions (*see* 481:7-26, 484), which strongly suggests ILG understood the documents were not within the mediation privilege. In fact, in his cover email to Maxon attorney Zitrin, ILG counsel Banks indicated that only *one* of the documents he had produced – a term sheet created at the mediation – was "ostensibly" privileged, plainly indicating that all of the *other* documents were *not* privileged. (AA1036:10-13.)[12]

ILG also published correspondence purporting to explain its intentions in entering into the Supplemental Settlement and its beliefs as to what the $6 million payment was

[12] Maxon did not include the term sheet among the exhibits initially submitted in support of the TRO. Although he did later submit the document as part of his rebuttal of ILG's contentions (*see* AA1036:10-28), there is no evidence the Superior Court relied on it.

for – again revealing that ILG understood that its communications with Wells Fargo related only to the manner in which the agreed payment would be distributed, and not to the mediated terms of the deal. (*See, e.g.,* Jan. 2012 letter, AA440-41.) Vance also openly discussed ILG's understanding of the Supplemental Settlement in open court; for example, she stated it had been "ILG's belief that the deal that was going to be negotiated with Wells Fargo was going to be with respect to payment of fees to ILG." (RT 9/13/12, 22:22-25.) This Court cannot sustain ILG's evidentiary objections on this record.

D. ILG's Misleading Client Letters Are Not Protected By Evidence Code Section 1152

ILG contends that the misleading "settlement offers" it made to its Clients should also have been excluded pursuant to Evidence Code §1152. The limited protection afforded by that statute is, however, inapplicable here.

Section 1152 is not a privilege, but "a rule of evidence subject to review for abuse of discretion." (*Hawran v. Hixson* (2012) 209 Cal.App.4th 256, 296.) The statute "is not an absolute bar to liability since a settlement document may be admissible for a purpose other than proving liability." (*Ibid.*) Here, Maxon offered the letter and Release ILG sent to its 600 Clients not as evidence "to prove [ILG's] liability for the loss or damage" (ILG's fraud/malpractice) but to demonstrate the need for an injunction to prevent ILG from obtaining additional releases on the basis of misleading information. The court was not called upon to make any findings on the merits, but to determine whether to put a temporary halt to ILG's conduct pending the court's determination as to who, between ILG and its Clients, is entitled to the money. It is, further, a common practice for courts

to review attorney communications to class members and, if appropriate, to enjoin them. (*See* sections II-B and IV-B-4.) The documents were properly admitted for those purposes.

IV. Injunctive Relief Was Warranted By The Evidence And Properly Tailored To Protect The Settlement Funds And The Interests Of The ILG Client Class Members

A. The TRO Should Be Reviewed For Abuse Of Discretion

Maxon agrees with ILG that a TRO should be reviewed under the same standards as are applied to a preliminary injunction. (AOB 30, citing *Church of Christ in Hollywood v. Superior Court* (2002) 99 Cal.App.4th 1244, 1251-52.) However, ILG's argument as to the scope of review is mistaken. As well-summarized in *California Correctional Peace Officers Ass'n v. State of California* (2000) 82 Cal.App.4th 294, 302:

> The decision to grant a preliminary injunction rests in the sound discretion of the trial court and will not be reversed unless the court has exceeded all bounds of reason or contravened the uncontradicted evidence. [Citations.] ***If the evidence conflicts, we must construe it in the light most favorable to the trial court's decision***. But if no issue of fact is presented, we determine whether the granting of the preliminary injunction was error as a matter of law. ***The party challenging the injunction bears the burden of showing a clear abuse of discretion or error of law***. [Citations.]

(Emphasis added.) (*See also Continental Baking Co. v. Katz* (1968) 68 Cal.2d 512, 527 [articulating the same standard for abuse of discretion].)

B. There Is No Evidence That The Court Abused Its Discretion In Issuing The TRO

The purpose of a preliminary injunction "is the preservation of the status quo until a final determination of the merits of the action." (*Continental Baking,* 68 Cal.2d at 528; *see also* Witkin, *California Procedure* [5th ed. 2008] § 285 p. 225-26). "'The ultimate

goal…in deciding whether a preliminary injunction should issue is to minimize the harm which an erroneous interim decision may cause. [Citation.]'" (*White v. Davis* (2003) 30 Cal.4th 528, 554.)

> "Trial courts evaluate two interrelated factors when deciding whether to issue a preliminary injunction. The first is the likelihood that the plaintiff will prevail [on the merits] at trial; the second, the interim harm that the plaintiff will likely sustain if the injunction were denied as compared to the harm that the defendant will likely suffer if the injunction were issued. By balancing the respective equities, the trial court should conclude whether--pending trial on the merits--the defendant should or should not be restrained from exercising his or her claimed right." [Citation.]

(*California Correctional Peace Officers,* 82 Cal.App.4th at 302.) The court "must also take into account the *public interests that are implicated* by the relief sought when it is balancing the harms. *Caribbean Marine Services Co. v. Baldrige,* 844 F.2d 668, 674 (9th Cir.1988)." (*Price v. City of Stockton, Cal.* (E.D. Cal. 2005) 394 F.Supp.2d 1256, 1262.) The California standard "is quite similar to the federal standard." (*Ibid.*) "'In the last analysis the trial court must determine which party is the more likely to be injured by the exercise of its discretion… and it must be exercised in favor of that party….' [Citation.]" (*Continental Baking*, 68 Cal.2d at 528.)

Here, the court had more than a reasonable basis to conclude that ILG's appropriation of over 92% of the Supplemental Settlement payment – coupled with its failure to disclose the true settlement terms to the court, its failure to seek approval for its attorneys' fees, and its repeated misrepresentations to its Clients – presented an ongoing risk of continued, substantial harm to the private interests of the ILG Clients as well as to the public interests in the fair and orderly administration of justice and preservation of the

integrity of the class action device. ILG, in contrast, presented no evidence that requiring it to place the funds into a trust account would unduly impair its business, or that temporarily halting its communications with its "former clients" (AOB 39) would expose the firm or the Clients to any risk of harm. On the basis of the evidence presented, the court was well within its discretion to (and indeed, could only reasonably) conclude that injunctive relief was warranted.

1. Requiring ILG to deposit the disputed funds in a secure escrow account was essential to protect the interests of the ILG Client Class Members

The trial court did nothing more than order ILG to preserve the disputed *res* in trust until its rights *vis à vis* the ILG Client Class Members can be ascertained.[13] ILG did not advance any competing proposal, nor did it attempt to show that the order would have any substantial negative impact on its continued operations. This type of asset preservation order is entirely typical and well-authorized under the injunction statutes. (*See Mitsui Manufac. Bank v. Texas Commerce Bank-Fort Worth* (1984) 159 Cal.App.3d 1051, 1059; *Wind v. Herbert* (1960) 186 Cal.App.2d 276, 286 [affirming issuance of preliminary injunction "to assure that the partnership assets will remain intact pending an accounting and a final hearing on the merits."])

As Maxon argued below (AA407:18-27), the court also had authority to order ILG to hold the balance of the Supplemental Settlement in constructive trust pending a ruling on the proper allocation of the funds pursuant to Civil Code §2223 ("One who wrongfully detains a thing is an involuntary trustee thereof, for the benefit of the owner") and §2224

[13] ILG has represented it has complied with this part of the TRO notwithstanding this appeal. (AA1052-54.)

("One who gains a thing by fraud,…, undue influence, the violation of a trust, or other wrongful act, is… an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it.").

The need for and wisdom of the order has been borne out by subsequent events. Maxon has asked this Court to take judicial notice of the pleadings in another action against a law firm related to ILG (*Maxon v. Capstone* San Francisco Superior Court No. CG-13-528884), in which Plaintiff alleges that the ILG Attorneys and their cohorts are actively working to fraudulently transfer all of ILG's accounts receivable to a new, separate entity. (RA78:18-79:2, 81:8-27.)

ILG also contends the injunction "was effectively an improper pre-judgment writ of attachment" and that reversal is required because Plaintiff Intervenor did not meet the requirements for such a writ. (AOB 34-36.) This is a red herring. Maxon did not seek a writ of attachment, and the TRO was a temporary measure to protect the disputed assets until the hearing on the OSC. Whether Maxon could have met the standards for a writ of attachment is irrelevant.

2. The restrictions on ILG's communications with the ILG Client Class Members were well-justified by ILG's prior misconduct

ILG next contends the TRO should be reversed because it "imposes an impermissible content-based prior restraint on speech." (AOB 36-38.) This Court need not reach that issue, because ILG can only speak through its attorneys, and the ILG Attorneys subject to the TRO have not appealed. Further, the limited restrictions placed on the ILG Attorneys' communications were well justified given the evidence of ILG's

extensive history of fraudulent conduct. ILG had not only mailed hundreds of letters misinforming its Clients about the terms of the Supplemental Settlement and inducing them to accept $750 in lieu of their rightful share of the funds, but subsequently sent a second round of letters misrepresenting Maxon's claims, and inducing the Clients to settle their potential malpractice claims for an additional $1,000 – all without ever disclosing the amount they would have received had they opted out of the *Lofton* settlement, or had the Supplemental Settlement been allocated *pro rata* to the Clients. A temporary restraint on ILG's communications, pending further hearing on these very serious claims, was in fact the *only* way to protect the ILG Client Class Members from further abuse by ILG. For ILG to claim, as it does, that the TRO improperly restrained the firm from seeking to enforce the fraudulently-obtained releases against its "former clients" (AOB 39) stands justice and reason on its head.

Limited restraints designed to prevent the dissemination of misleading information that would frustrate the class action process are well within the court's plenary authority and ongoing responsibility to protect absent class members, police the conduct of lawyers, and prevent abuses of the class action process. (*Mevorah v. Wells Fargo Home Mortgage* (N.D. Cal. 2005) 2005 WL 4813532 *3 [requiring that all communications with putative class members be pre-approved by the court after defendant made false and misleading statements to putative class members]; *Pollar v. Judson Steel Corp.* (N.D. Cal. 1984) 1984 WL 161273 [TRO prohibiting defendant and its attorneys from further communicating with potential opt-in class members after they had unilaterally published a confusing and misleading notice likely to cause the class members to believe they were

not eligible for relief, and also ordering that corrective notice be given]; *Bowens v. Atlantic Maint. Corp.* (E.D.N.Y. 2008) 546 F.Supp.2d 55, 90 [enjoining defense counsel from contacting actual or potential members of opt-in plaintiff class].)

The courts also regularly order corrective notices to remedy deceptive communications and impose sanctions for misconduct in class actions. (*See, e.g., Patterson, supra* [affirming order prohibiting defendant from seeking confirmation of arbitration awards while class certification was pending]; *Veliz v. Cintas Corp*. (N.D. Cal. 2004) 2004 WL 2623909 at *3 [ordering defendant to issue corrective notice after its CEO sent a letter to potential opt-in plaintiffs that discouraged participation in the lawsuit]; *Hampton Hardware v. Cotter & Co.* (N.D. Tex. 1994) 156 F.R.D. 630, 633-34 [prohibiting defendant from communicating with putative class members after it sent several letters intended to discourage participation in the lawsuit]; *Bontempo v. Metro Networks* (N.D. Ill. 2002) 146 Lab. Cas. (CCH) ¶34,550 [enjoining defendant from communicating with his employees concerning the litigation].)

Belt v. Emcare, Inc. (E.D. Tex. 2003) 299 F.Supp.2d 664 well illustrates the expansive authority of a class action judge to remedy the type of misconduct at issue here. In *Belt,* the court found that a letter from the defendant misrepresented numerous facts about the lawsuit and interfered with the employees' right to participate in the case. (299 F.Supp.2d at 666-668). To remedy that improper conduct, the court ordered that the defendant: (1) cease all communications with potential opt-ins absent a court order; (2) issue corrective notice on defendant's letterhead; and (3) bear the cost of corrective notice and all reasonable attorneys' fees and costs in bringing the plaintiffs' motion for

relief. It also required that all potential class members be given an additional 30 days to opt into the putative class, and reserved the possibility that it would allow putative class members to opt into the class post-verdict. (*Id.* at 669-70.)

California law is consistent. For example, in *Bronco Wine Co. v. Frank A. Logoluso Farms* (1989) 214 Cal.App.3d 699, a commercial grape supplier brought a class action against a purchaser (Bronco) for breach of contract and unlawful business practices, alleging the purchaser had wrongfully downgraded the quality of the suppliers' grapes in order to pay lower prices. Like ILG, the defendant responded by embarking on a campaign to induce the suppliers to release their claims. The court found that, "[o]nce it became apparent that the court was going to award restitution damages in favor of nonparty growers, Bronco sought to secure their releases" without advising them about the damages available. (214 Cal.App.3d at 716.) The trial judge issued a TRO to prevent the defendant from obtaining further releases "without first informing [the class members] of the restitution they received from the judgment," (*ibid*), and the Court of Appeal affirmed.

As in those cases, the court below was fully justified in concluding that ILG's past deceptive communications to the ILG Client Class Members – which were expressly designed to enable ILG to retain as much of the $6 million Supplemental Settlement as possible – justified placing similar restrictions on its subsequent communications.

3. The TRO did not infringe the Clients' privacy rights

Having stolen millions of dollars from them, ILG now purports to be concerned about its Clients' rights, contending that requiring it to comply with that portion of the

TRO that directs it prepare a class list – an order with which ILG *never complied* – would unconstitutionally infringe the Clients' privacy rights. This argument ignores several pertinent facts.

First, the identity of ILG's Clients was already a matter of public record at the time the order was issued, as the names of the Clients are listed on the face of the pleadings of each of the mass actions ILG filed. (AA682-789, 827-857.)

Second, the names and address of all *Lofton* class members – including the ILG Client Class Members – had already been disclosed to the *Lofton* class settlement administrator, and ILG and Wells Fargo used the services of the administrator to distribute the $750 Supplemental Settlement payments it made. (AA499.) The TRO does not require disclosure of any additional information. Further, disclosure of class member contact information is entirely proper where necessary to protect the rights of class members. (*See, e.g., Mevorah* at *6 [ordering defendant to provide "a complete list of all potential class members" it had contacted, and to permit plaintiff to depose them].)

V. CONCLUSION

For the foregoing reasons, the challenged Orders should be affirmed.

Dated: July 3, 2013

CHAVEZ & GERTLER LLP
ZITRIN LAW OFFICE
ANDERSON LAW

By: ___________________________

Mark A. Chavez
Attorneys for Respondent

CERTIFICATE OF WORD COUNT

Pursuant to California Rules of Court, Rule 8.204(c), I certify that RESPONDENT'S BRIEF contains 13,981 words, not including the tables of contents and authorities, the caption page, this Certification page and appendices.

Dated: July 3, 2013 ____________________

Mark A. Chavez