No. A136626
(San Francisco County Super. Ct. No. CGC-11-509502)

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

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

Plaintiff,

v.

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

Defendants.

INITIATIVE LEGAL GROUP APC,

Appellant,

v.

DAVID MARK MAXON,

Intervenor/Respondent.

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

APPELLANT'S OPENING BRIEF

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Pursuant to California Rule of Court 8.208, Appellant Initiative Legal Group APC ("ILG") hereby certifies that Marc Primo owns ten percent or more of ILG.

DATED: February 28, 2013.

SEAN M. SELEGUE

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INTRODUCTION

This is an appeal from a Temporary Restraining Order against a law firm issued by a court without jurisdiction that relied on a fragmentary record of inadmissible mediation documents and communications. The TRO required the firm to deposit nearly $5,000,000 into a court-controlled account, imposed a prior restraint on the law firm's communications with its own former clients, restrained the firm's ability to petition the courts in other matters, and compelled disclosure of a client list. The TRO is flawed from beginning to end and must be reversed.

The dispute involves Appellant Initiative Legal Group, APC ("ILG") and one former client, Intervener David Mark Maxon. ILG represented Maxon and about 600 other individuals in wage and hour lawsuits against Wells Fargo Home Mortgage ("Wells Fargo"). After years of litigation in multiple cases brought by multiple lawyers and law firms, a mediation led to the class settlement in this action. The plaintiff, Dawn Lofton, moved for approval of the class-wide settlement, and the court granted final approval without the filing of a single objection. ILG did not act as class counsel, never represented Lofton, did not appear as counsel of record, and did not receive any fees from the ultimate $19 million class settlement.

ILG's clients were members of the certified class in this action. Those who did not opt out—Maxon among them—released overlapping claims ILG was separately prosecuting on their behalf. ILG subsequently proposed to Maxon an additional settlement in which Wells Fargo would pay up to $6 million for a broader release and for the firm's fees and costs incurred over five years of litigation. ILG proposed each client be paid $750, which represented the maximum statutory penalty on a remaining claim arguably not released in

the class settlement. The vast majority of ILG's clients agreed but Maxon declined to do so.

Maxon then brought suit against ILG in a putative class action for breach of fiduciary duty and related claims, which is currently pending. He contends the individual settlements were part of a scheme by which ILG received too much and misled its clients.

Maxon makes very serious allegations, and ILG stands ready to address them in the separate action Maxon has filed, but this settled class action is not the place for any of Maxon's complaints about ILG to be resolved. The TRO should be reversed for three independent reasons explained below: (1) lack of jurisdiction on multiple grounds, (2) the court's improper reliance on inadmissible material and (3) the impropriety of the TRO's various directives to ILG.

STATEMENT OF FACTS

A. After ILG And Others Attempt Unsuccessfully To Bring Actions On A Class-Wide Basis, Maxon And Approximately 600 Other Wells Fargo Employees Retain ILG To Pursue Their Individual Claims.

In May 2006, ILG began representing Laura Strickler, a Wells Fargo employee in a putative class action alleging that the company had misclassified thousands of Home Mortgage Consultants ("HMCs") as exempt employees and had denied them certain wages and benefits required by law. AA 918 ¶ 3. When ILG learned other counsel had already filed a similar class action, Strickler dismissed the class allegations and pursued a private attorney general action. *Id.* ¶ 4. The *Strickler* action was heavily litigated, including written and deposition discovery, discovery motions, a writ petition and summary adjudication/summary judgment motions. *Id.* ¶ 5.

In the fall of 2007, Michael Hollander, another former HMC retained ILG to file a putative class action, *Hollander v. Wells Fargo*, which was later deemed related to *Strickler*.

AA 918 ¶ 6. That case was eventually limited to a single claim for non-compliant wage statements and, like *Strickler*, was heavily litigated. *Id.* ¶¶ 7-8. Ultimately, the case was denied certification and proceeded as an individual action.

Meanwhile, between February 2005 and January 2010, counsel other than ILG were also pursuing class claims on behalf of HMCs. That action, the *Mevorah* case, was initially certified, but after two appeals, was decertified in January 2010. AA 918 ¶ 9. Once the *Mevorah* class was decertified, former putative class members began retaining attorneys individually. *Id.* Approximately 600 retained ILG to file wage and hour actions against Wells Fargo. *Id.* Maxon was one of the HMCs who retained ILG to represent him. AA 919 ¶ 10.

In May 2010, Maxon executed an attorney-client agreement with ILG. AA 252-53. The agreement provided that if ILG resolved Maxon's claims, it would be entitled to the greater of one-third of any recovery or its hourly fees (ranging from $285 to $650 per hour), plus costs incurred. *Id.*

ILG filed two actions on Maxon's behalf: (1) *McLane, et al. v. Wells Fargo*, an action seeking individual damages for wage and hour violations, and (2) *Mather, et al. v. Wells Fargo*, an action brought to recover statutory penalties of up to $750 under Section 226(f) of the Labor Code for Wells Fargo's alleged failure to provide employment records upon request. AA 919 ¶ 11. *McLane* and *Mather,* the two cases in which Maxon was named as a plaintiff along with other ILG clients, were two of ten mass actions ILG filed for its clients. AA 449. Among other things, ILG successfully resisted Wells Fargo's attempts to remove the cases to federal court and prepared and defended clients for depositions throughout California. AA 450.

B. Mediation Leads To A Court-Approved, Class-Wide Resolution Of The Wage And Hour Claims Of All Affected Wells Fargo Employees, Including The 600 Whom ILG Represented.

After over five years of complicated and expensive litigation, the well-known mediator David Rotman met on February 15, 2011, with Wells Fargo and counsel representing HMCs who were suing the bank in different actions. AA 133, 928. Attending the mediation session in separate rooms were (1) Wells Fargo, (2) attorneys Kevin McInerney and James Clapp (who had brought the now-decertified *Mevorah* action) and (3) ILG and attorney Mark Yablonovich, who had brought other litigation on behalf of HMCs. AA 133:21-23, 109:15-17. Wells Fargo and the former *Mevorah* attorneys McInerney and Clapp negotiated a proposed deal that they evidently thought would be fair and reasonable for all affected HMCs, including those represented on an individual basis by ILG. AA 15, 919 ¶ 13. On March 24, 2011, McInerney and Clapp filed the instant action on behalf of Dawn Lofton, who sought to represent a putative class of HMCs. AA 1-6. ILG did not serve as class counsel in this action, nor did the firm appear as counsel of record. AA 919 ¶¶ 12-13.

On April 5, 2011, Lofton moved for preliminary approval of the settlement. AA 9-24. During the hearing, ILG told the court that it represented 600 clients with individual lawsuits against Wells Fargo, who would also be class members. AA 560:9-21. Class counsel also told the court that "[t]hese individuals' cases that these gentlemen have been referring to were essentially settled on the same day in front of the very same mediator . . . Wells has a separate settlement with these folks." AA 560:27-561:4; *see also* AA 562:17-18 (Wells Fargo's counsel stated that "all of the parties and their counsel, who are here resolved these cases in mediation").[1]

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[1]There is much disagreement over what transpired at the
(. . . continued)

During the hearing, there was a discussion between the court, class counsel and ILG about ILG continuing to communicate with its 600 individual clients once the class was certified. AA 561:9-21, 561-5:6, 563:7-28. Class counsel agreed that such communication was appropriate and that class counsel would not "be contacting anyone that are [sic] independently represented by . . . these firms." AA 561:5-6. On April 27, 2011, Judge Giorgi preliminarily approved the class settlement. AA 84-96. Maxon, as a member of the class, received the court-approved notice of settlement and submitted his claim form. AA 417 ¶ 5, 424-32, 418 ¶ 14, 436.

Class counsel's motion for attorney's fees mentioned the "settlement of the individual ILG lawsuits of $6,000,000" and referenced the 600 clients on whose behalf ILG had filed actions against Wells Fargo. AA 109:18-19, 113 n.1. The motion for final approval of the settlement informed the court that

> in February of this year, a mediation occurred at David Rotman's offices with the three camps in separate offices. Class counsel was there on behalf of a California putative class, Wells was there, and in the third office was ILG and Mark Yablonovich. 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.[2] (AA 133:21-25)

(. . . continued)
mediation and in subsequent mediated negotiations. As explained *infra* in Section II, what took place at the mediation, and the negotiations pursuant to it, was inadmissible and should not have been disclosed to or considered by the court. In any event, this record shows—contrary to some of Maxon's arguments below—that settlement discussions between ILG and Wells Fargo were inherently preliminary until ILG's clients agreed to the separate settlement, as demonstrated by Maxon's decision not to agree to the separate settlement when ILG presented it to him. *See infra* at pp.6-7.

[2]Here again, ILG points out that its view of what took
(. . . continued)

Because ILG was not class counsel in this action (AA 363:20-22, 397:16), ILG neither applied for nor received any fees from the settlement of this case. AA 151-54.

On July 27, 2011, Judge Giorgi entered an Order Granting Final Approval of Class Action Settlement and Entry of Judgment ("the final approval order"). AA 151-54. Following final approval, the class members, including Maxon, who had not opted out were deemed to have released their various wage and hour claims. AA 153 ¶ 8. The court awarded class counsel $6,333,333 in fees. AA 149-50.

The court reserved jurisdiction only to enforce the settlement "in accordance with its terms . . . pursuant to California Rule of Court 3.769(h) and California Code of Civil Procedure section 664.6." AA 154 ¶ 9. As reflected by this record, and to the best of ILG's knowledge, the settlement process is now complete, and the funds have been distributed. AA 419 ¶ 16, 920 ¶ 18.

C. ILG Offers A Separate Settlement To Its Clients, Which The Vast Majority Accept.

On January 30, 2012, ILG wrote to Maxon regarding the proposed separate settlement with Wells Fargo. AA 920 ¶ 19. In the letter, ILG explained that the class settlement had resolved Maxon's pending wage and hour claims against Wells Fargo and, as a result, ILG would dismiss Maxon's individual action against Wells Fargo on those claims. AA 440. ILG further explained that while the proposed settlement with Wells Fargo had been intended by ILG to cover only ILG's fees and costs, Maxon arguably still had the *Mather* records claim pending. AA 440. Since the maximum penalty due to Maxon under Section 226 of the Labor Code

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(. . . continued)
place is not (and cannot be) in the record due to mediation confidentiality.

would be $750, ILG proposed that $750 be paid to Maxon to release his *Mather* claim and any other claim not already released by the class settlement. AA 440.

ILG's letter went on to explain that under the proposed settlement, all of ILG's other individual clients would receive $750 for their similar claims and that ILG would receive the remainder of up to approximately $5,520,000 in payment of ILG's fees and costs incurred for litigation efforts over a five-year period. AA 440-41. The release stated that the allocation of fees to ILG would be based on agreement between ILG and its clients and that "Wells Fargo has not specified or agreed to any allocation towards attorneys fees." AA 443.

While the vast majority of ILG's other clients agreed to the proposed additional settlement with Wells Fargo, and authorized payment of fees to ILG (AA 920 ¶ 21), Maxon did not. *Id.* ¶ 20. In early May 2012, Wells Fargo disbursed a fee and cost payment of $5,448,000 to ILG pursuant to the agreements signed by ILG's clients. *Id.* ¶ 22.

D. ILG Discloses Maxon's Criticisms To Other Former Clients And Proposes A Resolution.

In March 2012, Maxon began questioning the amount of fees ILG claimed in connection with the proposed settlement, and his belief that Wells Fargo owed him additional money in unpaid commissions. AA 445. ILG explained to Maxon that certain of his wage claims been resolved by the class settlement, of which his share had already been fully paid, but that ILG was interested in discussing Maxon's claim for unpaid commissions. AA 447. ILG also provided Maxon with detailed information about the firm's substantial work in connection with over five years of litigation on wage and hour claims against Wells Fargo. AA 447-50.

In August 2012, ILG disclosed to its former clients Maxon's criticisms of ILG and the separate settlement.

AA 458-68. ILG offered them $1,000 for a full release of any claims they might have against ILG. *Id.* In this communication, ILG provided nine pages of information, including an accounting of payments received, a detailed explanation of potential conflicts of interest implicated by the offer, a description of the relief Maxon would likely seek from ILG, including disgorgement of the fees and punitive damages, the potential for each former client to recover more than $1,000 if he or she filed a lawsuit against ILG, a warning that the former clients had no obligation to settle with ILG and a further suggestion that each client should consult with independent legal counsel as he or she felt necessary. *Id.*[3]

E. Maxon Files An Action Against ILG.

On September 5, 2012, Maxon filed a putative class action in San Francisco Superior Court against ILG and four of its attorneys, asserting claims for breach of fiduciary duty, declaratory relief, and violations of Section 17200 of the Business and Professions Code. *Maxon v. Initiative Legal Group APC, et al.*, No. CGC-12-523966 ("*Maxon v. ILG*") (AA 622-59). Maxon seeks to represent a class composed of all 600 ILG clients (AA 633:28-34:3), even though he is one of only a small minority who did not agree to the separate individual settlements. Maxon claimed that, as a result of the settlement with Wells Fargo, ILG wrongfully collected and retained approximately $5.5 million that, in Maxon's view, belonged to Maxon and other members of the proposed class. AA 623:8-10.

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[3]An example of the elaborate disclosure documents ILG sent to its former clients is in the record because one recipient gave a copy to Maxon. AA 421 ¶ 36.

F. In This Action, Maxon Obtains A Temporary Restraining Order and Order To Show Cause Against ILG.

On September 6, 2012, the day after he filed his separate lawsuit against ILG, Maxon filed an ex parte application in *this* action for an order shortening time to hear a motion to intervene along with an application for a TRO and an order to show cause why a preliminary injunction should not be issued against ILG. AA 155. The court set the hearing for one week later on September 13, 2012. AA 366.

While Maxon sought a TRO and preliminary injunction against ILG, his proposed complaint in intervention did not name ILG as a defendant. Instead, Maxon's proposed complaint named Wells Fargo as a defendant and, as Maxon describes it, included "factual allegations and claims for relief" that were "identical" to those set forth in the complaint Lofton had filed in March 2011. AA 472-79, 388:10-11. The causes of action in the proposed complaint in intervention are for restitution of overtime wages, a claim based on Section 1194 of the Labor Code, waiting time penalties, rest and meal breaks, and penalties pursuant to Section 226(a) of the Labor Code. AA 472-79. Maxon's application for a TRO and OSC sought relief against ILG, which was not identified in any of the pleadings as a party to this action.

Specifically, Maxon sought a TRO that would impose a constructive trust and compel ILG to deposit the approximately $5.5 million Wells Fargo paid under the separate settlement. AA 860:4-18. Maxon also asked for ILG to be restrained from further action to "induce" its former clients to sign releases and from taking any action to enforce releases already signed. AA 860:19-22. Maxon also asked that the TRO require ILG to file and serve a list of all clients and their contact information. AA 860:23-24. Maxon went on to request an Order to Show Cause re Preliminary Injunction ("OSC") that would compel ILG to demonstrate why a

preliminary injunction should not issue to order a "corrective notice" to ILG's former clients and declare that any release signed by those former clients is unenforceable. AA 860:6-8. In support of his motion and application, Maxon submitted numerous confidential mediation documents and communications. AA 485-527, 1035-45.

At the hearing on September 13, 2012, the Honorable Harold Kahn, who by this time had replaced Judge Giorgi in the law and motion department, granted Maxon's motion to intervene and issued a TRO and OSC. AA 1046-47, 1048-51. Judge Kahn was "troubled." Reporter's Transcript ("9/13 RT") 13. He thought that Judge Giorgi "was misled and not properly informed during the preliminary and final approval process." 9/13 RT 29. Judge Kahn went on to say that class counsel McInerney was no longer "in a position to represent the class . . . , and I think there needs to be new class counsel." 9/13 RT 45. One of Maxon's lawyers volunteered to fill that role but the court rejected the proposal as a "clear conflict." 9/13 RT 47-48.

Prior to the hearing, ILG filed written objections based on mediation confidentiality and other grounds. AA 1017-34. ILG also raised an oral objection at the hearing to an unsigned draft term sheet from the mediation that Maxon's counsel filed just hours before the hearing began. 9/13 RT 24:10-22; *see also* AA 1035-37. Yet during the hearing, participants were allowed to make statements concerning what supposedly happened at the mediation. At one point, class counsel McInerney observed that "both sides have been sort of throwing the mediation privilege under the bus," something he viewed as "okay with me in the sense that, you know, I don't have anything to hide." 9/13 RT 37. In response to class counsel's suggestion in open court that mediation confidentiality was being violated, the court actually encouraged further disclosures. *Id.* (the court "invit[ed]" class counsel "to tell

me any part of the picture that you think I should know"). Later in the hearing, ILG requested a ruling on its evidentiary objections (9/13 RT 59:1-4), but the court declined to rule specifically on them, commenting:

> You made many objections. There were about 60 or 70 of them. I don't believe at this time that it would be a good use of my time to go through it. I am going to tell you I have relied only on admissible evidence. Go back to the [*Biljac*] days with regard to this hearing. (9/13 RT 59:5-10)

On September 14, 2012, the court issued a TRO requiring ILG and certain of its attorneys (1) to deposit into the court or a trust account, and hold subject to the court's control and supervision, all monies ILG collected from the Supplemental Settlement with Wells Fargo, less funds ILG had paid to its clients; (2) to file a full accounting; (3) to refrain from any further action to "induce" former clients to release claims against ILG or its attorneys; (4) to refrain "from taking any action to enforce the terms of any purported release signed" by former clients; (5) to file and serve a list of names and contact information for former clients; (6) if contacted by former clients, "to state only that these matters are being considered by the Court and that they will receive further information shortly;" and (7) to file with the court a declaration describing steps taken to comply with the TRO. AA 1048-51.

The OSC required ILG to show cause why it should not be subject to a preliminary injunction that would be essentially identical to the TRO, except that the preliminary injunction would also (a) require ILG to provide a "corrective notice" to all of its clients and to all members of the class and (b) declare the releases invalid and unenforceable. AA 1049:17-50:9. In response, ILG deposited $4,921,109 into a trust account. AA 1053 ¶ 5. On September 19, 2012, ILG filed a declaration and accounting regarding its compliance with the TRO's requirement that those funds be deposited. AA 1052-85.

On September 20, 2012, ILG filed a notice of appeal from the TRO and OSC as well as the related order granting Maxon's motion to intervene. AA 1089-91. On that same day, ILG filed a challenge to Judge Kahn under Section 170.6 of the Code of Civil Procedure, and the following day, Wells Fargo filed a similar challenge. AA 1092-97.

On September 28, 2012, the OSC came on for hearing before Judge Patrick Mahoney, who determined that ILG's appeal of the TRO deprived the court of jurisdiction to proceed. 9/28/12 Reporter's Transcript ("9/28 RT") 4:5-11, 6:12-13. The Court then confirmed that the case would be frozen with the TRO in place pending the appeal. 9/28/12 RT 11:20-12:4.

STATEMENT OF APPEALABILITY

An order granting an injunction is an appealable order. CODE CIV. PROC. § 904.1(a)(1), (2), (6). An order granting a motion to intervene is also appealable in connection with an order granting injunctive relief. *Highland Dev. Co. v. City of Los Angeles*, 170 Cal. App. 3d 169, 178 (1985) (allowing review of an order granting a party intervention in connection with an order granting that same party an injunction, given that the former order affected the issuance of the latter), *disapproved on other grounds, Morehart v. Cnty. of Santa Barbara*, 7 Cal. 4th 725, 743 n.11 (1994); CODE CIV. PROC. § 906 (an appellate court may review any interlocutory order "which involves the merits or necessarily affects" the order appealed from, or "which substantially affects the rights of a party"); *Taylor v. W. States Land & Mortg. Co.*, 63 Cal. App. 2d 401, 403 (1944).

ARGUMENT

I.

THE SUPERIOR COURT LACKED SUBJECT-MATTER JURISDICTION.

A. Jurisdiction Is Reviewed *De Novo*.

Subject matter jurisdiction is a legal question subject to *de novo* review when the relevant evidence is not disputed. *Dial 800 v. Fesbinder*, 118 Cal. App. 4th 32, 42 (2004). All of the issues discussed in the remainder of this Section I are based on undisputed facts demonstrated by court records, so this Court should review the Superior Court's assertion of jurisdiction over ILG *de novo*.

B. The Trial Court Lacked Subject-Matter Jurisdiction Because Maxon's Complaint In Intervention Was Filed After Final Judgment.

The July 27, 2011 Order Granting Final Approval and Entry of Judgment ("the Final Approval Order") concluded the dispute between the class and Wells Fargo, because the order left nothing to be adjudicated between the parties other than enforcement of the court-approved settlement. *Ramon v. Aerospace Corp.*, 50 Cal. App. 4th 1233, 1237 (1996) ("A final judgment terminates the litigation between the parties and leaves nothing in the nature of judicial action to be done other than questions of enforcement or compliance"); *Louie v. BFS Retail & Commercial Operations LLC*, 178 Cal. App. 4th 1544, 1559 (2009) (only issues "withdrawn by an express reservation" from a final class judgment remain open upon entry of judgment); *Pangborn Plumbing Corp. v. Carruthers & Skiffington*, 97 Cal. App. 4th 1039, 1047 n.3 (2002) (order enforcing settlement under Code Civ. Proc. § 664.6 appealable "because it purport[ed] to finally resolve all issues between these particular parties . . . , required no further judicial action and left nothing to be done but to enforce what had

been determined"); *see also* J. EISENBERG, *ET AL.*, CALIFORNIA PRACTICE GUIDE: CIVIL APPEALS AND WRITS ¶ 2:41.6 (2012).

Here, there can be no doubt (as Maxon and ILG agree, AA 159:6-10, 386:4-5) that the order granting final approval resolved all issues between the parties to this action (*i.e.*, the dispute between the class and Wells Fargo), because the order declared that final judgment shall "have the effect of releasing and resolving the claims by Plaintiff and Class Members who did not file timely . . . exclusion requests." AA 153. Since the settlement approval order required nothing "further in the nature of judicial action on the part of the court [that was] essential to a final determination of the rights of the parties," it was final when entered. *Dana Point Safe Harbor Collective v. Superior Court*, 51 Cal. 4th 1, 5 (2010).

The time to appeal the judgment expired long ago with no party filing an appeal. *See* CAL. R. CT. 8.104(a)(1)(B) (service of "file-stamped copy of the judgment" triggers 60-day appeal period); *id.* 8.104(a)(1)(C) (even when judgment is not served, time to appeal expires in 180 days). Indeed, no class member (including Maxon) objected to the settlement (AA 580-81), and failure to object would have barred an appeal even if one had been timely filed. *See* AA 153 (order stated that "Class Members who did not timely object are barred from prosecuting or pursuing any appeal of this Final Order"); *Consumer Cause, Inc. v. Mrs. Gooch's Natural Food Mkts., Inc.*, 127 Cal. App. 4th 387, 395 (2005) (only objecting class members may appeal from final approval and judgment).

Once a matter is finally concluded, the trial court loses jurisdiction over the subject matter. 2 B. WITKIN, CALIFORNIA PROCEDURE, *Jurisdiction* § 328, at 942 (5th ed. 2008) ("When, by lapse of time for appeal or other direct attack on the judgment (e.g., motion for new trial, motion to vacate) it becomes final, the cause is no longer pending and the court has no further jurisdiction of the subject matter"). At that point, the

court's "findings on the fairness of [the] settlement, adequacy of notices, and adequacy of class representation are final and have the force of law." *Martorona v. Marlin & Saltzman*, 175 Cal. App. 4th 685, 696 (2009).

A newly filed action (such as *Maxon v. ILG*) does not in any way revive a previously closed action, even if the trial court attempts to consolidate the new action with the closed action. For example, a trial court acted beyond its jurisdiction by consolidating a newly filed assault and battery action brought by a woman against her former husband with the closed marital dissolution action between them. *Sosnick v. Sosnick*, 71 Cal. App. 4th 1335, 1340 (1999). "Consolidation was more than inappropriate—the court exceeded its jurisdiction in granting the motion and thereafter entertaining and ruling on [a] summary judgment motion." *Id.* at 1339; *see also Rochin v. Pat Johnson Mfg. Co.*, 67 Cal. App. 4th 1228, 1232 (1998) (amended judgment was void when not entered pursuant to statutory requirements to grant motion for new trial).

Because "any judgment or order rendered by a court lacking subject matter jurisdiction is void on its face," the TRO and OSC must be reversed. *Varian Med. Sys., Inc. v. Delfino*, 35 Cal. 4th 180, 196 (2005) (reversing all orders, including judgment after trial, when proceedings in trial court continued after a notice of appeal divested the trial court of jurisdiction) (citation and internal quotation marks omitted).

C. Maxon Cannot Invoke The Court's Limited Jurisdiction To Enforce The Agreement.

In the final approval order the trial court specifically retained jurisdiction under Section 664.6 and Rule of Court 3.769 "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 . . . ." AA 154 ¶ 9. This limited jurisdiction was maintained "[w]ithout affecting the finality of judgment." *Id.*

Section 664.6 confers limited jurisdiction by which a trial court may specifically enforce an agreement that settles pending litigation. CODE CIV. PROC. § 664.6; *Walton v. Mueller*, 180 Cal. App. 4th 161, 168 (2009). The court's retention of jurisdiction is "extremely limited" and does not allow the court to modify a settlement or judgment. *Hernandez v. Bd. of Educ.*, 126 Cal. App. 4th 1161, 1175-76 (2004). Similarly, California Rule of Court 3.769 only allows a court to retain jurisdiction to "enforce the terms of the judgment." CAL. R. CT. 3.769(h).

Maxon cannot invoke the court's reserved jurisdiction, because his complaint in intervention does *not* seek to enforce the settlement. To the contrary, he states that his intervention in this matter "will not affect the court-approved settlement." AA 377:12-14. Maxon also concedes that he and all other class members have received their payments under the settlement. AA 388:14-15. Since Maxon does not seek to enforce the terms of the completed class settlement, his complaint in intervention and application for a TRO and OSC against ILG exceeded the court's limited reserved jurisdiction to enforce the settlement. Since the court did not have jurisdiction over this dispute, the order granting Maxon's motion to intervene, and the TRO and OSC must be reversed.

Moreover, even if the court's post-judgment jurisdiction were not limited to enforcing the settlement terms, a class action court has the power and responsibility to supervise *class* counsel. That authority does not extend to attorneys who represent class members other than as class counsel. *Duhaime v. John Hancock Mut. Life Ins. Co.*, 183 F.3d 1, 6

(1st Cir. 1999).[4] The *Duhaime* court noted that court scrutiny of class settlements guards against potential conflicts between class counsel and named plaintiffs, on the one hand, and "faceless absent class members" on the other but is not intended to oversee representation of class members by non-class counsel. *Id.*

The First Circuit in *Duhaime* affirmed the denial of a class member's motion to intervene, because "individual side settlements are just that—side settlements; they are not a settlement of the class action itself." *Id.* at 4. As the court explained,

> [s]imilarly harmed plaintiffs often secure separate representation and enter into materially different settlements with a common defendant. In such situations, the settling parties have no legally protected interest in having a court scrutinize each settlement to ensure that all plaintiffs receive similar consideration for their releases. (*Id.* at 6)

See also Weight Watchers of Philadelphia, Inc. v. Weight Watchers, Int'l, Inc., 455 F.2d. 770, 775 (2d Cir. 1972) (Rule 23 "does not bar non-approved settlements with individual members which have no effect upon the rights of others").

Since Maxon's dispute with ILG does not involve enforcing the settlement approved in this action, the trial court lacked jurisdiction.

D. Maxon's Complaint In Intervention Against Wells Fargo Did Not Support The TRO Or The OSC Against ILG.

While it is indisputable that Maxon's complaint in intervention against Wells Fargo is barred by the judgment, it is equally true—and even more important—that Maxon's complaint *did not name ILG* as a defendant and *sought no relief*

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[4]California courts look to federal cases interpreting Rule 23 when there is no direct California precedent. *Green v. Obledo*, 29 Cal. 3d 126, 145-46 (1981).

against ILG. Because ILG was not a defendant below, no judgment could be entered against ILG. *Fazzi v. Peters*, 68 Cal. 2d 590, 594 (1968) ("judgment may not be entered either for or against one not a party to the action or proceeding"); *see also Tokio Marine & Fire Ins. Corp. v. W. Pac. Roofing Corp.*, 75 Cal. App. 4th 110, 123 (1999).

If no judgment could be entered against ILG, it follows that no TRO or preliminary injunction could issue against ILG, because such interim relief may be granted only if there is a reasonable probability the moving party will prevail at trial on the merits of the moving party's complaint. *See San Francisco Newspaper Printing Co. v. Superior Court*, 170 Cal. App. 3d 438, 442 (1985); *see also Yu v. Univ. of La Verne*, 196 Cal. App. 4th 779, 788 (2011) (moving party must show likelihood of prevailing at trial). Because no complaint is pending against ILG, there is no reasonable possibility of Maxon prevailing at trial against ILG.

Interveners like Maxon are not exempt from the fundamental rule that relief may be granted only against parties. An intervener must file a complaint in intervention. CODE CIV. PROC. § 387(a) ("intervention . . . is made by complaint, setting forth the grounds upon which the intervention rests, filed by leave of the court and served upon the parties . . ."); *In re Sutter Health Uninsured Pricing Cases*, 171 Cal. App. 4th 495, 513 (2009). The complaint is a "fundamental prerequisite" to intervention and, without it, intervention is not proper. *Tokio Marine & Fire Ins. Corp.*, 75 Cal. App. 4th at 120 (insurer's signature on stipulation could not transform non-party insurer into party to action); *see also Hausmann v. Farmers Ins. Exch.*, 213 Cal. App. 2d 611, 615 (1963) ("When the intervener is admitted, the pleading which he presents and files must state facts sufficient, if true, to establish the right or interest which he claims, or else he has no standing in court as a litigant if proper objection is made").

The complaint in intervention defines the parties to the suit, post-intervention. For instance, once admitted as an intervener, the intervener is "to be regarded as a plaintiff or as a defendant in the action . . . [depending upon] the party for whose success he seeks to intervene." *Timberidge Enters., Inc. v. City of Santa Rosa*, 86 Cal. App. 3d 873, 879 (1978) (where complaint in intervention supported dismissal of action, interveners were aligned with defendants and interveners' complaints were deemed answers to plaintiffs' complaint).

Therefore, Maxon made no claim against ILG in this action because he did not allege any claims against ILG in his complaint in intervention. Regardless of how Maxon's complaint against Wells Fargo might turn out (and it is obviously doomed to failure),[5] Maxon's complaint in intervention does not entitle him to any relief *against ILG*, a non-party. The court therefore had no power to enter any relief against ILG. "The objections to a judgment *against* a stranger to the action are . . . serious" and any "judgment is *wholly void*." *Moore v. Kaufman*, 189 Cal. App. 4th 604, 616 (2010) (citation and internal quotation marks omitted) (first emphasis in original; second emphasis added); *see also id.* at 615 (no jurisdiction against a "nonparty [who] is the attorney or former attorney

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[5]Maxon admits that his complaint in intervention against Wells Fargo is based on "identical" "factual allegations and claims for relief" as those set forth in the now-settled complaint that Lofton filed to commence this action. AA 472-79, 388. Those claims have already been adjudicated and released as to the class, including Maxon, by the final settlement approval order. *See, e.g., Louie,* 178 Cal. App. 4th at 1555 ("[A] judgment in a class action is binding on class members.") The "interest in finality of judgments . . . might be thought particularly strong in the class action context . . . because of the number of people the final judgment affects." *Duhaime v. John Hancock Mut. Life Ins. Co.*, 183 F.3d 1, 8 (1st Cir. 1999) (citing *Valerio v. Boise Cascade Corp.*, 80 F.R.D. 626, 647 (N.D. Cal. 1978)).

of a party"); 7 B. WITKIN, CALIFORNIA PROCEDURE, *Judgment* § 2 (5th ed. 2008) ("A judgment cannot be given in favor of or against one who is not a party to the action"). As such, the TRO and OSC must be reversed.[6]

II.

THE TRIAL COURT RELIED ON INADMISSIBLE EVIDENCE SUBJECT TO MEDIATION CONFIDENTIALITY AND THE SETTLEMENT EXCLUSION.

Maxon supported his claims against ILG by disclosing various materials subject to mediation confidentiality, including: (1) an unexecuted, draft "Term Sheet" that he acknowledges came from a mediation (AA 1036:10-11); (2) correspondence between ILG attorney Marc Primo and Wells Fargo's counsel, Lindbergh Porter (including a draft stipulation for dismissal), exchanged during continued mediated negotiations; and (3) numerous references to, descriptions of, and disclosures of mediation-related communications, writings, and documents, including statements

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[6]It bears noting that, even if Maxon had filed a complaint in intervention that had named ILG as a defendant based on the allegations in *Maxon v. ILG*, that action would have been subject to immediate abatement. CODE CIV. PROC. § 430.10(c) (a plaintiff can only institute and maintain a single action against a defendant); *see Crowley v. Katleman*, 8 Cal. 4th 666, 682 (1994) (plaintiff may assert primary right in only a single action); *Henry v. Clifford*, 32 Cal. App. 4th 315, 320-21 (1995) (second action barred by prior action against defendant based on same primary right).

And such a hypothetical complaint would impermissibly expand the issues in this action and, for that reason, could not support intervention. *See Kuperstein v. Superior Court*, 204 Cal. App. 3d 598, 600-01 (1988) (vacating order granting intervention); *see also Bame v. City of Del Mar*, 86 Cal. App. 4th 1346, 1364 (2001) (affirming denial of intervention where intervenor sought new and different relief).

made in open court and prior filings. AA 440, AA 458-70, AA 480-501, AA 557-68, AA 1035-45. All of these materials, predicated on what supposedly occurred during mediation, were inadmissible under the mediation confidentiality statutes (EVID. CODE §§ 1115-1128) and cannot support the TRO (nor for that matter jurisdiction or intervention).

A. The Trial Court's Refusal To Rule On ILG's Objections Warrants Reversal.

ILG filed written objections to materials protected by mediation confidentiality and moved to strike that inadmissible evidence. AA 1017-34; *see also* 9/13 RT 17:23-18:8, 8:5-8 (counsel noting violation of mediation confidentiality). The court nonetheless relied on the inadmissible information in questioning ILG's counsel (9/13 RT 17:2-16, 17:21-22, 18:14-18) and even invited counsel to reveal more after class counsel noted that mediation confidentiality had been thrown "under the bus." 9/13 RT 37. When ILG's counsel asked the court to rule on objections (9/13 RT 59:1-4), the court responded, "I don't believe at this point that it would be a good use of my time to go through [the objections]. I am going to tell you I have relied only on admissible evidence. Go back to the [*Biljac*] days with regard to this hearing." 9/13 RT 59:5-10.[7]

Because the trial court did not rule specifically on ILG's objections, they are deemed overruled, and it is presumed that the trial court considered the disputed evidence. *Reid v. Google, Inc.*, 50 Cal. 4th 512, 534 (2010). Because the trial court did not exercise discretion, the objections were properly preserved, and the merits of ILG's objections should be

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[7]The trial court's reference to *Biljac* refers to a Court of Appeal decision that has been disapproved and which formerly authorized trial courts to avoid ruling on specific evidentiary objections. *Reid v. Google, Inc.*, 50 Cal. 4th 512, 532 n.8 (2010).

reviewed de novo on appeal. *Id.* at 535. While a reviewing court can reverse and remand a matter to the trial court with directions to rule on objections (*see, e.g., Parkview Villas Ass'n, Inc. v. State Farm Fire & Cas. Co.,* 133 Cal. App. 4th 1197 (2005)), this Court can—and in this case should—rule on the objections as part of its determination on the merits of the appeal itself. *Reid,* 50 Cal. 4th at 535. The court's consideration of mediation and settlement-related evidence was erroneous as a matter of law, and no remand is necessary to reach that conclusion nor to rule that the TRO and OSC are unsupported by evidence as a result.

B. The Mediation Confidentiality Statutes Required Exclusion Of Mediation Materials.

The purpose of mediation confidentiality is to free participants of any concern that what they say or write in connection with mediation will later be used against them. *Cassel v. Superior Court,* 51 Cal. 4th 113, 124 (2011). Unfortunately, ILG was subjected to a vigorous attack below based on what allegedly happened in mediated negotiations, exactly what mediation confidentiality is supposed to forbid. EVID. CODE § 1119(c) ("All communications, negotiations, or settlement discussions by and between participants in the course of a mediation . . . shall remain confidential"); *id.* § 1119(a) ("No evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation is admissible or subject to discovery . . ."); *id.* § 1119(b) ("No writing, as defined in Section 250, that is prepared for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation, is admissible or subject to discovery . . .").

The statutory provisions are absolute and not subject to judicially crafted exceptions or limitations. *Cassel,* 51 Cal. 4th at 118; *Simmons v. Ghaderi,* 44 Cal. 4th 570, 580 (2008);

Fair v. Bakhtiari, 40 Cal. 4th 189, 194 (2006); *Rojas v. Superior Court*, 33 Cal. 4th 407, 415-16 (2004); *Foxgate Homeowners' Ass'n v. Bramalea California, Inc.*, 26 Cal. 4th 1, 13-14 (2001).

Here, Maxon's counsel violated mediation confidentiality numerous times—by revealing communications during the mediation process, and by disclosing writings prepared pursuant to the mediation. Several of the most glaring violations of mediation confidentiality follow.[8]

1. The Unsigned Draft Term Sheet Was Inadmissible.

Maxon's counsel improperly disclosed and put into evidence, just hours before the trial court hearing, an unexecuted draft term sheet exchanged between participants during the mediation. AA 1039-40. As a matter of law, it was subject to mediation confidentiality. EVID. CODE § 1119(b). Disclosure of a written settlement agreement reached pursuant to mediation is permitted *only* if it is signed and meets other conditions. EVID. CODE § 1123; *Fair*, 40 Cal. 4th at 196-97, 199-200. Waiver of mediation privilege cannot be implied so that even a settlement agreement *signed* at a mediation will not be admissible unless it expressly so states. *Simmons*, 44 Cal. 4th at 581 (even a document prepared at mediation with settlement terms and signed by both parties is inadmissible absent express language that the parties intended to be bound); *Fair*, 40 Cal. 4th at 199-200 (extrinsic evidence of parties' intent to be bound did not overcome mediation confidentiality, such that an agreement signed during mediation is still inadmissible). Here, the agreement was not even signed, and its provenance was not established. It was

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[8]ILG's objections identify all the improperly disclosed material with specificity. AA 881-98.

not only subject to mediation confidentiality but was an unauthenticated and entirely unreliable document.

2. Mediation Communications Between ILG And Wells Fargo's Counsel Were Inadmissible.

Correspondence and emails between attorneys Primo (ILG) and Porter (Wells Fargo), including their respective attachments of a draft and unsigned settlement agreement and stipulation for dismissal, also fall within the mediation confidentiality statutes. They would not have been exchanged but for the communications which took place at the mediation and were a continuation of the mediation. AA 919-20 ¶ 17.[9]

All of these communications were subject to mediation confidentiality, which extends beyond communications in the mediation itself to any communications that are made for the purpose of, or pursuant to, mediation. EVID. CODE § 1119. Communications occurring outside of the mediation room itself are covered if related to the mediation. *Cassel*, 51 Cal. 4th at 128; *Wimsatt v. Superior Court*, 152 Cal. App. 4th 137, 159 (2007) (emails made for the purpose of, in the course of, or pursuant to mediation are not subject to disclosure); *Eisendrath v. Superior Court*, 109 Cal. App. 4th 351, 364 (2003); *Doe 1 v. Superior Court*, 132 Cal. App. 4th 1160, 1167 n.6 (2005) (despite a claim that offers were not prepared as part of the mediation process, mediation confidentiality applied because the sole purpose of the offers was to foster the mediation process). In short, "mediation confidentiality is to be applied where the writing or statement would not have

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[9]As the citation above demonstrates, the undisputed evidence established that the mediation continued beyond the initial February 15, 2011 mediation session. A written agreement governing the scope and duration of mediation confidentiality exists, but it is not contained in the record here because ILG had so little time to respond to the TRO application.

existed but for a mediation communication, negotiation, or settlement discussion." *Wimsatt*, 152 Cal. App. 4th at 160.

Because the correspondence and emails were for the purpose of, pursuant to, or in the course of, continued mediated negotiations, they were confidential and inadmissible. *Cassel*, 51 Cal. 4th at 129; *Wimsatt*, 152 Cal. App. 4th at 160 (emails that would not have existed but for a mediation communication, negotiation, or settlement discussion are not subject to disclosure).

3. Portions Of Wells Fargo's Position Statement Were Inadmissible.

Judge Kahn indicated that he gave no weight to Wells Fargo's position statement, presumably because it was unsworn. 9/13 RT 39:21-40:12. That was correct, but Judge Kahn did not go far enough. Portions of the position statement were also inadmissible insofar as they purported to reveal communications that took place during mediation. AA 870:3-5; 11-19.

4. Excerpts From Motions And Transcripts Maxon Provided To The Court Were Inadmissible.

Maxon submitted class counsel's settlement motions in connection with his application for a TRO and motion to intervene, along with a transcript of proceedings from the class settlement approval hearing. Those materials 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. AA 560:27-61:4. Under Section 1119 of the Evidence Code, all of those communications and statements were inadmissible.

Additionally, other documents submitted by Maxon discussed proposed total settlement amounts and issues regarding contemplated opt-outs, all of which were part of the

mediation process. AA 562:17-63:3; AA 485-86, 492-94. Those portions of the documents were inadmissible. They referred to facts and communications that arose during and "for the purpose of," "pursuant to," and "in the course of" mediation.

C. Mediation Confidentiality Was Not Waived.

None of the disclosures above, including those by class counsel during the settlement approval process, waived mediation confidentiality. Mediation confidentiality may only be waived expressly, not impliedly. EVID. CODE § 1121; *Simmons*, 44 Cal. 4th at 584-88; *Eisendrath*, 109 Cal. App. 4th at 360-65 (no implied waiver by conduct). Such a waiver is effective only if all participants, including the mediator and nonparties attending the mediation, grant express consent. EVID. CODE § 1122, 1997 Law Rev. Comm'n cmts. ("mediation documents and communications may be admitted or disclosed only upon agreement of all participants, including not only parties but also the mediator and other nonparties attending the mediation." To be effective, express consent must be established pursuant to strict statutory requirements. *Id.* § 1122(a). This record reflects no evidence of express waiver by all participants that meets the statutory requirements.[10]

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[10]Just as there is no implied waiver by disclosure of confidential mediation communications, there is no "good cause" exception based on perceived prejudice or injustice to a party: *Rojas*, 33 Cal. 4th at 414, 423-24. The statutes' terms govern, even if they compromise a plaintiff's ability to prove a claim. *Foxgate*, 26 Cal. 4th at 17-18; *Cassel*, 51 Cal. 4th at 119; *Wimsatt*, 152 Cal. App. 4th at 136.

D. Violations Of Mediation Confidentiality Require Reversal Of The Court's Orders.

A trial court plays a critical role as evidentiary gatekeeper. *Sargon Enters., Inc. v. Univ. of S. California,* 55 Cal. 4th 747, 770 (2012). In this case, the trial court failed in that role and, as a result, its orders must be reversed. Section 1128 of the Evidence Code provides that "[a]ny reference to mediation during any . . . noncriminal proceeding is grounds for vacating or modifying the decision in that proceeding, in whole or in part, and granting a new or further hearing on all or part of the issues, if the reference materially affected the substantial rights of the party requesting relief." EVID. CODE § 1128; *see also Foxgate,* 26 Cal. 4th at 18.

The trial court's failure to prohibit evidence of mediation communications and writings, and its reliance on them to ILG's detriment, substantially affected ILG's rights. Maxon's filings relied heavily on inadmissible communications and writings protected by mediation confidentiality. AA 378:4-21, 379:25-80:14, 380:15-81:4. The court relied on those communications to make its decision and itself referred to confidential communications. For instance, the court suggested that arguments of ILG's counsel during the TRO hearing were "belied" by writings protected by mediation confidentiality. 9/13 RT 17:21-22.

ILG was, of course, unable to demonstrate inaccuracies or provide context to misleading fragments of information, without revealing what actually transpired at the mediation and during subsequent mediated negotiations. ILG was thus placed in an impossibly unfair position when it was subjected to harsh attacks based on a partial and unreliable evidentiary record. 9/13 RT 18:5-8; *see Cassel,* 51 Cal. 4th at 136 ("The Legislature . . . could rationally decide that it would not be fair to allow a client to support a malpractice claim with excerpts from private discussions with counsel concerning the mediation while barring the attorneys from placing such

discussions in context by citing communications within the mediation proceedings themselves").

Class counsel magnified the prejudice to ILG by commenting that violation of mediation confidentiality was "okay with me in the sense that, you know, I don't have anything to hide" (9/13 RT 37), thereby suggesting that ILG did have something to hide. EVID. CODE § 1128, 1997 Law Rev. Comm'n cmts. ("An appropriate situation for invoking [section 1128] is where a party urges a trier of fact to draw an adverse inference from an adversary's refusal to disclose mediation communications"); *accord* EVID. CODE § 913(a) ("no presumption shall arise because of the exercise of [a] privilege, and the trier of fact may not draw any inference therefrom as to the credibility of the witness or as to any matter at issue in the proceeding").

Where a court admits and considers evidence which was subject to mediation confidentiality, and relies, in whole or in part on such inadmissible evidence, the remedy is reversal. *Foxgate*, 26 Cal. 4th at 18. In *Foxgate*, plaintiffs brought a motion for sanctions against counsel for defendant and defendant for their failure to cooperate in mediation. In support of that motion, plaintiffs submitted a report of the mediator which purported to describe misconduct of defendant and its counsel during the mediation. The motion also included a declaration by plaintiff's counsel reciting statements made during the mediation session. The trial court granted sanctions, but the Supreme Court reversed. *Id.* at 17-18. Since the sanctions order relied on the inadmissible declaration of counsel and the inadmissible mediator's report, references to the mediation materially affected the rights of defendant and its counsel. *Id.* at 18. Therefore, Section 1128 of the Evidence Code mandated reversal. *Id.*

The same holds true here. Maxon's counsel violated mediation confidentiality by disclosing statements made

during mediation. Maxon's counsel further violated mediation confidentiality by submitting documents containing information protected from disclosure. The court violated mediation confidentiality by considering the inadmissible evidence, by inviting further improper disclosures, by relying on the inadmissible evidence to question the veracity of counsel for ILG during the hearing, and by relying on it in making its rulings. As *Foxgate* demonstrates, the trial court's orders should be reversed.

E. ILG's Offer To Settle With Other Former Clients Was Not Admissible.

Maxon submitted a written settlement offer ILG made to another former ILG client. AA 421:25-22:8, 458-70. Examination of the document reveals nothing but candor on the ILG's part and for that reason cannot support any of the trial court's orders. But regardless of what it says, it was both inadmissible (EVID. CODE § 1152) and irrelevant to establish any liability flowing from ILG to Maxon (or anyone else).

Maxon painted the offer as evidence of a fraudulent scheme (AA 410), but that is contrary to law. A "settlement does not act as an admission of liability." *Isaacson v. California Ins. Guar. Ass'n*, 44 Cal. 3d 775, 779 (1988). "A party may reasonably wish to settle a claim even though he believes he is not liable; indeed, a major advantage of settling is that one may terminate a lawsuit without admitting liability." *Id.* at 794 n.14.

As with the court's admission and consideration of mediation material, the court's consideration of a settlement offer as evidence of supposed wrongdoing by ILG violated the rule that "offers to settle a claim, and negotiations pertaining to such offers, are inadmissible to prove liability on the claim." *Caira v. Offner*, 126 Cal. App. 4th 12, 30 (2005); *see also id.* at 32 (exclusion of settlement discussions promotes "complete

candor between the parties that is most conducive to settlement") (citation and internal quotation marks omitted). The trial court erred in ignoring and thereby impliedly overruling ILG's objections to the settlement offer. AA 1029:27-30:6.

III.

THE TRO AND OSC SHOULD BE REVERSED BECAUSE THE RELIEF GRANTED WAS IMPROPER.

Even if the trial court had jurisdiction, it erred in granting a TRO and OSC that (1) required ILG to disgorge almost $5 million and place those funds in an account subject to court control, (2) imposed a prior restraint on ILG's speech, and also compelled ILG to speak in a certain way, (3) prohibited ILG from litigating the enforcement of release agreements, and (4) required ILG to file and serve a list of its clients without regard to privilege and privacy concerns.

A. Standard Of Review.

This Court reviews a trial court's ruling on a temporary restraining order under the same standards applied to a preliminary injunction. *Church of Christ in Hollywood v. Superior Court*, 99 Cal. App. 4th 1244, 1251-52 (2002). "An appeal from an order granting a preliminary injunction involves a limited review of . . . two factors—likelihood of success on the merits and interim harm. If the trial court abused its discretion on *either* factor, we must reverse." *Shoemaker v. Cnty. of Los Angeles*, 37 Cal. App. 4th 618, 625 (1995) (emphasis added); *see also Teachers Ins. & Annuity Ass'n v. Furlotti*, 70 Cal. App. 4th 1487, 1493 (1999).

In reviewing an injunction, factual determinations are subject to review for substantial evidence, and conclusions of law are reviewed *de novo*. *Smith v. Adventist Health Sys./West*, 182 Cal. App. 4th 729, 739 (2010); *California Ass'n of Dispensing Opticians v. Pearle Vision Ctr., Inc.*, 143 Cal.

App. 3d 419, 426 (1983). Since there were no disputed facts pertinent to the TRO and OSC, both are subject to de novo review. *Garamendi v. Exec. Life Ins. Co.*, 17 Cal. App. 4th 504, 512-13 (1993) (grant or denial of injunction subject to *de novo* review where the matter involves question of law).

Whether an order violates freedom of speech is reviewed *de novo*. *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 510-11 (1984) (standard of independent review established by *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), is a "rule of federal constitutional law"); *Khawar v. Globe Int'l Inc.*, 19 Cal. 4th 254, 275 (1998) (appellate court reviews credibility determinations under clearly erroneous standard but "must examine for [itself] the statements in issue and the circumstances under which they were made to see whether they are of a character which the principles of the First Amendment protect") (citation and internal quotation marks omitted).

B. The TRO's Requirement That ILG Deposit Five Million Dollars Violates Numerous Limitations On Interim Relief And Should Be Reversed.

1. Maxon Has An Adequate Remedy At Law.

"[A]n injunction is an unusual or extraordinary equitable remedy which will not be granted if the remedy at law (usually damages) will adequately compensate the injured plaintiff." *Dep't of Fish & Game v. Anderson-Cottonwood Irrigation Dist.*, 8 Cal. App. 4th 1554, 1565 (1992). Maxon failed to demonstrate in any way that his damages remedy against ILG is inadequate. Maxon is already pursuing his legal remedy in *Maxon v. ILG*, and his claims in that case cover the same issues Maxon sought to address by seeking the TRO in this case. AA 478-515. Since Maxon's complaint in *Maxon v. ILG* seeks money damages on behalf of himself and other members of a putative class, and since the only harm Maxon

has identified in this action is monetary, his remedy in *Maxon v. ILG* is adequate.

2. Maxon Has No Claim To The $5 Million.

Maxon made no showing that he is entitled to any portion of the funds the court compelled ILG to deposit. The record reflects that he has no ownership interest in them. The funds represent the fee and cost portion of the proceeds of the separate settlement ILG was able to offer to its clients (AA 920), but Maxon elected not to participate. The funds do not even arguably belong to him. They relate to settlements with Wells Fargo involving those ILG clients who participated in the settlement and agreed with the proposed disposition of those proceeds. *Id.*

Since Maxon established no interest in settlement funds belonging to ILG by agreement with other clients of ILG, he had no basis for seeking imposition of a constructive trust on the funds. *See Communist Party v. 522 Valencia, Inc.,* 35 Cal. App. 4th 980, 990-91 (1995) (where plaintiff failed to prove entitlement to property, trial court erred in imposing constructive trust).[11]

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[11]Although the present case is not a proposed class action against ILG (in contrast to the separate *Maxon v. ILG* case), it is worth noting that Maxon is not eligible to serve as a class representative of ILG clients who participated in the separate individual settlements, because Maxon was not one of those clients. *Stephens v. Montgomery Ward & Co.*, 193 Cal. App. 3d 411, 422 (1987) (to represent the class fairly and adequately, the named plaintiff must have claims or defenses that are typical of those of the class). A trial court violates due process if it grants class-wide relief without applying the required class certification procedures and standards. *Rose v. City of Hayward*, 126 Cal. App. 3d 926, 927 (1981) (citing *People* v. *Pac. Land Research Co.* 20 Cal. 3d 10, 16 (1977)). "When a determination as to class certification is postponed until after proceedings on the substantive merits, the defendant is subject to one-way intervention, which would

(. . . continued)

3. The Deposit Order Did Not Meet The Heightened Standard For A Mandatory Injunction That Changes The Status Quo.

The purpose of a TRO is to preserve the status quo pending a trial on the merits. *Cont'l Baking Co. v. Katz*, 68 Cal. 2d 512, 528 (1968). "Where, as here, the preliminary injunction mandates an affirmative act that changes the status quo, [the appellate court] scrutinize[s] it even more closely for abuse of discretion. . . . A preliminary mandatory injunction is rarely granted, and is subject to stricter review on appeal." *Shoemaker*, 37 Cal. App. 4th at 625 (citation and internal quotation marks omitted); *see also Davenport v Blue Cross of California*, 52 Cal. App. 4th 435, 447 (1997) ("an injunction which compels a party to perform some physical act or surrender property is mandatory"); *Paramount Pictures Corp. v. Davis*, 228 Cal. App. 2d 827, 838-39 (1964) (a preliminary injunction that "accomplish[es] the main purpose of the action in advance of a trial on the merits" will "[r]arely . . . issue").

While courts on occasion restrain the payment of money or dissipation of property by injunction, even that has happened only when—at a minimum—the defendant was insolvent or otherwise unable to pay damages. *See, e.g., W. Coast Constr. Co. v. Oceano Sanitary Dist.*, 17 Cal. App. 3d 693 (1971) (upholding injunction restraining from expending money where insolvent public entity threatened to use funds designated for a specific construction project, and that were supposed to be placed in escrow, for litigation expenses); *Lenard v. Edmonds*, 151 Cal. App. 2d 764, 767 (1957) (upholding injunction where defendant threatened to dispose of negotiable instruments that served as security for a loan). Here,

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(. . . continued)
allow potential class members to elect whether to join in the action depending upon the outcome of the decision on the merits." *Rose*, 126 Cal. App. 3d at 937 (citation and internal quotation marks omitted).

Maxon failed to submit any evidence even suggesting ILG's insolvency or inability to pay a judgment. *See* CODE CIV. PROC. § 526(a)(3) (permitting issuance of an injunction "[w]hen it appears, during the litigation, that a party to the action is doing, or threatens, or is about to do, or is procuring or suffering to be done, some act in violation of the rights of another party of the action, and tending to render the judgment ineffectual").

4. The Injunction Was Effectively An Improper Pre-Judgment Writ Of Attachment.

Maxon did not meet the requirements for an injunction compelling payment of money because he did not demonstrate the unique circumstances necessary for such an injunction described above, such as an interest in particular property and an imminent threat of dissipation. An injunction is not available to ensure that a plaintiff who ultimately prevails on a cause of action for damages can collect on the resulting judgment. Prejudgment attachment provides the means to obtain such protection, subject to strict limitations to ensure due process for the defendant. An injunction that effectively imposes an attachment without meeting the statutory requirements should be reversed. *Doyka v. Superior Court*, 233 Cal. App. 3d 1134, 1136-37 (1991) (ordering funds deposited into a bank account "effectively imposes a prejudgment attachment upon [a party's] liquid assets without satisfying the statutory requirements for attachment"). That is the case here.

The courts have long recognized that "[a]ttachment is a harsh remedy because it causes the defendant to lose control of his property before the plaintiff's claim is adjudicated." *Martin v. Aboyan*, 148 Cal. App. 3d 826, 831 (1983). In fact, California's original attachment statute was held unconstitutional on due process grounds by the California Supreme

Court. *Randone v. Appellate Dep't*, 5 Cal. 3d 536 (1971). The present attachment statute was "the final legislative response to *Randone*" and is "subject to strict construction" because "the attachment procedures are purely the creation of the Legislature." *Nakasone v. Randall*, 129 Cal. App. 3d 757, 761 (1982).

To obtain an attachment, the moving party must, among other things, plead a claim eligible for pre-judgment attachment, demonstrate the probable validity of that claim, *and* file an undertaking to protect the defendant from wrongful attachment. CODE CIV. PROC. §§ 484.050(b), 484.090(a), 489.210. Maxon's application for a TRO met none of these requirements. He did not plead *any* claim against ILG. And the nature of his grievance with ILG would not, even if properly pleaded, fit within the category of claims eligible for attachment: "a claim or claims for money, each of which is based upon a contract, express or implied, where the total amount of the claim or claims is a fixed or ascertainable amount." CODE CIV. PROC. § 483.010; *see* AA 622-59 (*Maxon v ILG* complaint alleges pleads causes of action for breach of fiduciary duty, declaratory relief and breach of Section 17200 of the Business and Professions Code).

Maxon's failure to plead and establish with evidence a claim based on contract for a fixed sum would have been fatal to a request for an attachment. This requirement is important, because as the United States Supreme Court has recognized, attachment is "generally confined to claims by creditors" because such disputes "more readily lend themselves to accurate *ex parte* assessments of the merits. *Connecticut v. Doehr*, 501 U.S. 1, 17 (1991). Maxon not only failed to establish a claim of a type for which an attachment may be granted, but he sought, and was granted, an order tying up ILG's *entire* fee for clients who have not sought court intervention. Such blunderbuss relief is not permitted under the

attachment statute and, if it were, serious due process concerns would be raised.

Even if Maxon had properly sought and obtained an attachment, he would have been required to post an undertaking to protect ILG from damages arising from wrongful attachment. CODE CIV. PROC. § 489.210. The bonding requirement is an important component of due process protection for the defendant because "[w]ithout a bond, at the time of attachment, the danger that . . . property rights may be wrongfully deprived remains unacceptably high even with such safeguards as a hearing or exigency requirement." *Doehr*, 501 U.S. at 19 (plurality); *Shockley v. Gen. Cas. Co.*, 194 Cal. App. 2d 107, 109 (1961) ("The purpose of requiring a bond is to protect the defendant against damage by reason of the attachment"). The court here required no undertaking, to ILG's detriment.

C. The TRO Imposes An Impermissible Content-Based Prior Restraint On Speech.

The TRO purports to limit ILG's right to speak with its former clients and compels ILG to speak certain words should its former clients contact ILG.

The TRO mandates that if former ILG clients contact ILG about Maxon's claims or the August 17, 2012 letter from ILG regarding Maxon's claims, ILG must "state only that these matters are being considered by the Court and that they will receive further information shortly." AA 1051:4-7. Forcing ILG to use specific language with its former clients, and forbidding any other speech, is an improper, content-based prior restraint not only on ILG's free speech rights but those of its former clients. *See, e.g., Alexander v. United States*, 509 U.S. 544, 550 (1993) ("[T]emporary restraining orders and permanent injunctions—i.e., court orders that actually forbid speech activities—are classic examples of prior restraints").

Courts cannot issue orders that restrict speech unless narrowly tailored to achieve a compelling state interest. *Carroll v. President & Comm'rs of Princess Anne*, 393 U.S. 176, 183-84 (1968) ("[T]he State may not employ means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved") (citation and internal quotation marks omitted) When enjoining activities that implicate First Amendment freedoms, courts must draft TROs "couched in the narrowest terms that will accomplish the pin-pointed objective permitted by constitutional mandate and the essential needs of the public order." *United Farm Workers v. Superior Court*, 14 Cal. 3d 902, 909 (1975) (citing *Carroll*, 393 U.S. at 183).

Even in the area of commercial speech by attorneys such as advertising, government regulation of speech that is not false, deceptive or misleading "may be restricted only in the service of a substantial governmental interest, and only through means that directly advance that interest." *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 638 (1985). Maxon did not demonstrate, and the court did not find, that any speech by ILG had been false or misleading. To the contrary, the only example in the record of ILG's speech to former clients in respect to releases demonstrated candor. AA 458-68. With absolutely no record of false, misleading or deceptive speech by ILG, the TRO's prior restraint plainly violated the First Amendment. *See, e.g., Balboa Island Vill. Inn, Inc. v. Lemen*, 40 Cal. 4th 1141, 1158 (2007) (where certain statements were found after trial to be defamatory, permanent injunction prohibiting defendant from repeating those statements did not violate First Amendment).

In addition, the grant of an injunction against speech (and compelling speech) is particularly suspect at the pre-trial stage. "[I]t is crucial to distinguish requests for preventive relief prior to trial and post-trial remedies to prevent repeti-

tion of statements judicially determined to be defamatory." *Balboa Island*, 40 Cal. 4th at 1158. "The attempt to enjoin . . . initial distribution of a defamatory matter meets several barriers, the most impervious being the constitutional prohibitions against prior restraints on free speech and press." *Id.*

Here, since there has been no determination at trial that ILG engaged in any speech that could properly be regulated, prohibited or punished, the TRO violates the First Amendment and the California Constitution. *See id.* at 1169-70 ("This court has long recognized that under our state Constitution's free speech guarantee (CAL. CONST. art. I, § 2(a)) a person may be held responsible in damages for what the person says, writes or publishes but cannot be censored by a prior restraint").

On top of all of this, Maxon did not provide any evidence of an imminent threat that would support a TRO against non-speech activity, much less against Constitutionally protected speech. *See, e.g., East Bay Mun. Util. Dist. v. California Dep't of Forestry & Fire Prot.*, 43 Cal. App. 4th 1113, 1126 (1996); *Korean Philadelphia Presbyterian Church v. California Presbytery*, 77 Cal. App. 4th 1069, 1084 (2000) ("An injunction cannot issue in vacuum based on the proponents' fears about something that may happen in the future. It must be supported by actual evidence that there is a realistic prospect that the party enjoined intends to engage in the prohibited conduct"). This record demonstrates nothing to support the prior restraint. ILG presented the proposed releases to its former clients in writing by mail (thereby eliminating any possibility of duress or pressure) with full, extensive and candid disclosures, including advice to seek independent counsel regarding the proposed release. AA 284-95. These facts do not demonstrate any wrongdoing by ILG, any possibility of irreparable harm or any likelihood that persons such as Maxon who did not accept the proposed agreement could

prevail in asserting a claim for damages based on a mere settlement offer.

D. The TRO's Restriction On ILG's Ability To Enforce Its Releases With Former Clients Is Improper.

1. The Restriction Violates ILG's Right To Petition The Courts.

The TRO prohibits ILG "from taking any further action to enforce the terms of any purported release by any ILG-Client Class Member." AA 1050:24-25. This order constitutes an improper interference with the proceedings in *Maxon v. ILG*, a separate action. The TRO read literally would prohibit ILG from defending itself with the releases in *Maxon v. ILG* or any future action brought by a former client who signed a release. It is unclear what legitimate purpose could be served by this restriction, because enforcing a release would by definition require resort to legal process.

Prohibiting ILG from seeking to enforce a release violates ILG's right to petition the courts in any proceeding brought by or against ILG in which such a release would be relevant. *See Balboa Island,* 40 Cal. 4th at 1160 (an "injunction must not prevent [a party] from presenting her grievances to government officials. The right to petition the government for redress of grievances is 'among the most precious of the liberties safeguarded by the Bill of Rights'"). Such a restriction is an obvious violation of due process that improperly intrudes on the jurisdiction of whatever other tribunal is called upon to consider a release in ILG's favor. *E.g., Ford v. Superior Court,* 188 Cal. App. 3d 737, 740, 742 (1986) (where an injunction sought "to have one department of the superior court review and restrain the judicial act of another department of the superior court," holding "[t]hat cannot be done").

2. Maxon Did Not Prove That Irreparable Injury Would Result Absent An Injunction Restraining Enforcement Of The Releases.

Just as Maxon has no property interest in the funds that the court compelled ILG to deposit, he has no interest in releases that other ILG clients have granted in favor of ILG. No release affects Maxon at all because he declined to agree to one. AA 421 ¶ 35 to AA 422 ¶ 37. Accordingly, Maxon will suffer no harm, irreparable or otherwise, from any release agreed to by others that does not affect his legal rights.

In addition, even if Maxon had standing to seek injunctive relief for harms to others (which he does not), attempts to enforce a release cannot constitute irreparable injury. The enforceability of a release can be litigated in due course in any proceeding in which ILG relies on one or more of the releases. To the extent that settlement agreements have already been executed, any purported harm has already occurred, and the enforceability of those agreements is a question to be decided if and when a party who has actually agreed to one chooses to challenge it.

E. The TRO's Provision Compelling ILG To Disclose Information About Its Former Clients Should Be Reversed.

The trial court incorrectly compelled ILG to disclose information about clients other than Maxon, contrary both to the confidentiality inherent in the attorney-client relationship and to the constitutional right of privacy of ILG's clients.

Here again, Maxon did not show that he, or anyone else, would suffer irreparable harm if the contact information is not disclosed. *Korean Philadelphia*, 77 Cal. App. 4th at 1084 (irreparable harm must be imminent, likely, and supported by evidence for an injunction to issue). Presumably Maxon wants the contact information to further his putative class action in *Maxon v. ILG*, but Maxon has a legal remedy, which

is to seek the information through discovery in *Maxon v. ILG*. The trial judge presiding over that case should decide in the first instance whether such discovery is appropriate, particularly because there are important and sensitive issues implicated by Maxon's request.

First, as noted above, Maxon is a single former client, and he is not typical or representative of the class he claims to represent. He did not join in the separate settlements ILG negotiated and offered to its clients, and Maxon accordingly can claim no harm from it. The trial judge in *Maxon v. ILG* should be the one to assess whether Maxon should be provided with personal information about ILG's other clients and under what conditions. A rushed TRO proceeding in this settled class action was not the correct means to consider all of the issues Maxon's request presents.

Second, the privacy and privilege implications of Maxon's request are substantial. An attorney may not divulge information learned in the course of a client relationship without the client's consent. *See* BUS. & PROF. CODE § 6068(e) (attorney must maintain client confidences inviolate); EVID. CODE §§ 954-955; *Willis v. Superior Court*, 112 Cal. App. 3d 277, 293 (1980); *Harding Lawson Ass'n v. Superior Court*, 10 Cal. App. 4th 7, 10 (1992) (disclosure of employees' confidential information implicates constitutionally protected rights of privacy).

Although Maxon has waived privilege over his communications with ILG by filing *Maxon v. ILG* (EVID. CODE § 958), he cannot waive privilege for any of ILG's other former clients. *See* EVID. CODE § 912(a) (only holder of privilege may waive by disclosure). Indeed, the record reflects that ILG communicated individually with its clients and not as a group. *E.g.*, AA 438, 440-41, 447, 456. And even if ILG's other HMC clients are treated as joint clients in their actions

against Wells Fargo, Maxon lacks standing to waive privilege on them. EVID. CODE § 912(b).[12]

Maxon has no standing to waive attorney-client privilege for ILG's other clients. The former clients of ILG affected by the TRO's disclosure order had no say in the TRO proceedings below, were not served and were not given notice. California law prohibits a party such as ILG from being compelled to turn over private information without at a minimum notice to the affected persons and a protective order regulating use of the information. CAL. CONST. art. I, § 1; *Valley Bank of Nevada v. Superior Court,* 15 Cal. 3d 652 (1975) (bank could not be required to disclose even relevant personal customer information without proper notice to customers and protective orders to ensure privacy); *see also* CODE CIV. PROC. § 1985.3 (imposing strict limitations on subpoenas to attorneys for client information).

The TRO's provision compelling ILG to turn over its client list to Maxon and file it in the public record must be reversed because the record lacks any evidence of urgency, of irreparable harm, or of inadequacy of legal remedy in *Maxon v. ILG.* The record does, however, demonstrate significant privacy and privilege concerns that should be addressed in an orderly fashion in *Maxon v. ILG* and not in a rushed TRO proceeding in this settled class action.

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[12]In part out of concern over maintaining confidentiality, courts have recognized that legal malpractice claims may not be brought by third parties due to the personal nature of the attorney-client relationship and the importance of protecting the attorney-client privilege. *See, e.g., Fireman's Fund Ins. Co. v. McDonald, Hecht & Solberg,* 30 Cal. App. 4th 1373, 1382-84 (1994) (insurers not subrogated to insured's claim for legal malpractice against defense counsel); *Kracht v. Perrin, Gartland & Doyle,* 219 Cal. App. 3d 1019, 1023-24 (1990) (malpractice, breach of contract, fraud and fiduciary duty claims against attorney are not assignable because client alone holds privilege).

CONCLUSION

For the reasons discussed above, this court should reverse the trial court's orders granting the motion to intervene, the temporary restraining order and the order to show cause.

DATED: February 28, 2013.

Respectfully,

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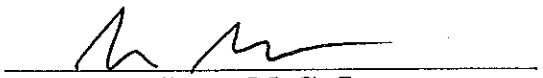
CERTIFICATE OF COMPLIANCE PURSUANT TO CAL. R. CT. 8.204(c)(7)

Pursuant to California Rule of Court Supreme Court Rule 8.204(c)(1), and in reliance upon the word count feature of the software used, I certify that the attached **Appellant's Opening Brief** 12,710 words, exclusive of those materials not required to be counted under Rule 8.204(c)(3).

DATED: February 28, 2013.



SEAN M. SELEGUE

PROOF OF SERVICE

I, John C. Carrillo, declare:

I am a resident of the State of California and over the age of eighteen years, and not a party to the within action; my business address is Three Embarcadero Center, 10th Floor, San Francisco, California 94111-4024. On February 28, 2013, I served the following document(s) described as:

APPELLANT'S OPENING BRIEF; APPELLANT'S APPENDIX, VOLUMES ONE THROUGH FOUR

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

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I declare under penalty of perjury that the foregoing is true and correct. Executed at San Francisco, California on February 28, 2013.

John C. Carrillo

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