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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

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

NO. CIV. 2:08-102 WBS JFM

Plaintiffs,

MEMORANDUM AND ORDER RE:  
MOTION FOR SUMMARY JUDGMENT

v.

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

Defendants.

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Plaintiffs General Charles "Chuck" Yeager, (Ret.)  
("Yeager") and the General Chuck Yeager Foundation ("Foundation")  
filed this lawsuit alleging various claims against defendants

1 Connie Bowlin, Ed Bowlin, David McFarland, Aviation Autographs,  
2 Bowlin and Associates, Inc. ("B&A"), Spalding Services, Inc., and  
3 International Association of Eagles, Inc. Currently before the  
4 court is defendants Connie Bowlin, Ed Bowlin, Aviation  
5 Autographs, and B&A's motion for summary judgment pursuant to  
6 Federal Rule of Civil Procedure 56.<sup>1</sup>

7 I. Summary Judgment Standard

8 Summary judgment is proper "if the pleadings, the  
9 discovery and disclosure materials on file, and any affidavits  
10 show that there is no genuine issue as to any material fact and  
11 that the movant is entitled to judgment as a matter of law."  
12 Fed. R. Civ. P. 56(c). A material fact is one that could affect  
13 the outcome of the suit, and a genuine issue is one that could  
14 permit a reasonable jury to enter a verdict in the non-moving  
15 party's favor. Anderson v. Liberty Lobby, Inc., 477 U.S. 242,  
16 248 (1986). The party moving for summary judgment bears the  
17 initial burden of establishing the absence of a genuine issue of  
18 material fact and can satisfy this burden by presenting evidence  
19 that negates an essential element of the non-moving party's case.  
20 Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986).

21 Alternatively, the moving party can demonstrate that the  
22 non-moving party cannot produce evidence to support an essential  
23 element upon which it will bear the burden of proof at trial.

24 Id.

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

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

## 13 II. Evidentiary Objections

14           Despite the frustrations repeatedly expressed by this  
15 and other courts,<sup>2</sup> the practice of cluttering the record with  
16 unnecessary evidentiary objections in connection with summary  
17 judgment motions appears to have become institutionalized. In  
18 this case for example, plaintiffs filed 86 separate evidentiary  
19 objections to defendants' proffered evidence and declarations in  
20 support of the motion, contending that many of the submitted  
21 facts are "irrelevant," lack personal knowledge, or are supported  
22 by evidence which is hearsay. Not to be outdone, in reply,  
23 defendants filed 57 evidentiary objections to the declarations  
24 submitted by plaintiffs in their opposition.

25           At trial, most lawyers do not object to questions when  
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27           <sup>2</sup> See Burch v. Regents of Univ. of Cal., 433 F. Supp. 2d  
28 1110, 1118-22 (E.D. Cal. 2006); Marceau v. International Broth.  
Of Elec. Workers, 618 F. Supp. 2d 1127, 1141 (D. Ariz. 2009).

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

16           The court perceives at least two reasons for this  
17 difference in practice. First, in the setting of a jury trial,  
18 counsel run the risk of antagonizing the jury by repeatedly  
19 making unnecessary objections. An irritated jury might retaliate  
20 by deciding the case against their client. In the context of a  
21 summary judgment motion, however, lawyers are entitled to assume  
22 that even an irritated judge will decide the motion on its merits  
23 and will not retaliate against them.

24           Second, particularly in the larger law firms, the  
25 lawyer or lawyers who prepare the materials in support of, or in  
26 opposition to, motions for summary judgment are typically not the  
27 same lawyers who will try the case. The task of combing through  
28 the opponent's declarations and looking for evidentiary

1 objections may seem to be one that is easily turned over to an  
2 associate who does not need to have any trial experience or  
3 particular knowledge of the case. Even when the trial attorney  
4 does have a hand in preparing the motion or opposition, that  
5 attorney typically has not fully developed his or her trial  
6 strategy by the time the motion for summary judgment is briefed.  
7 Accordingly, not wishing to waive any conceivable objection the  
8 trial attorney may want to eventually make at trial, the  
9 attorneys heed the admonition of the Rutter Group:

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

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

14 The problem with this practice is not just that it  
15 frustrates judges. It frustrates the very purpose of Rule 56 of  
16 the Federal Rules of Civil procedure by turning summary judgment  
17 practice from an inquiry into whether there are truly disputed  
18 issues of material fact into a contest to determine which side  
19 can come up with the most sustainable evidentiary objections. If  
20 the rulings on the evidentiary objections result in the motion  
21 being denied, the case will of course proceed to trial. If those

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23 <sup>3</sup> That advice, as this court reads it, refers to whether  
24 the objection will be waived on appeal, not to whether it will be  
25 waived at trial. See FDIC v. New Hampshire Ins. Co., 953 F.2d  
26 478, 484-85 (9th Cir. 1991). To this court's knowledge, failure  
27 to object to evidence presented in connection with a summary  
28 judgment motion does not waive any objection to that evidence at  
trial. See Amnesty Am. v. Town of W. Hartford, 361 F.3d 113, 118  
(2d Cir. 2004) (noting in connection with an appeal from an order  
granting summary judgment that on remand "at trial, plaintiffs  
are free to reiterate their objections to [the district court's  
evidentiary] rulings").

1 rulings result in the motion being granted, the matter will  
2 proceed to appeal, where the trial court's rulings on each of the  
3 objections can be scrutinized, presumably under *de novo* review,  
4 by the Court of Appeals.

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

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

### 27 III. The Sham Affidavit Rule

28           In addition to their evidentiary objections, defendants

1 contend that certain portions of plaintiffs' declarations should  
2 be excluded from consideration by the "sham affidavit rule."  
3 "The general rule in the Ninth Circuit is that a party cannot  
4 create an issue of fact by an affidavit contradicting his prior  
5 deposition testimony." Kennedy v. Allied Mut. Ins. Co., 952 F.2d  
6 262, 266 (9th Cir. 1991). This is because "if a party who has  
7 been examined at length on deposition could raise an issue of  
8 fact simply by submitting an affidavit contradicting his own  
9 prior testimony, this would greatly diminish the utility of  
10 summary judgment as a procedure for screening out sham issues of  
11 fact." Id. at 266 (quoting Foster v. Arcata Assocs., Inc., 772  
12 F.2d 1453, 1462 (9th Cir. 1985)).

13           The sham affidavit rule may be invoked only if a  
14 district court makes "a factual determination that the  
15 contradiction was actually a sham" and "the inconsistency between  
16 a party's deposition testimony and subsequent affidavit . . .  
17 [is] clear and unambiguous." Van Asdale v. Int'l Game Tech., 577  
18 F.3d 989, 998-99 (9th Cir. 2009) (internal quotations marks,  
19 citations omitted). Accordingly, "the non-moving party is not  
20 precluded from elaborating upon, explaining or clarifying prior  
21 testimony elicited by opposing counsel on deposition [and] minor  
22 inconsistencies that result from an honest discrepancy, a  
23 mistake, or newly discovered evidence afford no basis for  
24 excluding an opposition affidavit." Messick v. Horizon Indus.,  
25 62 F.3d 1227, 1231 (9th Cir. 1995). Yeager and Victoria Yeager  
26 each submitted a declaration in opposition to defendants' motion  
27 for summary judgment portions of which defendants contend ought  
28 to be stricken as sham.

1           A.    Yeager Declaration

2           At his deposition, Yeager stated that he did not recall  
3 answers to approximately 185 different questions, including  
4 questions that go to the heart of this action. (See Noonan Decl.  
5 Ex. B.) For instance, Yeager indicated he did not recall what  
6 concerns he had about the Bowlins selling the Gathering of the  
7 Eagles prints, whether any agreement existed between himself and  
8 the Bowlins, whether the Bowlins made any misrepresentations to  
9 him concerning their sale of his memorabilia, whether he entered  
10 an agreement with the Bowlins concerning the development of the  
11 Leiston Legends print or attended the Tribute to the Aces,  
12 whether the Bowlins are selling the Hey Pard print, what is  
13 illegal about the Bowlins' use of his name, and other critical  
14 issues in the case.<sup>4</sup> (Gen. Yeager Depo. 13:17-19, 20:10-21,  
15 21:1-5, 29:21-30:11, 31:13-22, 42:11-17, 66:7-17, 94:19-22.)

16           However, in Yeager's Corrected Declaration, he now  
17 states that he is able to recall these same matters in detail  
18 after "having his recollection refreshed," including the amount  
19 he typically charged for signing items, the oral agreements he  
20 made with the Bowlins, and his participation in the Tribute to  
21 Aces. (See Gen. Yeager Corrected Decl. ¶¶ 16, 21, 22-26, 27.)  
22 It is clear that Yeager's declaration is a sham. In his  
23 declaration, Yeager gives no explanation as to why he suffered  
24 from such extensive memory loss at his deposition, other than to

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



1 say his recollection was refreshed by a series of documents which  
2 are not attached to his declaration. (Id. ¶ 14.) This claim is  
3 unbelievable given that Yeager was shown over twenty exhibits  
4 during his deposition in an attempt to refresh his recollection,  
5 but was consistently unable to recall any of the matters now  
6 elaborated on in his declaration. (See, e.g., Yeager Depo. 14:7-  
7 25; 19:7-20:6; 21: 10-22:2; 23:17-26:20; 38:24-40:3; 41:1-42:17;  
8 44:9-25; 45:10-46:22; 55:7-21; 57:9-58:2; 62:14-63:7; 65:7-17;  
9 66:7-17; 67:10-68:3; 69:9-70:17; 70:21-71:11; 71:15-72:17; 72:20-  
10 73:10; 73:13-74:4; 78:4-24; 83:22-84:12; 94:2-95:10.) This is  
11 not a case of a simple misunderstanding of a few questions that  
12 requires additional explanation, but instead one where Yeager  
13 repeatedly refused to answer hundreds of material questions.

14           Just because Yeager's responses at his deposition were  
15 to the effect that he did "not recall" certain events does not  
16 mean those responses do not contradict his later recollection of  
17 those same events. Courts have found that the sham affidavit  
18 rule may be applied when a matter that a witness fails to  
19 remember during a deposition is then remembered with clarity in  
20 an affidavit used to defeat summary judgment. Mitchael v.  
21 Intracorp, Inc., 179 F.3d 847, 854-55 (10th Cir. 1999); (finding  
22 an affidavit from a witness that "more clearly recalled  
23 discussions and meetings" that the witness could not remember  
24 during his deposition "arguably contradicted his deposition" and  
25 therefore "represent[ed] an attempt to create a sham issue of  
26 fact"); accord Juarez v. Utah, 263 Fed. Appx. 726, 735-36 (10th  
27 Cir. 2008) (excluding plaintiff's affidavit referencing racial  
28 slurs used against her as a sham affidavit because she stated she

1 could not recall any such slurs at her deposition); see also  
2 Gilani v. GNOC Corp., No. 04-CV-2935 (ILG), 2006 WL 1120602, at  
3 \*3 (E.D.N.Y. April 26, 2006) (applying the sham affidavit rule  
4 when plaintiff "admitted in her deposition she did not recall  
5 seeing the cleaning staff before she entered the restroom" but  
6 then recalled that she did see a staff member in an affidavit  
7 with "no other evidence corroborating the recollection.")

8           Yeager's declaration is far more questionable than any  
9 of the aforementioned affidavits excluded by courts under the  
10 sham affidavit rule. In a case such as this, where the deponent  
11 remembers almost nothing about the events central to the case  
12 during his deposition, but suddenly recalls those same events  
13 with perfect clarity in his declaration in opposition to summary  
14 judgment without any credible explanation as to how his  
15 recollection was refreshed, the disparity between the affidavit  
16 and deposition is so extreme that the court must regard the  
17 differences between the two as contradictions. See Mitchael, 179  
18 F.3d at 854-55.

19           Yeager has failed to "provide[] a sufficient  
20 explanation for the contradiction" between his deposition  
21 testimony, where he was unable to remember almost anything about  
22 the details of this action, and his declaration where those  
23 details are suddenly perfectly clear. Martinez v. Marin Sanitary  
24 Serv., 349 F. Supp. 2d 1234, 1242 (N.D. Cal. 2004). There was  
25 nothing confusing about the questions posed to Yeager. The clear  
26 disparity between the sweeping lack of knowledge of Yeager at his  
27 deposition and the information presented in his declaration  
28 leaves no conclusion other than that his declaration is a self-

1 serving attempt to manufacture issues of fact to defeat summary  
2 judgement. Accordingly, the court will disregard the  
3 contradictions between Yeager's deposition testimony and his  
4 Declaration when evaluating defendants' motion for summary  
5 judgment.

6 B. Victoria Yeager Declaration

7 Defendants additionally contend that various statements  
8 made by Victoria Yeager in her Declaration in opposition to the  
9 motion for summary judgment contradict both her earlier  
10 statements and plaintiffs' responses to interrogatories during  
11 discovery. Throughout the various iterations of their complaint,  
12 plaintiffs have consistently alleged that defendants agreed to  
13 provide plaintiffs with one-third of the Leiston Legends prints  
14 signed at the Gathering of Aces event. (See Original Compl. ¶¶  
15 24, 27; First Am. Compl. ¶¶ 24, 27; SAC ¶¶ 25, 28.) In addition,  
16 in their interrogatory responses plaintiffs continued to advocate  
17 that the agreement between the Bowlins and Yeager "provided that  
18 GENERAL YEAGER would appear and speak at the [Tribute to Aces] .  
19 . . and would be entitled to retain one-third (1/3) of [the]  
20 signed lithographs for his own use." (Noonan Decl. Ex. E.)  
21 Plaintiffs did not supplement or correct these discovery  
22 responses pursuant to Rule 26(e).

23 In her Declaration, Victoria Yeager now contends that  
24 she knew at the time of the signing of the Leiston Legends prints  
25 that the Bowlins wanted to give the Yeagers 100 prints and that  
26 in response the Yeagers "said to hold onto the other 200 and  
27 maybe [the Bowlins] could sell them for" the Yeagers. (V. Yeager  
28 Decl. ¶ 15.) While there is tension between this statement and

1 the previous allegations by plaintiffs, Victoria Yeager is not a  
2 named plaintiff in this action. As such, unlike in Wasco  
3 Products, Inc. v. Southwall Technologies, Inc., 25 F.3d 989 (9th  
4 Cir. 2006), plaintiffs have not presented a new theory of  
5 liability based upon Victoria Yeager's declaration. In fact, at  
6 no point in plaintiffs' Opposition to this motion do they advance  
7 Victoria Yeager's theory of the Leiston Legends agreement.  
8 Accordingly, the court finds it unnecessary to strike this  
9 portion of Victoria Yeager's declaration. Plaintiffs remain  
10 bound by their responses to defendants' interrogatories and  
11 admissions, irrespective of Victoria Yeager's declaration. See  
12 Wasco Products, 25 F.3d at 992; Conlon v. U.S., 474 F.3d 616,  
13 621-22 (9th Cir. 2007); School Dist. No. 1J, Multnomah County,  
14 Or. v. AC&S, Inc., 5 F.3d 1255, 1264 (9th Cir. 1993).

#### 15 IV. Relevant Facts

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

20 Yeager is a well-known figure in American aviation  
21 history. (Second Am. Compl. ("SAC") ¶¶ 15-17.) Connie and Ed  
22 Bowlin ("the Bowlins") are retired Delta Airlines captains who  
23 are active in the aviation community. (Bowlin Decl. ¶¶ 5-13.)  
24 The Bowlins are owners of Aviation Autographs, a non-incorporated  
25 Georgia business entity that sells and markets aviation  
26 memorabilia, and B&A, a Georgia corporation in the business of  
27 aviation sales and consulting. (SAC ¶¶ 7, 11-12.) The Bowlins  
28 met Yeager in the mid 1980s and became friends with him. (Bowlin

1 Decl. ¶¶ 18-20; Gen. Yeager Dep. 56:23-57:3, 60:20-61:14, 61:20-  
2 62:9.)

3 Defendant David McFarland met Yeager through the  
4 "Gathering of the Eagles" program, which was initiated and  
5 organized by McFarland beginning in 1982. (McFarland Decl. ¶¶  
6 12-20.) The Gathering of the Eagles brought distinguished  
7 aviators to the Air Command and Staff College ("ACSC") at Maxwell  
8 Air Force Base to give talks to the ACSC class. (Id.) Yeager  
9 attended all of the Gathering of the Eagles events coordinated by  
10 McFarland as an "Eagle." (Id. ¶ 20; Gen. Yeager Depo.  
11 25:11-28:24.) The program was funded through the painting,  
12 production, and sale of a limited number of lithographic prints  
13 signed by Eagles. (SAC ¶ 20; McFarland Decl. ¶ 14.) Additional  
14 financial support for the program was provided not by the ACSC  
15 itself, but by the ACSC Foundation and the International  
16 Association of Eagles, Inc. ("IAE"). (Statement of Undisputed  
17 Facts ("UF") 14-19.)

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

1           During this time period, Yeager wanted to market three  
2 items that he developed and signed in conjunction with McFarland  
3 and Yeager, Inc.<sup>5</sup>: a lithograph known as the "Hey Pard" print,  
4 which depicts Yeager breaking the sound barrier; a lithograph  
5 known as the "F-15" print, which depicts this same event; and a  
6 series of commemorative stamped envelopes known as the "First Day  
7 Covers," which were letters with a canceled stamp from Edwards  
8 Air Force Base, where an event celebrating the 50th anniversary  
9 of the breaking of the sound barrier was held. (McFarland Decl.  
10 ¶¶ 28-31; Bowlin Decl. ¶ 27, Donald Yeager Decl. ¶ 6, Exs. A, B;  
11 Noonan Decl. ¶¶ 17, 19 Exs. O, Q.) Yeager originally authorized  
12 McFarland to market these items until Yeager reached an oral  
13 agreement with Aviation Autographs to sell them for a fifty-fifty  
14 split of the proceeds.<sup>6</sup> (Bowlin Decl. ¶ 26.) Aviation  
15 Autographs then began marketing and selling these prints on their  
16 website and provided Yeager with regular summaries concerning  
17 sales of these prints from 2000 through 2004. (Bowlin Decl. ¶¶  
18 52-54, 75-81; Noonan Decl. ¶ 18, Ex. P.)

19           In 2003, Yeager was invited to an event coordinated by  
20 the Bowlins called the "Tribute to Aces." The idea for the  
21 Tribute to Aces developed from discussions between the Bowlins, a  
22 Georgia developer Mike Ciochetti, and famed aviator General Tex  
23 Hill. (V. Yeager Depo. 44:10-45:25.) Ciochetti and Hill

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24  
25           <sup>5</sup> Yeager, Inc. was a corporation set up by Yeager and his  
26 first wife, Glennis Yeager, for the benefit of their children.  
The corporation is presently run by the children of Yeager.

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

1 arranged for famous aviators, including Yeager, to come to  
2 Georgia to dedicate roads named after each of them in a housing  
3 development planned by Ciochetti. (Anderson Decl. ¶ 9; V. Yeager  
4 Depo. 44:10-47:6.)

5           The Bowlins formally coordinated the Tribute to Aces,  
6 which included the dedication of the roads, a symposium at which  
7 the "Aces"--the aviation legends in attendance--would speak, and  
8 the signing of a number of lithographic prints by the attending  
9 Aces. (Bowlin Decl. ¶ 41; Anderson Decl. ¶ 9.) Connie Bowlin  
10 sent each attending Ace a two-page letter explaining the  
11 background of the event, that an artist would be creating prints  
12 for each Ace to sign, and that Aviation Autographs would sell  
13 these prints. (Bowlin Decl. ¶¶ 31-32, Ex. 9.) Each Ace  
14 negotiated his own deal with respect to the prints. Victoria  
15 Yeager, Yeager's current wife, claims that Yeager made a deal to  
16 receive one-third of the lithographs Connie Bowlin said were  
17 being produced. (V. Yeager Depo. 106:16-18.) The Bowlins  
18 contend the agreement was actually for Yeager to receive 100  
19 prints, which Connie Bowlin confirmed with Yeager at an air show  
20 in Detroit in August 2003. (Bowlin Decl. ¶¶ 38-39.) Plaintiffs  
21 also contend that the Bowlins indicated the money from these  
22 lithographs would be used to pay the Aces travel expenses and the  
23 rest would go to charity, while defendants argue that plaintiffs  
24 have not shown any indication of the existence of such an  
25 agreement. (V. Yeager Depo. 107:13-18; Bowlin Decl. ¶¶ 38-39.)

26           Yeager attended the Gathering of Aces event in October  
27 2003, including the symposium and dedication of a street sign  
28 bearing his name. (Bowlin Decl. ¶¶ 40-42, Ex. 25; Anderson Decl.

1 ¶ 9; V. Yeager Depo. 46:7-47:6.) Yeager signed approximately 900  
2 prints of the lithograph made for him at the event, known as the  
3 Leiston Legends print, at the Bowlins' home. (SAC ¶ 26; Bowlin  
4 Decl. ¶ 43; V. Yeager Depo. 39:24-41:4.) Yeager was provided  
5 with 100 prints from the event, which were shipped to him  
6 directly from the artist. (Bowlin Decl. ¶ 43, Ex. 26.)

7 The Yeagers were reimbursed for a number of travel  
8 expenses associated with the Gathering of Aces event by October  
9 of 2003. (V. Yeager Depo. 35:9-36:14.) On October 14, 2003,  
10 Victoria Yeager sent an email to the Bowlins concerning the  
11 disposition of the extra prints signed by Yeager. (Bowlin Decl.  
12 ¶ 44; Exs. 27, 28; V. Yeager Depo. 141:11-143:6.) Connie Bowlin  
13 responded that 100 of the prints went to Yeager, 100 went to Jack  
14 Roush, who made two air craft available for the Tribute to Aces,  
15 200 went to the Bowlins, and the rest were distributed among  
16 volunteers or kept by the artist. (*Id.*) In December 2003,  
17 Yeager acknowledged that he received 100 Leiston Legends prints  
18 in a letter to Connie Bowlin. (Bowlin Decl. ¶ 45, Ex. 29.)

19 In 2004, the Yeagers became involved in litigation  
20 between themselves and Yeager's children and Yeager, Inc. in  
21 California state court over the use of funds by Yeager, Inc. In  
22 this ligation, Yeager v. D'Angelo, et al., No. 68834, whether  
23 Yeager or Yeager, Inc. owned the Hey Pard and F-15 prints and  
24 First Day Covers was directly in dispute.<sup>7</sup> (Noonan Decl. ¶¶ 17,  
25

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



1 19, Exs. O, Q; D. Yeager Decl. ¶ 6, Exs. A, B.) Between 2004 and  
2 2005, Victoria Yeager sent several emails to Connie Bowlin  
3 requesting delivery of the Hey Pard, F-15, and First Day Covers,  
4 which were in the possession of Aviation Autographs, to Yeager.  
5 (Bowlin Decl. ¶¶ 55-81.) In January 2005, the Bowlins refused to  
6 provide these items to the Yeagers, stating that given the  
7 ongoing litigation over ownership of the items they would prefer  
8 to maintain possession of the items until the final resolution of  
9 the state court action and would remove them for sale from the  
10 Aviation Autographs website. (Bowlin Decl. ¶¶ 63-69.)

11 On February 7, 2005, the Bowlins received a letter from  
12 Steven Thomas, an attorney retained by the Yeagers from Sullivan  
13 & Cromwell LLP, who requested that the Bowlins deliver the prints  
14 in dispute as well as "all other merchandise with General  
15 Yeager's likeness to him" in exchange for indemnity. (Bowlin  
16 Decl. ¶ 68, Ex. 47.) In June 2005, Victoria Yeager sent the  
17 Bowlins a series of emails demanding to remove the First Day  
18 Covers as for sale from the Aviation Autographs website, as well  
19 as all pictures of Yeager and references to Yeager's name from  
20 the site. (Bowlin Decl. ¶¶ 71-74. Exs. 51-57.) On August 16,  
21 2005, Sullivan & Cromwell sent a cease and desist letter to the  
22 Bowlins, accusing them of "continued unauthorized and unlawful  
23 use of General Chuck Yeager's name, image and likeness . . . ."  
24 (Bowlin Decl. Ex. 58.)

25 On October 11, 2005, the referee in the state court  
26 action involving the Yeagers preliminarily ruled that Yeager,  
27 Inc., not Yeager, owned the Hey Pard and F-15 prints and the  
28 First Day Covers. (D. Yeager Decl. ¶ 6, Exs. A, B.) The state

1 court entered a final judgment adopting the referee's Statement  
2 of Decision in Yeager v. D'Angelo on March 29, 2006. (D. Yeager  
3 Decl. ¶ 6, Exs. A, B; Noonan Decl. ¶¶ 17, 19, Exs. O, Q.)  
4 Yeager, Inc.'s ownership of the Hey Pard and F-15 prints and  
5 First Day Covers was affirmed by the California Court of Appeal  
6 on August 22, 2008. (Noonan Decl ¶ 20, Ex. R.) The Bowlins  
7 subsequently ceased selling these products and returned them to  
8 Yeager, Inc. (Bowlin Decl. ¶ 54; D. Yeager Decl. ¶ 7.)

9 Victoria Yeager continued to send emails requesting  
10 that the Bowlins remove all references to Yeager from the  
11 Aviation Autographs website through October 2005. (Bowlin Decl.  
12 ¶¶ 80-81.) The Aviation Autographs website contains several  
13 references to Yeager. The Aviation Autographs home page contains  
14 one such reference to Yeager:

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

1 bring them closer to you.

2 (Bowlin Decl. ¶ 85; Noonan Decl. ¶ 8, Ex. G.) The home page also  
3 makes reference to the Tribute to Aces event, and contains a  
4 picture of "[f]our of the five Aces who attended," but does not  
5 mention Yeager or contain his picture. (Bowlin Decl. ¶ 86.) The  
6 home page previously had displayed a statement, added in October  
7 2003, which mentioned Yeager's attendance at the Tribute to Aces  
8 event. (Id.) The home page was last edited with respect to  
9 Yeager in August 2005, when Connie Bowlin cropped a picture to  
10 remove Yeager from the photograph and deleted the reference to  
11 him as an attending Ace. (Id.)

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

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

1 Bowlins added the aforementioned sentence thanking Yeager for his  
2 attendance at the Tribute to Aces. (Id.)

3 Yeager is additionally referenced on the "News and  
4 Current Events" page on defendants' website. The page refers to  
5 Yeager directly once in an entry describing the Tribute to Aces,  
6 listing him as an attendee of the event. (Bowlin Decl. ¶ 90.)  
7 This entry was added in 2003 and has not been changed since that  
8 time. (Id.) The page also references the crash of the Bowlins'  
9 T-6 airplane. (Id.) Although Yeager was flying the Bowlins'  
10 plane when it crashed, he is not mentioned by name in the entry.  
11 (Id.)

12 Yeager is lastly referenced on pages selling various  
13 memorabilia relating to Yeager that are not owned by Yeager. (SAC  
14 ¶¶ 54, 59.) Plaintiffs have admitted they have no right to  
15 restrict the sale of these items and are not entitled to damages  
16 in connection with the sale of these products. (Noonan Decl. ¶¶  
17 6-7, Exs. E, F.)

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

26 On January 14, 2008, plaintiffs filed their initial  
27 complaint in this action. (Docket No. 1.) After this court  
28 granted in part defendants' motion to dismiss the Complaint,

1 plaintiffs filed their SAC on March 3, 2009. (Docket Nos. 17,  
2 77.) The SAC alleges eleven causes of action against defendants  
3 relating to their sale of lithographs for plaintiffs and usage of  
4 the likeness and image of Yeager: 1) breach of the California  
5 common law right to privacy/right to control publicity and  
6 likeness; 2) violation of California Civil Code section 3344  
7 (statutory right of publicity); 3) violation of the Lanham Act,  
8 15 U.S.C. § 1125(a), for false endorsement; 4) violation of the  
9 California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof.  
10 Code §§ 17200-17210; 5) violation of the California False  
11 Advertising Act, Cal. Bus. & Prof. Code § 17500; 6) fraud; 7)  
12 breach of oral contract; 8) breach of written contract; 9) unjust  
13 enrichment; 10) accounting; and 11) equitable rescission. The  
14 Bowlins, Aviation Autographs, and B&A now move for summary  
15 judgment on all claims pursuant to Rule 56.

16 V. DISCUSSION

17 A. Time-Barred Claims

18 Plaintiffs' action was filed in January of 2008, while  
19 many of the events giving rise to the claim occurred between 2000  
20 and 2004. Defendants have accordingly challenged many of  
21 plaintiffs' claims as time-barred. The statute of limitations  
22 generally begins to run at "the time when the cause of action is  
23 complete with all its elements. An exception is the discovery  
24 rule, which postpones accrual of a cause of action until . . .  
25 [the plaintiff] suspects, or has reason to suspect, a factual  
26 basis for its elements." Nogart v. Upjohn Co., 21 Cal. 4th 383,  
27 389 (1999); Apple Valley Unified School Dist. V. Vavrinek, Trine,  
28 Day & Co., 98 Cal. App. 4th 934, 943 (2002).

1           1.    Breach of Oral Contract

2           The statute of limitations for breach of oral contract  
3 under California law is two years. Cal. Civ. Proc. Code § 339.  
4 A cause of action on an oral contract accrues, and the statute of  
5 limitations begins to run, at the time the contract is breached.  
6 Cochran v. Cochran, 56 Cal. App. 4th 1115, 1124 (1997).

7 Plaintiffs allege breaches of multiple oral agreements with  
8 defendants. Specifically, plaintiffs allege that they were  
9 inadequately compensated for the Leiston Legends prints and  
10 travel to the Tribute to Aces weekend, that defendants breached  
11 an oral agreement that all proceeds from the Tribute to Aces  
12 weekend would go to charity, and that plaintiffs were not  
13 adequately compensated with regards to the profits and proceeds  
14 of the Hey Pard prints and First Day Covers. (SAC ¶ 118.)

15           These breaches all should have been apparent to  
16 plaintiffs between 2000 and at the latest in July 2004, putting  
17 plaintiffs' claim well outside the statute of limitations.

18 Plaintiffs allege that defendants breached an oral contract with  
19 Yeager with respect to the Legion Legends prints and the  
20 Gathering of Aces when they (1) failed to provide one-third of  
21 the Legion Legends prints to plaintiffs (2) did not pay  
22 plaintiffs the royalties owed from the prints, (3) did not  
23 reimburse Yeager for travel and lodging, and (4) did not give  
24 funds from the lithograph to a charity as promised. (Id. ¶  
25 118(a).) Plaintiffs would have been aware of any breaches  
26 relating to the these events as early as October 2003, when  
27 Yeager only received 100 prints from defendants, was not paid any  
28 royalties, and did not allegedly receive adequate reimbursement

1 for travel expenses. Victoria Yeager specifically asked about  
2 what the Bowlins planned to do with the extra prints signed by  
3 Yeager on October 14, 2003, putting her on notice of the Bowlins'  
4 alleged breaches of the oral contract surrounding the Tribute to  
5 Aces event such that she should have pursued litigation. See  
6 Nogart, 21 Cal 4th at 398 n.2. As such, plaintiffs' breach of  
7 oral contract claims related to the Leiston Legends prints and  
8 Gathering of Aces events are time-barred.

9 Plaintiffs' breach of oral contract claims related to  
10 the Hey Pard and F-15 prints and First Day Covers are similarly  
11 time-barred. Plaintiffs allege that they were not provided with  
12 adequate accounting of the profits from these prints and were not  
13 adequately compensated for them by defendants. (SAC ¶¶ 118 (c),  
14 (d).) However, defendants have provided evidence that plaintiffs  
15 received regular accounting from the Bowlins through January of  
16 2004, and that Victoria Yeager corresponded with the Bowlins  
17 about Aviation Autographs's inventory at that time. (Bowlin  
18 Decl. ¶¶ 52-54, 75-81; Noonan Decl. ¶ 18, Ex. P.) Additionally,  
19 as previously noted by the court in its August 6, 2008 Order re:  
20 defendants' motion to dismiss, plaintiffs themselves contended  
21 that they were on notice of the breach of contract claim no later  
22 than July 2004, well outside of the two year statute of  
23 limitations period. (See Docket No. 17; Docket No. 11, Pls.'  
24 Mem. in Opp'n to Defs.' Mot. to Dismiss 7:4-6 ("The documents  
25 attached and incorporated by [] [d]efendants show that []  
26 [p]laintiffs were not provided with a detailed inventory and  
27 report on commissions paid by [d]efendants until July 6, 2004 . .  
28 . ." ); id. at 2:19-20 ("[T]he [judicially noticed] documents

1 clearly demonstrate [d]efendants did not provide the information  
2 serving to put [p]laintiffs on notice of their [breach] claim  
3 until July, 2004 . . . ."); id. at 7:7-8 (stating plaintiffs  
4 "would not have been aware of the improper accounting and  
5 financial underpayments until this point in time").<sup>8</sup>

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

9 2. Fraud and Unjust Enrichment

10 The statute of limitations for fraud and unjust  
11 enrichment is three years. Cal. Civ. Code § 338(d); First  
12 Nationwide Sav. v. Perry, 11 Cal. App. 4th 1657, 1670 (1992).  
13 Plaintiffs' fraud claims are based upon the same actions by  
14 defendants as those outlined in plaintiffs' breach of oral  
15 contract claim. In fact, plaintiffs do not distinguish their  
16 arguments as to why plaintiffs satisfy the statute of limitations  
17 for the contract claim and the fraud claim in their own  
18 Opposition. (See Pls.' Corrected Opp'n Mot. Summary Judgment  
19 33:1-35:6.) As previously discussed, plaintiffs were well aware  
20 that they may have a fraud claim against defendants based on the  
21 accountings they received, and communications with the Bowlins in  
22 October 2003. Plaintiffs even went so far as to hire counsel to  
23 deal with the very issues before the court in August 2005.

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24  
25 <sup>8</sup> Plaintiffs contend that the Bowlins' ongoing retention  
26 of sales proceeds for the Leiston Legends prints is an ongoing  
27 breach and that therefore that the statute of limitations  
28 continues to run until their wrongful conduct is ceased. This is  
clearly incorrect, since the statute of limitations period would  
never run on any fraud or breach of contract case until a  
plaintiff's money was refunded, effectively nullifying the  
statute of limitations.



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

8           3.    Privacy Claims

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

16           The single publication rule provides that "[n]o person  
17 shall have more than one cause of action for damages for . . .  
18 invasion of privacy or any other tort founded upon any single  
19 publication or exhibition or utterance, such as any one issue of  
20 a newspaper or book or magazine or any one presentation to an  
21 audience or any one broadcast over radio or television or any one  
22 exhibition of a motion picture." Cal. Civ. Code § 3425.3.

23 "Under the single-publication rule, with respect to the statute  
24 of limitations, publication generally is said to occur on the  
25 'first general distribution of the publication to the public' . .  
26 . . the period of limitations commences, regardless of when the  
27 plaintiff secured a copy or became aware of the publication."  
28 Shively v. Bozanich, 31 Cal. 4th 1230, 1245 (2003) (citations

1 omitted).

2           The applicable statute of limitations as to the first  
3 and second claims regarding plaintiffs' right to privacy is two  
4 years. Cal. Civ. Proc. Code § 339; Long v. Walt Disney Co., 116  
5 Cal. App. 4th 868, 873 (2004); Cusano v. Klein, 264 F.3d 936,  
6 949-50 (9th Cir. 2001). The statute of limitations for  
7 plaintiffs' third claim is less certain since the Lanham Act does  
8 not contain its own statute of limitations provision. The  
9 general rule in the absence of such a provision is to borrow the  
10 most analogous statute of limitations from state law. See Polar  
11 Bear Prods., Inc. v. Timex Corp., 384 F.3d 700, 720 n. 17 (9th  
12 Cir. 2004); Jarrow Formulas, Inc. v. Nutrition Now, Inc., 304  
13 F.3d 829, 836-37 (9th Cir. 2002). Given the nature of  
14 plaintiffs' allegations, the most analogous statute of  
15 limitations from state law would be either the two-year statute  
16 applicable to right to privacy claims, or the three-year statute  
17 applicable to fraud claims.

18           Plaintiffs' claims are based on statements on  
19 defendants' website--which has been in existence since 2000. The  
20 single publication rule has been held to apply to statements  
21 published on the internet. Traditional Cat Ass'n, Inc. v.  
22 Gilbreath, 118 Cal. App. 4th 392, 394 (2004); see Oja v. U.S.  
23 Army Corps of Engineers, 440 F.3d 1122, 1131 (9th Cir. 2006).  
24 Plaintiffs' website is a "single integrated publication" for  
25 marketing aviation memorabilia and providing aviation related  
26 news and information, and accordingly is protected by the single-  
27 publication rule. See Christoff v. Nestle USA, Inc., 47 Cal. 4th  
28 468, 482-83 (2009). Many of the references to Yeager on

1 plaintiffs' website have been in existence since 2000, including  
2 the references to Yeager on the home page, the "About Aviation  
3 Autographs" page, and the references to Yeager in the website's  
4 metadata.

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

22 Furthermore, California courts have explicitly found  
23 that the repeated sale of identical products is subject to the  
24 single publication rule. For example, in Kanarek v. Buqliosi,

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

1 the court noted that the sale of copies of the same edition of a  
2 book is subject to the single publication rule. 108 Cal. App. 3d  
3 at 332; see also Christoff, 47 Cal. 4th at 479 (noting the reason  
4 for the single publication rule is that under a rule where the  
5 statute of limitations restarts when each copy of a book is sold  
6 would create the absurd result that "the Statute of Limitation  
7 would never expire so long as a copy of such book remained in  
8 stock and is made by the publisher the subject of a sale or  
9 inspection by the public." (citations omitted)); Hebrew Acad. of  
10 San Francisco v. Goldman, 42 Cal. 4th 883, 892 (2007) ("The  
11 statute of limitations could be tolled indefinitely, perhaps  
12 forever, under this approach.").

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

20           Nevertheless, courts have held that the single  
21 publication rule may not be available when a defendant  
22 republishes information. Kanarek v. Bugliosi, 108 Cal. App. 3d  
23 327, 332 (1980). Defendants admit that they altered their  
24 website in October 2003 to add information about the Tribute to  
25 Aces event, which constituted a republication of the information  
26 about Yeager so as to restart the statute of limitations. Id.  
27 However, plaintiffs have provided no other evidence indicating  
28 that defendants republished the information about Yeager at any

1 point in time after October 2003, when defendants added  
2 information about the Tribute to Aces event.<sup>10</sup> Accordingly, the  
3 statute of limitations has run as to all of plaintiffs' privacy  
4 causes of action relating to the use of plaintiffs' name on the  
5 Aviation Autographs website.

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

16 4. Equitable Tolling

17 Plaintiffs also contend that their claims are subject  
18 to equitable tolling because defendants induced plaintiffs not to  
19 sue by promising to take the Hey Pard and F-15 prints and First  
20 Day Covers off their website and entering into an agreement that  
21 the Bowlins could use Yeager's name and image until the state  
22 court proceedings involving the Yeagers were resolved. (Pls.'  
23 Opp'n Mot. Summary Judgment 37:7-13.) Generally, federal courts  
24 grant equitable relief from the statute of limitations in only  
25

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

1 two kinds of situations: (1) when delay in filing a claim is  
2 excusable and does not unduly prejudice the defendant (equitable  
3 tolling); or (2) when the defendant prevented the plaintiff from  
4 asserting her claim by some kind of wrongful conduct (equitable  
5 estoppel). See Santa Maria v. Pacific Bell, 202 F.3d 1170, 1178  
6 (9th Cir. 2000).

7 Plaintiffs' argument for equitable estoppel is based on  
8 the defendants' allegedly misleading conduct. Indeed, plaintiffs  
9 are not entitled to equitable tolling because equitable tolling  
10 ceases once a claimant retains counsel because the claimant "has  
11 gained the means of knowledge of her rights and can be charged  
12 with constructive knowledge of the law's requirements." Leorna  
13 v. United States Dep't of State, 105 F.3d 548, 551 (9th Cir.  
14 1997). Since plaintiffs had counsel at least as early as August  
15 2005 when a letter was sent from Sullivan & Cromwell to  
16 defendants, the statute of limitations could not be tolled beyond  
17 August 2005 in any event. Additionally, as previously addressed,  
18 plaintiffs were well aware of the actions at issue in the SAC  
19 well over four years ago, and as such have not presented a  
20 legitimate basis for equitable tolling.

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

28 (1) the plaintiff's actual and reasonable reliance on

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

7 Santa Maria, 202 F.3d at 1176; see also Johnson v. Henderson, 314  
8 F.3d 409, 414 (9th Cir. 2002). Equitable estoppel, then, may  
9 come into play "if the defendant takes active steps to prevent  
10 the plaintiff from suing in time." Santa Maria, 202 F.3d at  
11 1176-77.

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

28 Plaintiffs have not shown that defendants took active

1 steps to prevent them from suing before the statute of  
2 limitations period ended. Plaintiffs have not provided any  
3 evidence evincing the existence of any agreement between the  
4 Bowlins and plaintiffs where plaintiffs promised to delay suing  
5 until after the Yeagers' state court action was final. In fact,  
6 the evidence indicates that Victoria Yeager continued to  
7 aggressively confront the Bowlins over ownership issues relating  
8 to the Hey Pard and F-15 prints and First Day Covers and accused  
9 the Bowlins of behaving unlawfully while the state court  
10 litigation was ongoing. (Bowlin Decl. Exs 34, 35, 37, 50, 53.)  
11 The Yeagers obtained representation and continued to ask that the  
12 items in the state court action be delivered to them throughout  
13 2004 and 2005. (Id. Exs. 47, 48.) Victoria Yeager also  
14 repeatedly insisted that the Bowlins cease to use any reference  
15 to Yeager on their website. (Id. Exs. 52-54, 56.) Plaintiffs  
16 were not waiting to pursue litigation against the Bowlins based  
17 on their representations, but rather were continually objecting  
18 to the Bowlins' practices and actively preparing for litigation  
19 against them with the assistance of an attorney.

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



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

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

19           B. Breach of Written Contract

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

1 written contracts with defendants. (Gen. Yeager Depo. 12:12-  
2 13:15.) Plaintiffs in fact conceded during discovery that no  
3 such contracts exist, and neither General nor Victoria Yeager  
4 could identify any such contract at their depositions. (Noonan  
5 Decl. Exs. E, F; Gen. Yeager Depo 12:12-13:15; V. Yeager Depo.  
6 191:10-194:3.) Accordingly, the court will grant defendants'  
7 motion for summary judgment as to plaintiffs' breach of written  
8 contract claim.

9 C. Derivative Claims

10 1. UCL Claim

11 The UCL prohibits any "unlawful, unfair or fraudulent  
12 business act or practice." Cal. Bus. & Prof. Code § 17200. It  
13 incorporates other laws and treats violations of those laws as  
14 unlawful business practices independently actionable under state  
15 law. Chabner v. United Omaha Life Ins. Co., 225 F.3d 1042, 1048  
16 (9th Cir. 2000). Plaintiffs' fourth claim for violation of the  
17 UCL and is dependent on proof of a predicate violation of  
18 plaintiffs' first three claims for breach of the common law right  
19 to privacy, breach of California Civil Code section 3344, or of  
20 the Lantham Act. See Chabner v. United Omaha Life Ins. Co., 225  
21 F.3d 1042, 1048 (9th Cir. 2000). As these cause of action are  
22 time-barred, they cannot be used at the basis for plaintiffs' UCL  
23 claim.

24 In addition, a business practice may be "unfair or  
25 fraudulent in violation of the UCL even if the practice does not  
26 violate any law." Olszewski v. Scripps Health, 30 Cal. 4th 798,  
27 827 (2003). With respect to fraudulent conduct, the UCL  
28 prohibits any activity that is "likely to deceive" members of the

1 public. Puentes v. Wells Fargo Home Mortg., Inc., 160 Cal. App.  
2 4th 638, 645 (2008). Plaintiffs argue that even if their other  
3 derivative claims fail, defendants' practices are still "unfair"  
4 because their harm to plaintiffs outweighs the utility to  
5 defendants.

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

1 at the time of the last republication.

2 2. False Advertising

3 California's False Advertising Law prohibits the  
4 dissemination in any advertising media of any "statement"  
5 concerning real or personal property offered for sale, "which is  
6 untrue or misleading, and which is known, or which by the  
7 exercise of reasonable care should be known, to be untrue or  
8 misleading." Cal. Bus. & Prof. Code § 17500. The statements  
9 underlying plaintiffs' false advertising claim are the same  
10 references to Yeager on the Aviation Autographs website that are  
11 involved in the plaintiffs' first three causes of action. As  
12 such, plaintiffs' false advertising claim is also subject to the  
13 single publication rule. See Baugh, 828 F. Supp. at 755-56;  
14 Long, 116 Cal. App. 4th at 873. As the False Advertising Law has  
15 a statute of limitations of three years, Cal. Code Civ. Proc. §  
16 338(a), plaintiffs' false advertising claim is also time-barred  
17 for the same reason as plaintiffs' UCL claim.

18 3. Accounting and Equitable Rescission

19 Plaintiffs' accounting and equitable rescission claims  
20 are merely derivative of their fraud and contract claims. See  
21 Janis v. Cal. State Lottery Com., 68 Cal. App. 4th 824, 833-834  
22 (1998) ("A right to an accounting is derivative; it must be based  
23 on other claims."); Nakash v. Superior Court, 196 Cal. App. 3d  
24 59, 70 (1987) (finding rescission is a remedy that is dependant  
25 on another claim). As defendants' motion for summary judgment  
26 will be granted on those claims, the court must also grant  
27 defendants' motion for summary judgment on these claims as well.

28 IT IS THEREFORE ORDERED that defendants' motion for

1 summary judgment be, and hereby the same is, GRANTED.

2 IT IS FURTHER ORDERED that plaintiffs' complaint be,  
3 and the same hereby is, DISMISSED as to the remaining defendants.

4 DATED: January 6, 2010

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6 WILLIAM B. SHUBB  
7 UNITED STATES DISTRICT JUDGE  
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