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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

JOHN G. BRANCA, Special Administrator of the Estate of Michael J. Jackson; JOHN MCCLAIN, Special Administrator of the Estate of Michael J. Jackson; TRIUMPH INTERNATIONAL, INC., a California corporation, Plaintiffs, vs. HEAL THE WORLD FOUNDATION, a California corporation; UNITED FLEET, a California corporation; and DOES 1-10, inclusive, Defendants.	CASE NO. CV-09-07084 DMG (PLAx) **PLAINTIFFS' *EX PARTE* APPLICATION TO COMPEL DEPOSITION OF HOWARD MANN** Plaintiffs' Discovery Cut-Off: February 11, 2011 Complaint Filed: September 29, 2009 Hon. Dolly M. Gee

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TO THE COURT, ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that Plaintiffs John G. Branca and John McClain, Special Administrators of the Estate of Michael J. Jackson (the "Estate"), and Triumph International, Inc. (collectively, "Plaintiffs") hereby apply *Ex Parte*, pursuant to Local Rules 7-19 and 37-3 to compel the deposition of Howard Mann (the "Application") by a date no later than February 28, 2011. As described below, good cause exists for the Application, and Plaintiffs will suffer irreparable injury and prejudice not attributable to the lack of Plaintiffs' diligence if the Application is not granted.

This Application is brought on an *Ex Parte* basis as a result of Mr. Mann's last-minute cancellation of his deposition, and his attorney's intentional delay and unresponsiveness in rescheduling his deposition. The facts are simple: Mr. Mann was served with a third-party deposition subpoena notice on December 10, 2010, with the deposition scheduled for January 7, 2011. On January 3, 2011, counsel for Plaintiffs asked Mr. Mann's attorney, Mr. Durst, whether Mr. Mann would be appearing on January 7th. Mr. Durst requested that the deposition be rescheduled to Monday, January 31, 2011. Plaintiffs agreed. On Friday, January 28, 2011, Mr. Durst notified Plaintiffs' counsel that Mr. Mann would not be appearing for deposition. Despite numerous attempts by Plaintiffs' counsel to confer regarding new dates for Mr. Mann's deposition, Mr. Durst refused to provide new dates. On Saturday, February 5, 2011, Mr. Durst informed Plaintiffs' counsel that Mr. Mann was refusing to appear for his duly noticed deposition based on his opinion that Plaintiffs "do not need Mr. Mann." As Mr. Mann has unequivocally refused to comply with the subpoena, Plaintiffs respectfully request that the Court compel Mr. Mann's deposition.

Plaintiffs further request that if no dates are available to the parties prior to Plaintiffs' discovery cut-off, that Mr. Mann's deposition be permitted to take place after the discovery cut-off without any prejudice to Plaintiffs in using Mr. Mann's deposition at trial. Defendants' counsel initially agreed to a stipulation allowing Mr.

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Mann's deposition to be taken after February 11, 2011, but later retracted that agreement.

As explained more fully below, Mr. Mann's company, Vintage Pop Media, is the entity with which Defendants entered into license agreements, licensing the precise marks that are the subject of this Court's preliminary injunction against Defendants. Plaintiffs learned of this arrangement in December 2010, and immediately thereafter served Mr. Mann with the deposition subpoena. The delay of his deposition until the end of January was an accommodation to Mr. Mann--an accommodation that was, apparently, exploited. Mr. Mann's attorney delayed in responding to Plaintiffs' counsel regarding when and if Mr. Mann would appear for deposition until six days before the discovery cut-off, a date which he was made aware of by Plaintiffs' counsel.

As the record clearly demonstrates, Plaintiffs made every effort to resolve this issue without resort to an *Ex Parte* motion. Unfortunately, those good faith efforts were used by Mr. Mann and his attorney to unnecessarily delay, and then, assert a legally untenable position. Had Mr. Mann's deposition remained scheduled for the day for which it was noticed, and Mr. Mann refused to appear, Plaintiffs would have had ample time to file a noticed motion. As a result, however, of delays caused by Mr. Mann and his attorney, Plaintiffs were left no choice but to seek relief from the Court. Plaintiffs will suffer irreparable injury and prejudice if they are not permitted to take Mr. Mann's deposition, as Mr. Mann's relationship with Defendants, and the development of that relationship, is key in understanding Defendants' past and present infringing conduct.

Moreover, the prejudice that Plaintiffs suffer is not attributable to the lack of Plaintiffs' diligence. Plaintiffs served Mr. Mann on December 10, 2010, nearly two months ago. Plaintiffs accommodated Mr. Mann and his attorney's schedules. Plaintiffs made numerous efforts to reschedule Mr. Mann's deposition after it was cancelled one business day before it was supposed to take place. Accordingly, Plaintiffs exercised both diligence in pursuing Mr. Mann's deposition, and restraint in

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not immediately moving the Court for relief. Although Plaintiffs are aware of the Court's reluctance to grant *ex parte* discovery motions, Plaintiffs' good faith efforts at resolving the issues that are the subject of this Application should not be penalized.

The Application is based on this Notice of Application and Application, the attached Memorandum of Points and Authorities, the concurrently filed Declaration of Nina D. Boyajian, and all documents and papers on file with the Court in this action.

Mr. Mann was given notice of this Application via a number of emails to his attorney, Lee Durst. *See* Declaration of Nina D. Boyajian ("Boyajian Decl.") at ¶19, Exs. J, L. N. Plaintiffs' counsel and Mr. Durst exchanged a number of follow-up correspondence regarding the substance of this Application. *Id*. Mr. Durst's contact information is: Lee Durst, Esq., The Durst Firm, 220 Newport Center Drive, Suite 11285, Newport Beach, California 92660; Tel: 949.400.5068; Fax: 714.242.2096; Email: lee.durst@gmail.com. Mr. Durst has not indicated whether or not he will be filing an opposition to the Application. *Id*.

Defendants were given notice of this Application via a number of emails to Defendants' counsel. *See* Boyajian Decl. at ¶20, Exs. J, L, N, O. Counsel for the parties exchanged a number of follow-up correspondence regarding the substance of this Application, and participated in two conferences, one live and one telephonic, on February 7, 2011. *Id*. Defendants were given notice through their counsel, Edgar B. Pease, III, Esq., Law Offices of Edgar B. Pease, III, 16255 Ventura Blvd., Suite 704, Encino, California 91436; Tel: 818.981.2200; Fax: 818.981.2201; Email: edgarpease@gmail.com. Defendants have indicated that they may or may not file an opposition to the Application. *Id*.

Dated: February 7, 2011

GREENBERG TRAURIG, LLP

By: */s/ NINA D. BOYAJIAN*
NINA D. BOYAJIAN
Attorneys for Plaintiffs John G. Branca and John McClain, Special Administrators of the Estate of Michael J. Jackson; Triumph International, Inc.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiffs are forced to file this *Ex Parte* Application because Defendants' business partner refuses to appear for a deposition properly noticed nearly two months ago. Howard Mann, with whom Defendants entered into a license agreement concerning many of the marks at issue in this lawsuit, has unequivocally refused to appear for deposition. He has not provided any legally tenable reason for his failure to appear, and there is none.

II. STATEMENT OF FACTS[1]

A. Relevant Procedural History.

Plaintiffs filed this lawsuit on September 29, 2009. Declaration of Nina D. Boyajian ("Boyajian Decl.") ¶2. Following the dismissal of Defendants' counterclaims, a preliminary injunction was entered against Defendants on April 23, 2010. *Id.*, ¶¶2-3, Ex. A. The injunction enjoined Defendants from, *inter alia*, (1) using the MJJ Trademarks[2] in connection with any goods or services, as to be likely to cause confusion, deception, or mistake on or in connection with the advertising, offering for sale, or sale of any product not authorized by Plaintiffs and using the MJJ Trademarks; (2) passing off, inducing, or enabling others to sell or pass off any product as a product sponsored by or affiliated with Plaintiffs by using the MJJ Trademarks; (3) committing any acts calculated to cause purchasers to believe that Defendants' products are those sold under the control and supervision of Plaintiffs, or sponsored, approved by, or connected with Plaintiffs; (4) otherwise competing unfairly by using the MJJ Trademarks in any manner; and (5) using Mr. Jackson's name, image or likenesses without express written authorization from Plaintiffs in any manner, or on products, merchandise, or goods. *Id.* Since the Court issued the injunction, Plaintiffs have not

[1] Plaintiffs will only summarize the facts relevant to this Application, and refer the Court to Plaintiffs' prior filings for a complete factual history.

[2] "MJJ Trademarks" was defined in the Complaint and the Motion for Preliminary Injunction.

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given Defendants the authorization to use any of the MJJ Trademarks or Mr. Jackson's name, image, or likeness in anyway. *Id.*, ¶4.

B. <u>Howard Mann's Properly Noticed Deposition.</u>

In late November and early December 2010, Defendants produced documents responsive to document requests propounded in February 2010 and July 2010. *Id.*, ¶5. Among those documents were license agreements between Defendants and Howard Mann, president of Vintage Pop Media Group ("Vintage"), ***licensing the precise marks that are the subject of the preliminary injunction, including MJ, Michael Jackson, and Heal the World Foundation***. *Id.*, Ex. B. The agreements were entered into on November 1, 2010, the same day that Ms. Johnson and her prior and new counsel appeared in Court. *Id.* The license agreements provide that Vintage will pay Defendants' attorneys fees and costs of defense in this lawsuit. *Id.*, Ex. B, p. 12. Although the agreements state that "the listed trademarks owned by HTWF will be used only after all current litigation contesting the trademarks ends," this "disclaimer" is meaningless, and was, in any case not followed by the parties to the license agreements. *Id.* Further, it is clear from this "disclaimer" language that Mr. Mann was aware of this lawsuit, and the Court's preliminary injunction. *Id.*

On December 10, 2010, Vintage and its president, Mr. Mann, hosted an event described as the "Unveiling of the Jackson Secret Vault Lithographic Collection" (the "Event"). The promotional poster for the Event, including Mr. Jackson's image, indicates that "part of the proceeds of sales go to Heal the World Foundation." *Id.*, ¶6, Ex. C. In response to a cease and desist letter sent to Mr. Mann's attorney prior to the Event, Mr. Mann's attorney stated: "Vintage Pop Media is making a donation of a portion of its profits to Michael Jackson's beloved charity, Heal the World Foundation." *Id.*, ¶7, Ex. D. The source of a statement such as this one, "Michael Jackson's beloved charity," could have only originated from Melissa Johnson and Defendant Heal the World Foundation. In the alternative, even HTWF's business associates and attorneys are confused as to the affiliation and sponsorship of HTWF. Following the response

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from Mr. Mann's attorney, Plaintiffs immediately served a subpoena on Mr. Mann, setting his deposition for January 7, 2011. *Id.*, ¶8, Ex. E.

On December 23, 2010, Mr. Mann produced documents in response to the subpoena and made objections to certain document requests. *Id.*, ¶9, Ex. F. No objections were made to the taking of Mr. Mann's deposition. *Id.* On January 3, 2011, counsel for Plaintiffs, Nina D. Boyajian, contacted Mr. Mann's attorney, Lee Durst, to confirm the January 7, 2011 deposition. *Id.*, ¶10, Ex. G. Mr. Durst indicated that Mr. Mann would not be appearing on January 7th, and requested that the deposition be rescheduled to Monday, January 31, 2011. *Id.*, ¶11. Plaintiffs agreed to accommodate Mr. Mann's schedule. *Id.*, Exs. G, H. On January 27, 2011, during a call between Ms. Boyajian and Defendants' counsel, Mr. Pease, Mr. Pease informed Ms. Boyajian that he had heard "rumors" from his client that Mr. Mann would not be appearing for his deposition on January 31. *Id.*, ¶12. At that time, Plaintiffs had not been notified that Mr. Mann would not be appearing. *Id.*

It was not until Friday, January 28, 2011--one business day prior to Mr. Mann's scheduled deposition--that Mr. Durst notified Ms. Boyajian that Mr. Mann would not be appearing for deposition and did not provide any reason for Mr. Mann's non-appearance. *Id.*, ¶13, Ex. I. On the same day, Ms. Boyajian called Mr. Durst informing him of the urgency in resetting Mr. Mann's deposition in light of the February 11, 2011 discovery cut-off. *Id.*, ¶14, Ex. J. Despite a number of subsequent attempts by Plaintiffs' counsel to confer regarding new dates for Mr. Mann's deposition, Mr. Durst failed to provide new dates. *Id.*, ¶15, Ex. J.

While Plaintiffs waited for Mr. Durst's response, Plaintiffs continued to make good faith efforts to resolve the dispute without resort to an *ex parte* application. *Id.*, ¶16, Ex. K. Namely, Plaintiffs' counsel conferred with Defendants' counsel about stipulating to the taking of Mr. Mann's deposition after Plaintiffs' February 11, 2011 discovery cut-off. *Id.* After the parties agreed to allow Mr. Mann's deposition to take place after February 11, 2011, Ms. Boyajian notified Mr. Durst of that agreement and

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once again requested dates for Mr. Mann's deposition. *Id*., at Ex. L. Although Defendants initially agreed to allow Mr. Mann's deposition to take place after the discovery cut-off, they later retracted that agreement. *Id*. It was Plaintiffs' hope that this extra time would ensure that Mr. Mann's deposition would be taken, and all parties' schedules accommodated. *Id*.

On Saturday, February 5, 2011, Mr. Durst informed Plaintiffs' counsel that Mr. Mann was refusing to appear for his duly noticed deposition, based on his opinion that Plaintiffs "do not need Mr. Mann." *Id*., ¶17, Ex. M. Plaintiffs' counsel responded that Mr. Durst's position lacked any legal basis and provided *ex parte* notice of this Application. *Id*., ¶18, Ex. N.

III. ARGUMENT

A. Good Cause Exists For Compelling Mr. Mann's Deposition, As Plaintiffs Will Otherwise Be Irreparably Injured And Prejudiced.

While most discovery motions are brought following a meet and confer process and noticed motion, in this instance--and through no fault of Plaintiffs-Plaintiffs were deprived of the opportunity to meaningfully meet and confer by Mr. Mann and his attorney. Boyajian Decl. ¶¶10-18, Exs. J, L, M, N. Mr. Mann first delayed, and then altogether cancelled his deposition without any legal basis for doing so. *Id*. Mr. Durst cancelled the deposition at a time when he knew a noticed motion and the requisite meet and confer process could not possibly take place. *Id*., ¶14. This type of strategic maneuvering should not be rewarded.

Local Rule 37-3 allows for discovery motions to be filed on an *ex parte* basis where the moving party can make a showing of "irreparable injury or prejudice not attributable to the lack of diligence of the moving party." Depositions may be compelled where it is clear that the non-moving party has declined to act in accordance with applicable standards, and the moving party has done nothing to contribute to the failure. *Bd. of Trs. v. Tyco Int'l, Ltd*., 253 F.R.D. 528, 530 (C.D. Cal. 2008).

As described above and in the accompanying Boyajian Declaration, Plaintiffs

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have indisputably acted with diligence in pursuing this discovery: the deposition subpoena was served nearly two months ago, Plaintiffs consistently initiated contact with Mr. Durst regarding the scheduling and rescheduling of the deposition, and, even after Mr. Durst cancelled the deposition just one business day before the deposition was set to take place, Plaintiffs continued to be diligent in attempting to reschedule Mr. Mann's deposition. *Id.*, ¶15, Ex. J. Now, because of Mr. Durst's legally baseless excuse for refusing to produce Mr. Mann for deposition, Plaintiffs are forced to ask for relief from this Court. *Id.*, ¶17, Ex. M. Had Mr. Durst stated his meritless objected to the deposition within the time allotted for objections under the Federal Rules, the parties would have had the opportunity to meet and confer, and Plaintiffs could have filed a noticed motion. Mr. Durst, however, strategically delayed notifying Plaintiffs of his "objection."

Plaintiffs will suffer irreparable harm and prejudice should the Court decline to compel Mr. Mann's deposition, as it is clear that Mr. Mann will not voluntarily appear for his deposition. Mr. Mann's present and past involvement with Defendants makes his testimony regarding Defendants' conduct highly relevant to the issues in this lawsuit, and the proper subject of discovery. The fact that Mr. Durst did not object to the taking of Mr. Mann's subpoena at the time he served objections to the document requests underscores the absence of any legally supported objection to Mr. Mann's deposition. *Id.*, ¶9, Ex. F.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court compel Mr. Mann's deposition by no later than February 28, 2011.

Dated: February 7, 2011 GREENBERG TRAURIG, LLP

By: */s/ NINA D. BOYAJIAN*
NINA D. BOYAJIAN
Attorneys for Plaintiffs John G. Branca and John McClain, Special Administrators of the Estate of Michael J. Jackson; Triumph International, Inc.

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