

Docket Nos. 10-15297/10-16503

United States Court of Appeals
For the Ninth Circuit

CHARLES E. "CHUCK" YEAGER, et al.,

Plaintiffs and Appellants,

v.

CONNIE BOWLIN, et al.,

Defendants and Appellees.

Appeal from the United States District Court
for the Eastern District of California, Sacramento
Case No. 2:08-cv-00102-WBS-JFM

Honorable William B. Shubb, United States District Court Judge

APPELLEES' ANSWERING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Appellee Bowlin & Associates, Inc. dba Aviation Autographs, declares that it has no parent company, and no publicly-held corporation holds more than 10% of its stock.

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Defendants and Appellees, Connie and Ed Bowlin, Aviation Autographs and Bowlin & Associates, Inc. (the “Bowlins”) hereby submit Appellees’ Answering Brief, responding to the Opening Brief of Plaintiffs and Appellants, Charles E. Yeager and the General Chuck Yeager Foundation (“Yeager”).

I. INTRODUCTION

The District Court’s order granting summary judgment is noteworthy in one respect. The District Court found that a declaration submitted by well-known aviator General Chuck Yeager was a “sham,” and “a self-serving attempt to manufacture issues of fact to defeat summary judgment.” (5 ER 1302, 1304-05.) What compelled the District Court to make such a finding against a person of Yeager’s renown? It had no choice. Yeager’s Declaration mocked the integrity of the judicial process.

Relevant excerpts from General Yeager’s deposition are part of the record on appeal. (3 ER 563-657; 3 ER 658-82.) Yeager’s testimony speaks for itself. He answered essentially every question the same exact way: “I don’t recall.” Yeager, who asserts a fraud claim, did not recall if the Bowlins had ever lied to him. Yeager, who alleges breach of contract claims, did not recall any agreements with the Bowlins. Yeager, for that matter, could not recall anything connected with any of the prints at issue. *One hundred eight-five times*, Yeager did not recall.

Yet, when faced with a motion that could end his lawsuit, Yeager's recollection suddenly and dramatically returned. The District Court would have none of Yeager's miraculously recovered memory, however, and correctly excluded the material portion of Yeager's Declaration under the Sham Affidavit Rule.

Apart from the foregoing, the District Court's detailed and thorough ruling is otherwise unexceptional. Aviation Autographs began selling aviation-related memorabilia in the summer of 2000. From the beginning, Yeager's name and image appeared on the website. The website, for example, referenced selling items from Yeager's "personal collection," described Yeager as "best of friends" with the Bowlins, and included a photograph of Yeager sorting through memorabilia with famed German World War II Ace Gunther Rall. From the start, payments and quarterly statements headed Yeager's way. Nothing in the parties' arrangements required any portion of the proceeds to go to charity. Aviation Autographs' sale of Yeager memorabilia was a commercial endeavor from the start.

The parties' relationship soon changed. The litigation storm that developed following Yeager's marriage to Victoria D'Angelo reached out to envelop the Bowlins in January 2008 with the filing of this lawsuit. In his complaint, Yeager includes an unequivocal allegation concerning the use of his name on the website. While acknowledging that the Bowlins had had limited permission to sell certain

autographed prints, Yeager also expressly alleges that the Bowlins had “never” been authorized to more generally use his name, likeness or image for Aviation Autographs’ commercial endeavors. Second Amended Complaint (“SAC”), ¶ 63 (1 ER 157). According to Yeager, the Bowlins “never” had his permission to refer to items as being from his “personal collection,” to term themselves as “best of friends” with him, or to display the photograph of him with Gunther Rall. (1 ER 156-58.) While they could display the prints for sale, these other uses had “never” been authorized.

Yeager waited over seven years to file suit on these uses of his name and image that he now expressly alleges had “never” been authorized. The District Court’s finding that these and related claims are time-barred, therefore, is well-grounded in the undisputed evidence and the law. The District Court in a separate post-judgment order subsequently and correctly awarded the Bowlins their attorneys’ fees and costs.

Yeager now challenges these rulings. In so doing, he continues with his hallmark shifting of positions. Now, according to Yeager, the Bowlins *did* have permission to use his name, image, and likeness on their website, so long as the proceeds from the sales went to charity. Not only that, but the Bowlins’ permission to do so purportedly extended through August 2005, when Yeager’s attorneys at Sullivan & Cromwell sent them a cease and desist letter.

According to Yeager, this new approach represents the “crux” of his claims and, indeed, of his entire appeal. (*See, e.g.*, AOB 4.) However, much like the sham declaration below, this new “crux” is simply another results-driven effort, this time tailored to create the appearance of grounds for reversal. Yeager’s arguments are unmoored from the record and contradict his own express allegations. The undisputed evidence below makes plain the correctness of the District Court’s rulings. Yeager waited too long to file this lawsuit.

II. STATEMENT OF JURISDICTION

The Bowlins do not contest Yeager’s Statement of Jurisdiction.

III. STATEMENT OF ISSUES

1. Did the District Court abuse its discretion in ruling on the parties’ evidentiary objections by not specifically stating whether it was relying on all or only some of the asserted grounds for objecting?

2. Did Yeager waive his challenge to the District Court’s evidentiary rulings by failing to respond to the Bowlins’ evidentiary objections below?

3. Did the District Court abuse its discretion by excluding portions of Yeager’s Declaration under the Sham Affidavit Rule when Yeager answered essentially every material question at his deposition (over 185 of them) the same way, “I do not recall,” and then, in opposing the motion for summary judgment, suddenly came forward with substantive, detailed testimony?

4. Did the District Court correctly rule that Yeager's California Statutory and Common Law Right of Publicity Claims are time-barred?

5. Did Yeager waive his challenge to the District Court's ruling that his Right of Publicity Claims are time-barred by failing to contest the District Court's alternative ruling that the claims are time-barred even without application of the Single Publication Rule?

6. Did the District Court correctly find the Lanham Act and California state law claims for Unfair Competition and False Advertising are time-barred?

7. Did Yeager waive his challenge to the District Court's finding that the Lanham Act claim is time-barred by failing to contest the District Court's alternative ruling that the claim is time-barred even without application of the Single Publication Rule?

8. Did Yeager waive his challenge to the District Court's finding that the Lanham Act and state law Unfair Competition and False Advertising claims are time-barred by failing to present to the District Court the grounds now raised on appeal?

9. Did the District Court correctly reject Yeager's effort to rely upon equitable tolling and equitable estoppel to excuse his late filing?

10. May the District Court's grant of summary judgment be affirmed on the alternative ground that Yeager did not meet his burden of coming forward with admissible evidence from which a reasonable trier of fact could find in his favor?

11. Did the District Court abuse its discretion in awarding the Bowlins their attorney's fees and costs?

IV. STATEMENT OF THE CASE

On January 14, 2008, many years after the events in question, Yeager filed his original complaint. Yeager alleged violations of the common law and statutory right of publicity, Cal. Civ. Code § 3344; False Endorsement in violation of the Lanham Act, 15 U.S.C. § 1125(a); Unfair Competition, Cal. Bus. & Prof. Code §§ 17200, *et seq.*; False Advertising, Cal. Bus. & Prof. Code §§ 17500, *et seq.*; as well as fraud, breach of oral agreement, conspiracy, and unjust enrichment. (Dkt. No. 1; 1 ER 1.)

The Bowlins responded with a Motion to Dismiss. (Dkt. Nos. 9-10, 13.) The District Court granted the Bowlins' Motion to Dismiss in part, with leave to amend, finding several claims to be time-barred and the fraud claims to have been inadequately pled under Rule 9(b). (Dkt. No. 17.)

Yeager's original counsel then moved to withdraw. (Dkt. Nos. 28, 29, 31.) The District Court approved this withdrawal with the appearance of substitute counsel. (Dkt. No. 44.) That counsel also soon moved to withdraw, which motion

was granted by the District Court. (Dkt. Nos. 53, 56, 58.) Yeager, proceeding without counsel, then filed his First Amended Complaint. (Dkt. No. 62; 1 ER 38.)

Yeager subsequently retained a third set of attorneys. (Dkt. No. 69.) Yeager proceeded to file the operative SAC (1 ER 139), which the Bowlins answered. (Dkt. No. 81.) This complaint reasserted the prior claims and added new ones for breach of written agreement, open book account, and equitable rescission. (1 ER 139.)

After the close of discovery, the Bowlins moved for summary judgment.¹ Prior to the filing of the Opposition, a fourth attorney joined as counsel of record for Yeager. (Dkt. No. 112.) The District Court granted the Bowlins' motion in a detailed thirty-seven page written ruling. (5 ER 1295.)² Judgment and this appeal followed (5 ER 1332, 6 ER 1636).

The Bowlins filed their statutory Bill of Costs, and, as the prevailing party on the California statutory right of publicity and Lanham Act claims, moved for an award of their attorney's fees. (Dkt. Nos. 137, 138, 141; 5 ER 1333, 1378.) After an initial round of briefing, the District Court requested additional evidence

¹ 1 ER 175, 226; 2 ER 247, 485, 522; 3 ER 532, 558; 4 ER 1058.

² In its Order, the District Court dismissed three other defendants, David McFarland, International Association of Eagles, Inc., and Spalding Services, Inc., who had never been served. (5 ER 1296, n.1) Yeager has not challenged these dismissals.

relating to the Bowlins' counsel's invoices. (7 ER 1829.) After receipt of this evidence and further briefing, the District Court awarded the Bowlins a substantial portion of their requested fees and non-statutory costs.³ (8 ER 1994.) Yeager appeals from this ruling as well. (8 ER 2018.) The two appeals were consolidated.

V. STATEMENT OF THE FACTS

The lack of disputed material facts is well-illustrated by Yeager's Statement of Facts, which largely mirrors that of the District Court. Where Yeager does vary from the District Court it is because he has interspersed excluded evidence and/or mere allegations *without* making that clear. (*E.g.*, AOB, 14, citing to SAC.)⁴ The Bowlins highlight below those areas of Yeager's factual summary that go beyond the admitted evidence.

A. General Yeager, Colonel David McFarland, Connie and Ed Bowlin, and The Gathering of Eagles Program.

Yeager is a well-known figure from American aviation history. (5 ER 1306.) The Bowlins are retired Delta Airline pilots who are active in the aviation community. (*Id.*) The Bowlins met Yeager in the mid 1980s, and they became

³ Statutory costs were awarded in the interim. (6 ER 1644.)

⁴ The District Court sustained the Bowlins' objections to a substantial portion of Yeager's evidence, and excluded a portion of Yeager's Declaration under the Sham Affidavit Rule. (5 ER 1297-1306.) These rulings are discussed in Section VII(A)(2), *infra*. As a result of these evidentiary rulings, Paragraphs 12-18 and 20-30 of Yeager's Declaration, and Paragraphs 4, 6-18, 20-29 and 31-33 of Victoria Yeager's Declaration, were excluded in whole or in part. (5 ER 1203; 5 ER 1300-06.)

friends. (*Id.*) Defendant David McFarland met Yeager through a program known as the “Gathering of Eagles,” discussed below. (*Id.* at 5 ER 1307.)

McFarland initiated and organized the Gathering of Eagles in 1982, and, through it, brought distinguished aviators to the Air Command and Staff College (“ACSC”) at Maxwell Air Force Base to speak to ACSC classes. (*Id.*)⁵ Yeager attended all of the Gathering of Eagles events coordinated by McFarland. (*Id.*) The Gathering of Eagles program was funded through the painting, production, and sale of a limited number of lithographic prints signed by the Eagles. (*Id.*) McFarland accumulated a substantial collection of aviation memorabilia through this program, but did not have the means to market it. (*Id.*) The Bowlins and McFarland began discussing selling the merchandise through a website. (*Id.*) In the summer of 2000, the Bowlins created Aviation Autographs and its associated website. In June of that year, McFarland’s foundation entered into a marketing arrangement with Aviation Autographs with respect to Gathering of Eagles lithographs. (*Id.*)

⁵ McFarland sets forth a fuller history of the program in his Declaration filed in support of the Bowlins’ Motion for Summary Judgment. (3 ER 532.)

B. Yeager Enters into His Initial Deal with the Bowlins in 2000 to Have Them Sell the Hey Pard and F-15 Prints, and First Day Covers.

During this same summer of 2000, Yeager also had three items, developed by him in conjunction with McFarland and Yeager, Inc.⁶ that he sought to market: the “Hey Pard” print, which depicts Yeager breaking the sound barrier; the “F-15” print, which similarly memorializes Yeager’s breaking of the sound barrier (this time in an F-15 at the 50th Anniversary of the event in 1997); and the “First Day Covers,” a series of commemorative envelopes with a cancelled stamp from Edwards Air Force Base (which is where the 50th Anniversary event took place). (5 ER 1308.)

Yeager originally authorized McFarland to market these items. (*Id.*) He subsequently entered into an oral agreement with Aviation Autographs under which it agreed to sell the prints for a fifty-fifty split of the proceeds. (*Id.*) Aviation Autographs began marketing and selling these prints on its website in 2000, and provided Yeager with regular summaries of the sales from 2000 through at least 2004. (*Id.*)⁷ Nothing in this agreement, even as alleged by Yeager in the

⁶ Yeager, Inc., was a corporation set up by Yeager and his first wife, Glennis Yeager, for the benefit of their children. (5 ER 1308 n.5.) Yeager, Yeager, Inc., and Yeager’s children remain embroiled in a separate lawsuit also pending before this Court. *Yeager v. Susan Yeager, et al.*, Case No. 10-15467.

⁷ Yeager conceded (in opposing the Bowlins’ initial motion to dismiss) notice of any alleged breach of this oral contract no later than July 2004 as a result of his receipt of these regular summaries. (5 ER 1317.)

SAC, required the Bowlins to distribute the net proceeds to charity. (*See* 1 ER 149-151.)

In his Opening Brief, Yeager asserts that the parties “contest” the terms of the above-described oral agreement and that Yeager, among other things, gave the Bowlins “limited permission to use his name, image, and trademarks to sell these items” with the understanding that he could withdraw permission or set or change the price, or withdraw the items from sale at any time. (AOB 13-14.) Yeager’s only cited support is the SAC. (*Id.*, citing SAC, 1 ER 149-152.) Yeager could not recall this agreement during his deposition. (5 ER 1302; *see also* 3 ER 568, 586, 601, 603, 604, 613, 616, 622, 655.) The Bowlins’ objections to the paragraphs of Yeager’s Declaration on this subject were sustained. (5 ER 1300, 1304.) Yeager’s “facts” in this regard are mere allegations.

C. Connie Bowlin Organizes the Tribute to Aces Event, Which Yeager Attends in 2003 Along with Several Famous Aviators.

In 2003, the Bowlins invited Yeager to attend the “Tribute to Aces” event. (5 ER 1308.) The event grew out of discussions between the Bowlins, famed aviator General Tex Hill, and a local Georgia developer, Mike Ciochetti. (*Id.*) A number of renowned World War II aviators, including Colonel Bud Anderson, General Robin Olds, and German Ace Gunther Rall, were invited and attended with Yeager and General Hill. (*See* 5 ER 1309; 2 ER 256-260; 2 ER 524.)

The Bowlins coordinated the event, which took place in the fall of 2003 and included a dedication of roads named after each attending “Ace,” a symposium, and the signing of a number of prints. (5 ER 1309.) Connie Bowlin sent each Ace a two-page letter explaining the background of the event, that an artist would be creating prints for each Ace to sign, and that Aviation Autographs would be selling the prints. (*Id.*, 2 ER 256-57, 289.)

Each Ace negotiated his own deal concerning the prints. (*Id.*) Victoria Yeager, General Yeager’s current wife, claims that Yeager’s deal provided that he would receive one-third of the prints that were being produced, known as the *Leiston Legends* prints. (*Id.*) For his part, Yeager could not recall this agreement at his deposition. (5 ER 1302; 3 ER 590, 595, 597.) The Bowlins testified that Yeager agreed to receive 100 prints. (5 ER 1309). Victoria Yeager also contends that the Bowlins stated that the monies received from the sale of the prints would be used to pay travel expenses of the Aces with the remainder going to charity. (*Id.*) The Bowlins have consistently denied this characterization. (*Id.*)

Yeager attended the event, including the dedication of the streets, where he posed for a photograph holding a street sign bearing his name. (*Id.*; *see also* 2 ER 342.) Yeager signed 900 prints. He was provided 100, subsequently shipped directly to him by the artist. (5 ER 1310.) By October of 2003, the Yeagers had also been reimbursed for some of their travel expenses. (*Id.*)

On October 14, 2003, more than four years before this lawsuit was filed, Victoria Yeager sent an email to the Bowlins concerning the disposition of extra prints signed by Yeager. (*Id.*) Connie responded that 100 of the prints went to Yeager, 100 went to Jack Roush, who had made aircraft available for use in advance of the event, 200 went to the Bowlins, and the balance were distributed to volunteers or remained with the artist. (*Id.*) By way of handwritten note to Connie Bowlin, Yeager acknowledged receipt of his 100 *Leiston Legend* prints in December 2003. (*Id.*, 2 ER 260, 350.)⁸

D. Yeager Enters His Litigation Phase, Becoming Embroiled in Lawsuits With His Own Children and Launching Increasingly Vitriolic Emails at the Bowlins.

In 2004, Yeager became involved in litigation in California State Court involving his current wife, Victoria Yeager (previously D'Angelo), his children, and Yeager, Inc. (*Id.*) Among the disputed issues was whether Yeager owned the Hey Pard and F-15 prints and First Day Covers, or if these items were instead the property of Yeager, Inc. (*Id.*) In 2004 and 2005 during that litigation, Victoria Yeager sent several emails to Connie Bowlin requesting delivery of these items to

⁸ In his Statement of Facts, Yeager reviews his allegations concerning the Tribute to Aces event, including a claim that he would not have attended had he known the net proceeds would not be donated to charity. Yeager also includes his contentions concerning the supposed revenues earned by the Bowlins from the event. Again, Yeager is relying upon excluded evidence or mere allegations. (AOB, at 16, citing SAC, 1 ER 146-149; 5 ER 1300, 1304.)

Yeager, notwithstanding Yeager, Inc.’s claim of ownership. (5 ER 1311; 2 ER 263-268, 396-474.) In January 2005, the Bowlins refused Victoria Yeager’s demand, stating that ownership was disputed. (5 ER 1311; 2 ER 265-66.)

On February 7, 2005, the Bowlins received a letter from a Sullivan & Cromwell LLP attorney retained by the Yeagers. The letter requested that the Bowlins deliver the disputed prints and “all other merchandise with General Yeager’s likeness” to him in exchange for indemnity. (*Id.*; 2 ER 265, 438-39.) Victoria Yeager then sent a stream of emails to Connie Bowlin, demanding not only the removal of the First Day Covers from the website, but also the removal of all pictures of Yeager and all references to his name. (5 ER 1311; 2 ER 266-67, 452-66.) Sullivan & Cromwell followed with a Cease and Desist letter on August 16, 2005 that accused the Bowlins of “continued unauthorized and unlawful use of General Chuck Yeager’s name, image and likeness” (5 ER 1311; 2 ER 468.) Victoria Yeager continued through October 2005 to send emails to Connie Bowlin demanding that the Bowlins remove all references to Yeager from the website. (5 ER 1312; 2 ER 268, 471-476.)

On October 11, 2005, the referee in the state court action preliminarily ruled that Yeager, Inc., not Yeager, owned the Hey Pard prints, F-15 prints, and First Day Covers. (5 ER 1311.) Final judgment was subsequently entered and affirmed

on appeal. (*Id.* at 1312.) The Bowlins thereafter returned these items to Yeager, Inc. (*Id.*)

E. References to Yeager on the Aviation Autographs Website.

From its very beginning in 2000, the Aviation Autographs website referenced Yeager. Yet, Yeager *expressly* alleges that while the Bowlins had permission to sell certain products bearing his name or image, they *never* had permission to more generally use his name and image as they did on the website. Yeager identifies, for example, the portion of the website that mentioned “aviation heroes, such as General Charles E. Chuck Yeager, Col. C.E. Bud Anderson, General Tex Hill, Gunther Rall, Bob Hoover and more,” and the statement that the Bowlins’ “personal friendship with many of these living legends gives us a unique opportunity to bring them closer to you.” (1 ER 153-54, SAC, ¶¶ 57, 58(A).) Yeager also identifies a photograph of Yeager and Gunther Rall, with a caption reading, “Left, Chuck Yeager and Gunther Rall sort through our selection of signature edition collectables on other combat aces”; a reference that the Bowlins are “best of friends with aviation legend Gen. Chuck Yeager and are selling items from his personal collection”; and a separate statement relating to Yeager’s attendance at the Tribute to Aces event. (1 ER 153-156; SAC, ¶¶ 57-59.) Yeager further alleges that the Bowlins improperly used his name in the “metadata” associated with the website. (1 ER 156-57; SAC, ¶ 61.)

Yeager concludes his extensive review of these uses with the unequivocal allegation that “GENERAL YEAGER has *never* granted Defendants permission to use his name, likeness and identity in connection with their commercial sales endeavors, including use on their website.” (1 ER 157; SAC, ¶ 63, emphasis added.)

These website references, which Yeager claims were “never” authorized, were all added prior to October 2003. Most were added in June 2000 when the website was established and remained unchanged since that time. (5 ER 1312-1314, 2 ER 269-270.)⁹

VI. SUMMARY OF ARGUMENT

Yeager has established no abuse of discretion with respect to the District Court’s evidentiary rulings. Indeed, given Yeager’s failure to respond to the Bowlins’ objections below, the Court may properly find that Yeager has waived these arguments on appeal altogether.

The District Court’s exclusion of portions of Yeager’s Declaration under the Sham Affidavit Rule was similarly a proper exercise of its discretion. In fact, Yeager left the District Court with no choice, short of allowing Yeager to make a

⁹ As to this subject matter as well, Yeager has intermixed allegations with the admissible evidence without making the distinction clear. Yeager’s contentions in his Opening Brief regarding why the Bowlins allegedly utilized these metadata entries, or the purported commercial advantage from this use, are unsubstantiated allegations. (AOB, at 21, citing SAC, 1 ER 157.)

mockery of the judicial process. Yeager obstructed all meaningful inquiry at his deposition with his pat response, “I don’t recall.” His subsequent submission of a detailed, substantive declaration in opposition to the motion for summary judgment represents exactly what the Sham Affidavit Rule is intended to prevent.

The District Court’s ruling that Yeager’s claims are time-barred is similarly correct under the law and in view of the undisputed facts. In light of the gravamen of Yeager’s publicity-related claims, all of which arise out of an internet publication that remained unmodified as to Yeager for years prior to the filing of the lawsuit, the District Court properly applied the Single Publication Rule in finding that Yeager had waited too long to file suit. In addition, as an alternative basis for its rulings, the District Court also found Yeager’s claims to be time-barred *without* application of the Single Publication Rule. Yeager has neglected to challenge these alternative findings on appeal, thereby waiving the right to do so and providing an independent basis to affirm.

In related fashion, Yeager waived several of his current arguments on appeal by failing to present them to the District Court. For example, the arguments Yeager now raises with respect to the claimed inapplicability of the Single Publication Rule to the Lanham Act, Unfair Competition Law (Cal. Bus. & Prof. Code § 17200), and False Advertising statute (Cal. Bus. & Prof. Code § 17500) were not properly raised below and should be deemed waived.

Yeager also offers no basis to reverse the District Court's rulings with respect to equitable tolling and equitable estoppel. Indeed, the undisputed evidence affirmatively undercuts any suggestion that these doctrines might apply. And here again, Yeager waived the arguments presently advanced on appeal by failing to present them to the District Court.

Accordingly, this Court should affirm the District Court's grant of summary judgment. Having done so, it should similarly affirm the attorney's fee award. Yeager's only alleged point of error is that the District Court considered supplemental evidence regarding the allocation of time to particular billed tasks, beyond the contemporaneous billing records submitted with the original fee application. Ninth Circuit authority authorized the District Court's well-reasoned approach, and there was no abuse of discretion.

VII. ARGUMENT

A. The District Court's Evidentiary Rulings Were Correct.

1. Yeager Has Failed to Establish Error in the District Court's Rulings on the Bowlins' Evidentiary Objections.

Using a similar format, both parties below submitted extensive objections to evidence. (4 ER 1062; 5 ER 1203, 1276.) Yeager contests the District Court's rulings on these objections. Yeager, however, does not identify any specific supposed error, or even the particular evidence that he contends should have been admitted.

Instead, Yeager merely complains of the ruling's brevity. With citation to the District Court's observation that it believed the parties had submitted unnecessary evidentiary objections, Yeager opines that the District Court lacked the required "precision (or motivation)" to create an "adequate record." (AOB, 24.) This argument unfairly characterizes the actions of the experienced district court judge, and provides no basis for reversing the District Court's rulings.

In fact, the District Court, while frustrated with the number of objections, expressly stated that it would "proceed to rule upon the parties' evidentiary objections." (5 ER 1300.) After noting that the objections and the grounds therefore had been separately set forth by the parties, the District Court sustained or overruled them. *Id.*

While Yeager complains that the District Court did not specify whether it agreed or disagreed with *each* ground raised, he cites no authority imposing such a burden on the District Court. Yeager thereby waives this argument on appeal. *Indep. Towers of Washington v. State of Washington*, 350 F.3d 925, 929 (9th Cir. 2003) (bare assertion of an issue will not preserve it); Fed. R. App. P. 28(a)(9)(A).

Moreover, Yeager has not established reversible error. The District Court's rulings on evidentiary matters are reviewed for an abuse of discretion. *Wong v. Regents of the Univ. of California*, 410 F.3d 1052, 1060 (9th Cir. 2005). "A district court abuses its discretion if it reaches a result that is illogical, implausible,

or without support in inferences that may be drawn from facts in the record.” *In re Oracle Corp. Sec. Litig.*, 627 F.3d 376, 385 (9th Cir. 2010) (citation omitted).

Further, a District Court’s decision is presumed correct, and may be affirmed on any ground that finds support in the record, whether or not the District Court relied upon those grounds. *Atel Fin. Corp. v. Quaker Coal Co.*, 321 F.3d 924, 926 (9th Cir. 2003); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 322 F.3d 1064, 1076-77 (9th Cir. 2003).

Accordingly, in order to establish error, Yeager was required to examine each ruling and establish that the ruling was incorrect. The record for Yeager to do so was readily available, as both parties had submitted written objections. By failing to undertake that task, Yeager has necessarily failed to establish an abuse of discretion.

More fundamentally, Yeager improperly seeks to shift the burden of the admission of the evidence. Yeager, as the party seeking admission, bore the burden of proof to demonstrate its admissibility. *In re Oracle Corp. Sec. Litig.*, 627 F.3d at 385. Once the Bowlins objected, it was incumbent upon Yeager to demonstrate why the evidence was admissible. *Id.* at 385-86. Yet, Yeager filed no response to the Bowlins’ evidentiary objections, and raised no arguments concerning those objections at the hearing. (*See* Reporter’s Transcript (“RT”), Supplemental Excerpts of Record (“SER”) 63-93.) It is therefore too late for

Yeager to come before this Court to complain that this evidence should have been admitted. *Oracle*, 627 F.3d at 385-96 (“Moreover, for Plaintiffs to fail to respond to Defendants’ objections, and to then challenge the district court’s evidentiary rulings on appeal, is to invite the district court to err and then complain of that very error. We cannot countenance such a tactic on appeal.”) (citation omitted).

Accordingly, the District Court’s evidentiary rulings should be affirmed.

2. The District Court Properly Excluded Portions of Yeager’s Declaration as a Sham.

Raising the Sham Affidavit Rule, the Bowlins objected to admission of certain paragraphs in Yeager and Victoria Yeager’s declarations. (5 ER 1203, incorporating 3-16 of Bowlins’ Reply Brief, SER 49-62.)¹⁰ After a thorough review of the controlling law and evidence, the District Court found that “Yeager’s declaration is a sham,” and “a self-serving attempt to manufacture issues of fact to defeat summary judgment.” (5 ER 1302-05.)¹¹ Yeager now challenges this exclusion.

¹⁰ Cognizant of Ninth Circuit Rule 30-1.5, the Bowlins have included in the SER Yeager’s Opposition to the Motion for Summary Judgment in light of the waiver arguments advanced herein, and those portions of the Bowlins’ Reply Brief that set forth the sham affidavit objection.

¹¹ The District Court did not strike the entire Declaration, but instead only the substantive portions that contradicted Yeager’s prior unwavering deposition testimony that he “did not recall” anything material about the case. For example, Yeager was not examined on his background at the deposition, and the Bowlins therefore did not move to exclude that portion of his Declaration under the Sham

This decision by the District Court is reviewable under the abuse of discretion standard. *Wong*, 410 F.3d at 1060; *see also Van Asdale v. Int'l Game Tech.*, 577 F.3d 989, 998 (9th Cir. 2009). Yeager has not established any abuse of discretion here.

The Sham Affidavit Rule provides that a party cannot create an issue of fact through an affidavit that contradicts his prior deposition testimony. *Kennedy v. Allied Mut. Ins. Co.*, 952 F.2d 262, 266 (9th Cir. 1991). “[I]f a party who has been examined at length on deposition could raise an issue of fact simply by submitting an affidavit contradicting his own prior testimony, this would greatly diminish the utility of summary judgment as a procedure for screening out sham issues of fact.” *Id.*; *see also Radobenko v. Automated Equip. Corp.*, 520 F.2d 540, 544 (9th Cir. 1975).

Before disregarding such affidavits, “the district court must make a factual determination that the contradiction was actually a ‘sham.’” *Kennedy*, 952 F.2d at 267. A party “is not precluded from elaborating upon, explaining or clarifying prior testimony elicited by opposing counsel on deposition [and] minor inconsistencies that result from an honest discrepancy, a mistake, or newly discovered evidence afford no basis for excluding an opposition affidavit.”

Affidavit Rule. (5 ER 1203; RT, at 3:7-14, SER 67.) Yeager has not challenged the ruling concerning Victoria Yeager’s testimony. (*See* 5 ER 1305-1306.)

Messick v. Horizon Indus., 62 F.3d 1227, 1231 (9th Cir. 1995) (citation omitted).

In order to strike an affidavit as a sham, the inconsistencies between the deposition testimony and the subsequent affidavit must be “clear and unambiguous.” *Van Asdale*, 577 F.3d at 998-99.

As the District Court correctly recognized, Yeager’s Declaration was no simple elaboration or clarification, and his new testimony was not the result of honest discrepancies, mistakes, or newly discovered evidence. (*See* 5 ER 1302-05.) Yeager answered nearly *every* material question at his deposition the same way: “I don’t recall.” (3 ER 659-82, *see also* 3 ER 564-657.) This rote response was provided not to one, two, or even a dozen questions, but to *185* different questions. (*Id.*; *see also* 5 ER 1302.) Yeager obstructed all meaningful inquiry into the material facts. His testimony amounted to the direct statement that he had no recollection of *any* fact relevant to his claims.

Despite suing for fraud, for example, Yeager did not recall whether the Bowlins made any misrepresentations. Despite asserting breach of oral agreement, Yeager had no recollection of the supposed agreements. Despite asserting a claim for breach of written agreement, Yeager did not recall any written contracts with the Bowlins. Yeager did not recall what memorabilia the Bowlins might be selling, how the Bowlins might be using his name, or even generally the nature of the claims asserted. Yeager did not recall attending the *Tribute to Aces* event,

signing the *Leiston Legends* prints, or any aspect of any agreement with the Bowlins concerning those prints. (5 ER 1302; *see also* 3 ER 568, 575-76, 584-586, 595, 616, 642.) Yeager also did not recall the claims alleged in the *pro per* complaint that he personally signed, or his own lawsuit against his children. (3 ER 573-74.)

Yeager was provided extensive documentation *during* the deposition in an effort to refresh his recollection, and the questions posed by counsel were clear. (5 ER 1302-03.)¹² Yeager understood the questions; when he did not, he asked for clarification. (3 ER 568-69.) Even in his subsequent declaration, Yeager never admitted to confusion during the deposition. (5 ER 1302-03.) His attorney at the deposition interposed almost no objections, asked no follow up questions, and offered no declaration concerning Yeager's supposed confusion. (*See* 3 ER 564-657.) No corrections were served.

While Yeager's memory came flooding back when faced with a dispositive motion, his explanation for this miraculous restoration was, as found by the District Court, "unbelievable." (5 ER 1303.) In his declaration, Yeager made no effort to address his wholesale lack of memory during the deposition, and offered only that his recollection had somehow been "refreshed" by several documents that

¹² *See also* 3 ER 569, 574-81, 591-95, 597-99, 606-09, 612-13, 615-17, 619-23, 628, 632-33, 642.

he did not even attach. (5 ER 1199.) No expert or medical declaration was filed attesting to any memory lapse or confusion suffered by Yeager as a result of age.

As for the few documents that supposedly did “refresh” Yeager’s recollection, as noted, not one was attached to his declaration in contravention of both Federal Rule of Civil Procedure 56(e) and Federal Rule of Evidence 612. Neither Yeager nor his attorney provided any explanation regarding who selected these documents, how or why these particular documents refreshed his recollection when the dozens supplied at the deposition did not, or why Yeager was otherwise incapable of providing responses on these core issues during his deposition, prior to being served with a motion for summary judgment. (5 ER 1199; SER 70-77, RT 6-13.)

In the face of this record, Yeager on appeal does little more than recycle the same empty arguments rejected below. The primary case now cited by Yeager to excuse his restored memory is *Law Co. v. Mohawk Constr. & Supply Co.*, 577 F.3d 1164 (10th Cir. 2009), yet this case does not support Yeager’s argument. In *Law Co.*, a district court excluded an affidavit on the basis that its content contradicted earlier deposition testimony. *Id.* at 1169. The district court had not, however, as required in the Tenth Circuit, expressly found that the affidavit raised a sham fact issue. *Id.* As such, the Tenth Circuit refused to address the issue on the merits and remanded the issue to the district court for further findings. *Id.* at 1170. In *dicta*,

the Tenth Circuit also noted that it did not see any contradiction between the declaration and testimony at issue. *Id.* at 1170 n.4. The Tenth Circuit’s analysis is not remotely applicable to the circumstances of this case, where a deponent essentially refuses to answer every material question, and then comes forward with previously withheld answers in an effort to salvage his case. Further, unlike the district court in *Law Co.*, the District Court here *did* make the requisite factual finding that the declaration was a sham.

Yeager also fails to distinguish the cases expressly relied upon by the District Court. (*See* 5 ER 1303-04.) *See Mitchael v. Intracorp, Inc.*, 179 F.3d 847, 854-55 (10th Cir. 1999) (affirming exclusion of an affidavit in which the declarant “arguably contradicted his deposition, or at least more clearly recalled” material discussions and meetings, thereby “sandbagging” the moving parties); *Juarez v. Utah*, 263 Fed. Appx. 726, 735-36 (10th Cir. 2008) (affirming the striking of an affidavit despite the plaintiff’s contention that she was simply supplying information that she could not recall during the questioning); *Gilani v. GNOC Corp.*, 2006 WL 1120602, *3 (E.D.N.Y. April 26, 2006) (striking plaintiff’s affidavit affirmatively testifying as to the presence of cleaning staff in a restroom, where plaintiff in her deposition could not recall whether the cleaning staff had been present). Each of these cases supports the District Court’s conclusion in this case. None is addressed by Yeager.

Yeager's level of abuse is far greater than found in any of the cases cited above, given his total refusal to provide substantive answers during the deposition. Yeager's characterization of his obstruction as a discrete lapse in memory and his subsequent declaration as a "clarification" cannot be reconciled with the record. These were not "minor inconsistencies." *See Messick*, 62 F.3d at 1231.

The sham affidavit doctrine exists to prevent this gamesmanship. There is no legitimate explanation for Yeager's approach to his deposition. The District Court's exclusion of this evidence was not only the correct decision, it was a decision required to preserve the integrity of the judicial process.

B. The District Court's Grant of Summary Judgment Was Correct.

A grant of summary judgment is reviewed *de novo*. *Travelers Cas. & Sur. Co. of Am. v. Brennete*, 551 F.3d 1132, 1137 (9th Cir. 2009). This Court therefore applies the same standard as did the District Court under Rule 56(c). *Id.* Pursuant to that standard, "[t]he moving party initially bears the burden of proving the absence of a genuine issue of material fact." *In re Oracle Sec. Litig.*, 627 F.3d at 387. "[T]he burden then shifts to the non-moving party to designate specific facts demonstrating the existence of genuine issues for trial." *Id.* The Court must draw all justifiable inferences supported by the evidence in favor of the non-moving party. *Id.* However, "mere argument does not establish a genuine issue of material fact to defeat summary judgment." *MAI Sys. Corp. v. Peak Computer, Inc.*, 991

F.2d 511, 518 (9th Cir. 1993). The opposing party's burden is not a light one.

“The non-moving party must show more than the mere existence of a scintilla of evidence or some metaphysical doubt as to the material facts at issue.” *In re Oracle Sec. Litig.*, 627 F.3d at 387, citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986), and *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). The non-moving party must come forth with evidence from which a jury could reasonably render a verdict in the non-moving party's favor. *Id.*

Finally, this Court may affirm the District Court's grant of summary judgment on any ground supported by the record, even if that ground was not relied upon by the District Court. *United Nat. Ins. Co. v. Spectrum Worldwide, Inc.*, 555 F.3d 772, 776 (9th Cir. 2009), citing *Valdez v. Rosenbaum*, 302 F.3d 1039, 1043 (9th Cir. 2002).

1. The District Court Correctly Found Yeager's State Law Claims for Alleged Violation of the Common Law and Statutory Right of Publicity To Be Time-Barred.

As one basis for its ruling, the District Court applied the Single Publication Rule, California Civil Code section 3425.3, and found Yeager's claims for alleged violation of the common law and statutory right of publicity to be time-barred. While Yeager disputes this ruling, it is important at the outset to identify what Yeager does not contest.

Yeager does not contest that the Single Publication Rule applies to these two state law claims, nor could he reasonably do so under *Christoff v. Nestle USA, Inc.*, 47 Cal. 4th 468 (2009). Yeager also does not contest that the applicable statute of limitations is two years. *See* AOB, 28-43; *see also* Cal. Code Civ. Proc. § 339; *Long v. Walt Disney Co.*, 116 Cal. App. 4th 868, 873-74 (2004); *Cusano v. Klein*, 264 F.3d 936, 949-50 (9th Cir. 2001). Lastly, Yeager does not contest that the Single Publication Rule applies to the Internet. (AOB, 37 (“*Traditional Cat Ass’n*. simply held that the single publication rule generally applies to ‘webpage publication,’ a proposition that Gen. Yeager does not dispute.”)); *see also Traditional Cat Ass’n, Inc. v. Gilbreath*, 118 Cal. App. 4th 392, 395 (2004).

Rather, in seeking reversal, Yeager raises only two arguments: (1) that modifications to the website – modifications which it is undisputed had nothing to do with Yeager – constitute a “republication” that restarted the statute of limitations; and (2) that the Bowlins never established an accrual date for these two claims. Both of these arguments lack merit.

a. The District Court Correctly Found That There Had Not Been a “Re-publication” Sufficient to Restart the Running of the Statute of Limitations.

Yeager argues that the District Court erred in concluding that the content referring to Yeager on the Aviation Autographs website constituted a single integrated publication. In so arguing, Yeager suggests that there are no well-

established standards for analyzing modifications to websites for purposes of application of the Single Publication Rule. The converse is true. There is substantial Ninth Circuit and other authority on this issue, albeit un-cited by Yeager.

The law Yeager seeks to avoid is straightforward: Content posted on an internet website constitutes a “single publication” provided that it is not substantively altered. *E.g., Oja v. U.S. Army Corps of Eng’rs*, 440 F.3d 1122, 1130 n.14, 1132 (9th Cir. 2006) (“Of course, substantive changes or updates to previously hosted content that are not ‘merely technical’ may sufficiently modify the content such that it is properly considered a new publication for purposes of the statute of limitations period.”); *Canatella v. Van De Kamp*, 486 F.3d 1128, 1134-35 (9th Cir. 2007) (defendant’s act of adding allegedly offending material to a different portion of its website did not trigger a new cause of action since a verbatim copy of that summary had previously appeared on the same website).

Also instructive on this issue is a New York case, *Firth v. State*, 775 N.E.2d 463, 465 (N.Y. 2002), cited by this Court in *Canatella*. *Canatella*, 486 F.3d at 1135. In *Firth*, which has become an oft-cited authority for what constitutes an act of republication on the Internet, a public employee brought a defamation suit based upon a report on a state website. The plaintiff claimed a republication occurred when a modification was made to the website, even though the modification was

unrelated to the material pertaining to the plaintiff. The court in *Firth* flatly rejected this argument:

The mere addition of unrelated information to a Web site cannot be equated with the repetition of defamatory matter in a separately published edition of a book or newspaper. . . . *The justification for the republication exception has no application at all to the addition of unrelated material on a Web site, for it is not reasonably inferable that the addition was made either with the intent or the result of communicating the earlier and separate defamatory information to a new audience.*

We observe that many Web sites are in a constant state of change, with information posted sequentially on a frequent basis. . . . A rule applying the republication exception under the circumstances here would either discourage the placement of information on the Internet or slow the exchange of such information, reducing the Internet's unique advantages. In order not to retrigger the statute of limitations, a publisher would be forced either to avoid posting on a Web site or use a separate site for each new piece of information. . . . These policy concerns militate against a holding that any modification to a Web site constitutes a republication of the defamatory communication itself.

Id. at 466-67 (emphasis added; citation omitted.)

The approach taken by this Court in *Canatella* and *Oja*, and by the New York court in *Firth*, is consistent with that taken in California state courts and other courts around the country. *See, e.g., Traditional Cat*, 118 Cal. App. 4th at 404-05 (applying Single Publication Rule where website had not been altered in the one year prior to the filing of the lawsuit); *Salyer v. Southern Poverty Law Center, Inc.*, 701 F. Supp. 2d 912, 917-18 (W.D. Ky. 2009) (modifications to website unrelated to alleged defamatory statements do not constitute republication for purposes of

application of the Single Publication Rule); *Atkinson v McLaughlin*, 462 F. Supp. 2d 1038, 1054-55 (D.N.D. 2006) (modifications to website that did not change the substance or content of defamatory statements were not a republication for purposes of the Single Publication Rule); *Churchill v. State*, 876 A.2d 311, 319 (Me. 2005) (no republication where modifications do not alter the substance or form of the allegedly defamatory material). Contrary to Yeager's argument, this Court is not visiting uncharted legal territory.

The Bowlins established through undisputed evidence that the references to Yeager were posted on the Aviation Autographs website many years prior to the filing of the lawsuit, and that there were no substantive modifications with respect to Yeager within any relevant statutory period. (5 ER 1320; 1322-1323.)¹³

Yeager's argument that there has been a republication within the statutory period is a mere conclusion, insufficient to support the denial of a motion for summary judgment. *Nissan Fire & Marine Ins. Co. v. Fritz Cos., Inc.*, 210 F.3d 1099, 1102-03 (9th Cir. 2000) (nonmoving party cannot simply rest on allegations); *W.*

¹³ Thus, this case is distinguishable from *Kanarek v. Bugliosi*, 108 Cal. App. 3d 327 (1980). *Kanarek* concerned a new paperback publication of a novel previously published in hardcover. *Id.* at 333. The case, as the year of its issuance makes apparent, did not involve publication on the Internet. Further, as reviewed above, there has been no separate act of publication with respect to Yeager in this case. The Yeager content remained on the same website unchanged throughout the years.

Mining Council v. Watt, 643 F.2d 618, 624 (9th Cir. 1981) (court need not accept legal conclusions “cast in the form of factual allegations.”)

Furthermore, Yeager’s proposed approach, which would provide a plaintiff with a new cause of action whenever an unrelated change is made to a website, or even every time a website owner fails to *remove* material upon receipt of a cease and desist letter, would undercut the fundamental reason for the Single Publication Rule. *Canatella*, 486 F.3d at 1135 (single publication rule prevents a multiplicity of actions, which would lead to potential harassment and excessive liability, and drain judicial resources). If Yeager’s novel approach was adopted, multiple lawsuits and the elimination of the statute of limitations in Internet cases would be the new standard. The District Court’s ruling is supported by uncontroverted evidence, is consistent with the law, and should be affirmed.

b. Justice Werdegarr’s Concurrence in *Christoff* Does Not Support Yeager’s Position.

Yeager discusses Justice Werdegarr’s concurrence in *Christoff* at length, suggesting that her analysis supports his republication argument. It does not. The publication at issue in *Christoff* was a marketing campaign that spanned several years and involved not only product labels, but also transit ads, coupons in newspapers, magazine advertisements, and Internet advertisements. *Christoff*, 47 Cal. 4th at 482. The California Supreme Court in *Christoff*, while confirming that the Single Publication Rule applies to right of publicity claims, declined to address

precisely how the rule might apply to such an extensive and diverse marketing campaign. *Id.* at 481-482. Justice Werdegar attempted in her concurrence to answer a question pertinent to *that* case, but which has *no* relevance here: “[T]he broadest question posed here is whether *all* distribution of labels employing the original misappropriated image, whenever they occurred, should be deemed to constitute a single publication Phrased more generally, should a series of temporally distinct publications be treated as a single publication because each consisted of substantially the same text or images?” *Id.* at 483.

Nothing remotely of the sort is present here, where there is just one website that remained unchanged in relevant part for many *years* before the filing of the lawsuit. Neither the Opinion nor Judge Werdegar’s concurrence suggested any disagreement with the law set forth above as it pertains to Internet publications. *Christoff* simply did not consider, and certainly did not reject, the rule that republication on the Internet requires a substantive modification to relevant content.¹⁴ *Sakamoto v. Duty Free Shoppers, Ltd.*, 764 F.2d 1285, 1288 (1985)

¹⁴ And, indeed, Justice Werdegar cited *Firth v. State*, 706 N.Y.S.2d 835, 841-43 (N.Y. Ct.Cl. 2000). *Christoff*, 47 Cal.4th at 485. This *Firth* decision was affirmed in *Firth v. State*, 775 N.E.2d 463 (N.Y. 2002), which is, as discussed above, the case cited by the Ninth Circuit in *Canatella*. To the extent Justice Werdegar’s concurrence suggests anything on the California Supreme Court’s view regarding application of the Single Publication Rule to the Internet, therefore, it is that the California Supreme Court will adopt the same rule advanced in *Firth* and advocated herein.

(opinions are not precedential concerning matters not raised or litigated); *Styne v. Stevens*, 26 Cal.4th 42, 57-58 (2001).

c. Yeager's Contention That His Right of Publicity Claims Did Not Accrue Until His Attorneys Sent a Cease and Desist Letter in August 2005 Is Without Merit.

Yeager's next argument with respect to his right of publicity claims is that these claims did not accrue until August 2005 when his attorneys sent the Cease and Desist letter to the Bowlins. This argument is both irrelevant and incorrect.

First, August 2005 is more than two years prior to the filing of the action. Even if the claim did not accrue until then, it would still be time-barred, just as the District Court found. (5 ER 1322-23.)

Second, this argument is not supported by the record. For, while Yeager now suggests that the Bowlins had permission to use his name and image until August 2005 when the letter was sent, this contention is not supported by admissible evidence and is directly contradicted by Yeager's own allegations. As reviewed above, Yeager expressly alleged that the Bowlins "never" had his permission to characterize themselves as "best of friends" with him; "never" had his permission to state that any item came from "his personal collection"; "never" had his permission to depict him on the website in a photograph with Gunther Rall sorting through the selection of items; and "never" had his permission to use his name in the website's metadata. (1 ER 154-57, SAC ¶¶ 58, 61, 63.) Thus,

according to Yeager, while the Bowlins may have had the right to display certain lithographs for sale (1 ER 114, 117, 118, SAC, ¶¶ 27, 42, 46, 51), Yeager “never” granted Defendants permission for the more general commercial uses of his name and likeness set forth above (1 ER 157, SAC, ¶ 63). He termed such uses “unauthorized.” (1 ER 153; *see also* 5 ER 126, SAC, ¶ 69 (“Defendants have continuously, without Plaintiff’s prior consent or agreement, invaded Plaintiff’s right to privacy”))).

Yeager is bound by his own allegations. *American Title Ins. Co. v. Lacelaw Corp.*, 861 F.2d 224, 226 (9th Cir. 1988). Since Yeager expressly alleges that the Bowlins “never” had permission to use his name in this fashion, the first publication by the Bowlins was necessarily, in his view, wrongful, thereby triggering the statute of limitations. As set forth above, this publication date was as early as the year 2000 for most of the references, and no later than October 2003 when the Tribute to Aces reference was added.

d. Yeager Fails to Challenge the District Court’s Alternative Basis for Finding Yeager’s California Right of Publicity Claims to Be Time-Barred, Which Did Not Depend Upon Application of the Single Publication Rule.

Yeager fails to challenge a separate finding by the District Court to the effect that even if the Single Publication Rule did not apply, Yeager was on notice of his claims by August 2005, when Sullivan & Cromwell sent the cease and desist letter that threatened “litigation over the very same issues before this court.” (5 ER

1323.) Yeager does not challenge this alternative basis, and has thereby waived any challenge to the District Court's finding that these claims are time-barred. *See Rodriguez v. Hayes*, 591 F.3d 1105, 1118 n.6 (9th Cir. 2010) (“[F]ailure of a party in its opening brief to challenge an alternative ground for a district court’s ruling given by the district court waives that challenge.”); *Destination Ventures, Ltd. v. F.C.C.*, 46 F.3d 54, 57 (9th Cir. 1995) (claim on appeal waived by failing to address in brief).

2. The District Court Correctly Found Yeager’s Lanham Act Claim to Be Time-Barred.

Yeager’s only argument for reversal with respect to the Lanham Act claim is that the District Court erroneously applied the Single Publication Rule. However, the District Court rested its ruling on two alternative grounds, one with and one without application of the Single Publication Rule. (5 ER 1323.) Yeager’s Opening Brief fails to address the District Court’s alternative basis, and he has therefore waived any challenge to it. *See Rodriguez*, 591 F.3d at 1118 n.6; *Destination Ventures*, 46 F.3d at 57. As a result, this Court need *not* decide whether the Single Publication Rule should apply to Yeager’s Lanham Act claims and can affirm based upon the District Court’s unchallenged ruling. In the event it does reach the question, the District Court ruled correctly given the gravamen of Yeager’s claim.

a. The District Court Correctly Applied the Single Publication Rule to Yeager’s Lanham Act Claim.

The District Court found the Lanham Act claim to be time-barred with application of the Single Publication Rule. Yeager challenges this determination, raising two arguments. First, Yeager argues that the Single Publication Rule cannot apply because claims asserted under the Lanham Act are equitable in nature, and therefore application of “legal defenses (such as statutes of limitation)” is improper.¹⁵ Next, Yeager argues that the Supremacy Clause bars application of the Single Publication Rule to this federal claim. Both arguments lack merit.¹⁶

With respect to Yeager’s first argument, the Lanham Act is not *solely* equitable in nature. Wrongs that may be redressed through it, such as unfair competition or trademark infringement, are actions at law. *See Jarrow*, 304 F.3d

¹⁵ Yeager seemingly conflates the Single Publication Rule with an actual statute of limitation. The Single Publication Rule limits a plaintiff to one cause of action. Cal. Civ. Code § 3425.3; Restatement (Second) of Torts § 577A(4); *see generally, Christoff*, 47 Cal. 4th at 474 n. 5; *Canatella*, 486 F.3d at 1133. The Single Publication Rule is not itself a statute of limitation, and imposes no particular timeframe for a plaintiff to file suit.

¹⁶ Yeager did not preserve this contention by adequately presenting it below. Yeager only argued that he had located no case applying the Single Publication Rule to the Lanham Act, and not that the Single Publication Rule should not apply because the claim was equitable in nature. Yeager also did not raise the Supremacy Clause. (SER 24, Opp, at 24:12-14; *see also* SER 78-85, RT 14-21.) The Court should find this argument to have been waived. *Hillis v. Heineman*, 626 F.3d 1014, 1019 (9th Cir. 2010) (arguments raised for the first time on appeal are generally deemed waived), citing *Conn. Gen. Life Ins. Co. v. New Images of Beverly Hills*, 321 F.3d 878, 882 (9th Cir. 2003).

829, 837 n.5 (9th Cir. 2002) (“On the other hand, § 43(a) cannot be characterized as purely equitable . . .”), citing *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 477-78 (1962); *see also Polar Bear Prods., Inc. v. Timex Corp.*, 384 F.3d 700, 720 (9th Cir. 2004) (“ . . . [W]e begin our analysis with the observation that trademark infringement generally sounds in tort.”); *Int’l Order of Job’s Daughters v. Lindeburg & Co.*, 633 F.2d 912, 915 (9th Cir. 1980) (Lanham Act protects against “the broad business tort of ‘unfair competition’”). Yeager bases his Lanham Act claim on the underlying tort of violation of his right of publicity, and cannot contest that he also sought an award of damages on this Lanham Act claim. (1 ER 161-163, SAC 86-95); *see also* 15 U.S.C. § 1117(a). Yeager’s contention, therefore, that the Single Publication Rule cannot apply as a matter of law to his Lanham Act claim is incorrect, given the gravamen of the claim he asserts.

Indeed, perhaps recognizing this fact, Yeager’s argument rests more heavily on his second contention that the Supremacy Clause bars application of the Single Publication Rule. This argument, developed over several pages and with numerous case citations, is misplaced. The Ninth Circuit has already held that the Single Publication Rule may apply to federal claims when the claim is based upon a single publication. *Oja*, 440 F.3d at 1133 (violation of federal Privacy Act); *Canatella*, 486 F.3d at 1133 (Section 1983 claim). In applying the rule to these federal claims, this Court held that it was doing so not as a matter of state law, but

of federal law: the “logic” of the rule is employed such that “a single publication gives rise to only one cause of action.” *Canatella*, 483 F.3d at 1133. The Supremacy Clause is irrelevant because there is no application of state law; federal law governs this federal claim.

Yeager’s arguments against application of the rule to his Lanham Act claim lack merit. The Ninth Circuit in *Canatella* noted the underlying purpose of the Single Publication Rule:

. . . the single publication rule exists to reduce[] the possibility of hardship to plaintiffs [and defendants] by allowing the collection of all damages in one case commenced in a single jurisdiction and prevent a multiplicity of actions, leading to potential harassment and excessive liability, and draining of judicial resources.

Canatella, 486 F.3d at 1135 (internal quotations and citations omitted). Yeager’s Lanham Act claim arises from the same Internet publication and overlaps entirely with his state law right of publicity claims. In such circumstances, and for the same policy reasons as recognized in *Oja* and *Canatella*, the Single Publication Rule should be held to apply to Yeager’s claim for false endorsement under the Lanham Act. *Oja*, 440 F.3d at 1130-34; *Canatella*, 483 F.3d at 1133-34.

b. The District Court Correctly Found Yeager’s Lanham Act Claim to Be Time-Barred Even Without Application of the Single Publication Rule.

The leading Ninth Circuit case governing the timeliness of a Lanham Act claim is *Jarrow Formulas, Inc. v. Nutrition Now, Inc.*, 304 F.3d 829, 836-37 (9th

Cir. 2002), which holds that state law statutes of limitation drive evaluation of a plaintiff's delay under the doctrine of laches.¹⁷

Laches will bar a plaintiff's claim when there has been an unreasonable delay in bringing suit and prejudice to the defendant from that delay. *Id.* at 838. In evaluating whether the delay was unreasonable, courts examine when the plaintiff knew or should have known of the claim, as well any proffered reason for the delay. *Id.* As the Lanham Act contains no express statute of limitations, courts "borrow" the limitations period from the most closely analogous action under state law in assessing the length of delay. *Id.* at 836. When a Lanham Act claim is filed after the analogous statute of limitations has expired, the *presumption* is that laches bars the suit. *Id.*, at 837. This presumption attaches if any part of the claimed wrongful conduct occurred beyond the limitations period. *Id.* at 837-38.

¹⁷ It is not entirely settled whether a statute of limitations may be applied directly to bar a Lanham Act claim. *See Jarow*, 304 F.3d at 837 ("While it is uncertain whether Congress intended the statute of limitations to be a separate defense, the analogous state limitations period nonetheless plays a significant role in determining the applicability of laches."). In this case, the District Court cited to the controlling case, *Jarrow*, but did not make express findings concerning laches, the unreasonableness of the delay, or the prejudice to the Bowlins. (5 ER 1320.) Its reasoning on those subjects may be inferred from its discussion of notice, equitable tolling and equitable estoppel. (5 ER 1315-19, 1323-27.) In addition, the District Court's decision may be affirmed on any appropriate ground, even one not set forth in its decision, and the record here supports a finding of laches as a matter of law. *See United Nat. Ins. Co. v. Spectrum Worldwide, Inc.*, 555 F.3d 772, 776 (9th Cir. 2009).

The most closely analogous state action here is that for violation of the right of publicity, which is governed by a two-year statute. Cal. Code Civ. Proc. § 339; *Long*, 116 Cal. App. 4th at 873; *Cusano*, 264 F.3d at 949-50.¹⁸ Yeager's Lanham Act claim is based upon the same allegedly wrongful conduct and injury as his right of publicity claims; the gravamen of the two claims is identical. (1 ER 125-130.) For its part, the District Court stated that either this two-year statute or the three-year statute for fraud was appropriate. (5 ER 1320.) Under either period, Yeager waited too long to file suit.

Yeager's Lanham Act claim is expressly based upon two alleged misuses of his name and image that fall *years* outside of any potentially applicable period. Yeager specifically identifies, for example, the Aviation Autographs website's use of a photograph of him with Gunther Rall inspecting merchandise and the metadata references as violating the Lanham Act. (1 ER 129, SAC, ¶¶ 90, 91.) These references were added in 2000 and 2001, respectively, and not altered after that point. (5 ER 1313-1314.) Yeager therefore delayed upwards of seven and one-half years before filing suit.

¹⁸ Because of his singular focus on the Single Publication Rule, Yeager does not identify the standards or time periods governing evaluation of the timeliness of a Lanham Act claim.

This delay was unreasonable. As noted above in Section VII(B)(1)(c), Yeager alleges that the Bowlins “never” had permission to use his name or image in this fashion. (1 ER 124, SAC, ¶ 63.) Yet, Yeager delayed filing suit on these alleged misuses that reached back to the year 2000, even as the situation degraded further at the *Tribute to Aces* event in October 2003, when it is undisputed that Yeager did not receive the number of *Leiston Legends* prints, payment of royalties, or reimbursement of expenses to which he now claims he was entitled. (5 ER 1316.) Yeager continued to delay, despite conceding below that he was on notice of the breach of oral contract claims no later than July 2004. (5 ER 1317.) Indeed, Yeager already had additional lawyers at Sullivan & Cromwell (beyond those already involved in his lawsuit with his children) in place advancing his right of publicity claims no later than early 2005, and perhaps much sooner, as they sent out their first letter to the Bowlins in February 2005 with the cease and desist letter following in August 2005. (5 ER 1323; 2 ER 438, 468.) Yeager’s delay, in the face of these events, was unreasonable. *See Jarrow*, 304 F.3d at 838-39 (finding delay more than double the limitations period unreasonable); *E-Systems, Inc. v. Monitek, Inc.*, 720 F.2d 604, 607 (9th Cir. 1983) (laches barred action even though plaintiff claimed no actual knowledge of the defendant’s activities until the year the suit was filed: “Plaintiff ought to have discovered defendant’s use sooner had it been diligently enforcing its mark.”)

Yeager's delay was prejudicial. Not only did the Bowlins continue to operate and promote the website during the years of Yeager's delay, including with the uses of Yeager's name and image that he alleges were improper from the start, they were also *paying* Yeager in connection with the sale of items on that website, as well as entering into additional dealings with him concerning the sale of other merchandise through the website (*e.g.* the *Leiston Legends* prints in the summer of 2003). (5 ER 1308.) The Bowlins were harmed by, while Yeager directly profited from, this extensive delay. In such circumstances, the existence of prejudice is manifest. *Jarrow*, 304 F.3d at 839-40 (prejudice found where defendant used challenged product characterization as part of its marketing campaign), citing *Hot Wax, Inc. v. Turtle Wax, Inc.*, 191 F.3d 813 (7th Cir. 1999) (plaintiff failed to contest defendant's portrayal of product for years, and investments to maintain this portrayal constitute prejudice); *Whittaker Corp. v. Execuair Corp.*, 736 F.2d 1341, 1347 (9th Cir. 1984).

Accordingly, the District Court's alternative grounds for finding the Lanham Act claim to be time-barred should be affirmed.

3. The District Court Correctly Found Yeager's Unfair Competition Claim to Be Time-Barred.

Yeager raises two arguments in seeking reversal of the ruling that his unfair competition law ("UCL") claim (Cal. Bus. & Prof. Code §§ 17200, *et seq.*) is time-barred. First, Yeager contends that the District Court erroneously applied the

Single Publication Rule. Second, Yeager asserts that the District Court’s alternative holding – that Yeager’s UCL claim fails because each of the derivative claims upon which it is based is time-barred – is contrary to *Cortez v. Purolator Air Filtration Prods. Co.*, 23 Cal. 4th 163 (2000). Yeager waived *both* points by failing to raise them before the District Court, and, in any event, is incorrect on both.

a. Yeager Waived this Argument By Failing to Present It to the District Court Below.

Yeager did not present this argument to the District Court. Yeager contested generally the application of the Single Publication Rule, arguing that the rule should not apply to *any of the claims* because the Bowlins allegedly continued to make sales of products bearing Yeager’s name, image or likeness. (SER 21-25). This continuing violation argument does not appear in Yeager’s Opening Brief and has therefore been abandoned. *See TAAG Linhas Hereas de Angola v. Transamerica Airlines, Inc.*, 915 F.2d 1351, 1353 n. 1 (9th Cir. 1990) (“Since those arguments were not raised in [Appellant’s] opening brief, they have been abandoned on appeal.” (citation omitted.)) Yeager did not contend below that the Single Publication Rule could not apply to his UCL claim because it is an equitable claim, did not raise the *Cortez* case, and did not otherwise argue that a UCL claim can be maintained even if the underlying predicate claims are time-barred. (SER

21-25, 30-32.) Accordingly, this Court should find these arguments to have been waived. *Hillis*, 626 F.3d at 1019.

b. The District Court Correctly Applied the Single Publication Rule to Yeager’s UCL Claim.

Yeager first argues that since the claim is equitable, the Single Publication Rule cannot apply. UCL claims, however, are subject to what is known as the “absolute barrier” defense; a UCL claim “cannot be used to state a cause of action the gist of which is absolutely barred under some other principle of law.” *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.*, 17 Cal. 4th 553, 566 (1998). This principle bars Yeager’s attempted end-run around the Single Publication Rule.

As set forth by the California Supreme Court in *Cel-Tech Communications v. Los Angeles Cellular Telephone Co.*:

Specific legislation may limit the judiciary’s power to declare conduct unfair. If the Legislature has permitted certain conduct or considered a situation and concluded no action should lie, courts may not override that determination. . . .

. . . We [have] rejected the claim that a plaintiff may, in effect, plead around absolute barriers to relief by relabeling the nature of the action as one brought under the unfair competition statute. A bar against an action may not be circumvented by recasting the action as one under Business and Professions Code section 17200. . . .

20 Cal. 4th 163, 182-83 (1999) (internal quotations, citations omitted); *see also*

Chabner v. United of Omaha Life Ins. Co., 225 F.3d 1042, 1048 (9th Cir. 2000)

(“A court may not allow a plaintiff to ‘plead around an absolute bar to relief simply by recasting the cause of action as one for unfair competition.’”); *Rubin v. Green*, 4

Cal. 4th 1187, 1200-1204 (1993) (litigation privilege, which provides defendant absolute protection from civil tort liability, also applies to claim brought under UCL).

Here, Yeager seeks to circumvent the absolute bar of the Single Publication Rule merely by re-styling his claim as one under the UCL. The absolute barrier doctrine precludes this effort. Given the breadth of the UCL, a contrary conclusion would risk the *de facto* excision of the Single Publication Rule from the California Civil Code and undermine the rule's objective of preventing piecemeal liability and the potential endless tolling of the statute of limitations. *See Christoff*, 47 Cal. 4th at 806-07. Plaintiffs would simply re-style statutory and common law right of publicity claims and defamation and numerous other publication-based torts as claims under the UCL in order to escape an absolute bar to relief. Such an end run is precisely what the absolute barrier doctrine seeks to prevent. *See Cel-Tech*, 20 Cal. 4th at 182-184.¹⁹

¹⁹ Deciding that the Single Publication Rule applies, however, does not determine the applicable statute of limitations. In this case, however, the Court need not determine whether the UCL's four-year statute applies, or whether, because the gravamen of the action arises out of an alleged violation of the right of publicity, a shorter two-year period applies, particularly in light of the applicability of the Single Publication Rule. *See Davies v. Krasna*, 14 Cal. 3d 502, 515 (1975) (holding that the nature of the right sued or the principal purpose of the action, rather than the form of action or relief demanded, determines the applicable statute of limitation); *Wyatt v. Union Mortg. Co.*, 24 Cal. 3d 773, 786 n.2 (1979) (same). As the District Court found, the last publication here occurred no later than

c. Even If the Single Publication Rule Did Not Apply, Yeager Still Waited Too Long to File Suit.

The statute of limitations under the UCL is four years, which begins to run on the date the claim accrues. Cal. Bus. & Prof. Code § 17208. The California Supreme Court has not definitively held whether or not the discovery rule applies to UCL claims (presuming, for this purpose, no application of the Single Publication Rule), and a split has developed among California appellate courts on the issue. Compare *Snapp & Assocs. Ins. Servs., Inc. v. Robertson*, 96 Cal. App. 4th 884, 891 (2002) with *Broberg v. Guardian Life Ins. Co. of Am.*, 171 Cal. App. 4th 912, 920 (2009).

Yeager's claim does not require this Court to resolve the split. The same facts that placed Yeager on notice of his breach of oral contract and fraud claims similarly demonstrate notice as to this claim. (*See* 5 ER 1315-19.) Furthermore, as the District Court correctly found, the undisputed evidence shows that "[t]he alleged violations of plaintiffs' privacy rights were vividly apparent on defendants' website since its inception" (5 ER 1327). Yeager's UCL claim therefore accrued no later than October 2003 when the last publication concerning the Tribute to Aces program was added to the website.

October 2003, and Yeager waited more than four years to file suit. (5 ER 1320, 1322-1323.) The claim is therefore time-barred even under the longer period.

In addition, and as an alternative basis to support the District Court's ruling, Yeager's UCL claim is also barred by the doctrine of laches. *See* Section VII(B)(1)(b)(2)(a), *supra*; *Jarrow*, 304 F.3d at 842-43 (applying laches to UCL and False Advertising claims); *Spectrum Worldwide, Inc.*, 555 F.3d at 776.

4. The District Court Correctly Found Yeager's False Advertising Claim to Be Time-Barred.

Relying upon the same arguments that were raised with respect to the UCL claim, Yeager disputes the District Court's application of the Single Publication Rule to his Business & Professions Code section 17500 False Advertising claim. As with the Lanham Act and UCL claims, the Court need not reach this issue because Yeager did not preserve this issue by raising it below. (SER 21-25, 30-32.) Moreover, Yeager does not otherwise establish why this claim is timely. The gravamen of this false advertising claim, as the three claims before it, is that the Bowlins allegedly misused Yeager's name and image on the Aviation Autographs website. Yet, there were no modifications to the alleged "false advertising" after October 2003, which is well outside of the statutory period, whether a two-year statute applies, given that the gravamen of this action sounds in an alleged violation of the right of publicity, or the three-year statute used by the

District Court applies.²⁰ In addition, as with the UCL claim, this Court may also affirm the District Court on the alternative basis that laches bars Yeager from pursuing this claim. *See Jarrow*, 304 F.3d at 842-43; *Spectrum Worldwide, Inc.*, 555 F.3d at 776.

As for the Single Publication Rule, the District Court correctly concluded it should apply. Yeager's False Advertising claim is premised upon the same single internet publication and the same allegedly tortious conduct as his right of publicity, Lanham Act, and UCL claims. Allowing Yeager to escape the strictures of the Single Publication Rule, through the mere expedience of attaching a fresh label to what is, in essence, the same claim, would defeat the underlying purpose and public policy supporting the rule. *See, Cel-Tech*, 20 Cal. 4th at 184. It is the gravamen of Yeager's claims that drives the result.

Accordingly, the District Court's holding that Yeager's False Advertising claim is time-barred should be affirmed.

²⁰ *See* footnote 19, *supra*; *see also Iverson, Yoakum, Papiano & Hatch v. Berwald*, 76 Cal. App. 4th 990, 995 (1999) ("Neither the caption, form, nor prayer of the complaint will conclusively determine the nature of the liability from which the cause of action flows. Instead, the true nature of the action will be ascertained from the basic facts") (internal quotation omitted).

5. The District Court Correctly Rejected Yeager’s Reliance on the Equitable Tolling and Equitable Estoppel Doctrines.

Yeager challenges the District Court’s refusal to apply equitable tolling and equitable estoppel. It is not clear on appeal, however, which doctrine Yeager seeks to apply and why. Yeager reviews none of the elements of either doctrine, and his argument on appeal is different from the one raised below.

Yeager argued below that he was induced to delay suit by the Bowlins’ alleged statements concerning the Hey Pard and F-15 prints and First Day Covers during the Yeager intra-family litigation concerning ownership of those prints. (SER 37; *see also* SER 86-90, RT 22-26.) On appeal, Yeager takes a new approach, asserting that equitable tolling should apply because of purported disputed facts concerning whether Yeager was on notice concerning his claim relating to the *Leiston Legends* prints. (AOB 55-56.) This argument was not raised below. As such, Yeager waived his current challenge with respect to equitable tolling or estoppel. *Hillis*, 626 F.3d at 1019. Moreover, as discussed in the next section, there are no disputed issues of fact, and the District Court should be affirmed.

a. Yeager Has Not Established that Equitable Tolling Should Apply.

Equitable tolling focuses on whether there was excusable delay by the plaintiff: “If a reasonable plaintiff would not have known of the existence of a

possible claim within the limitations period, then equitable tolling will serve to extend the statute of limitations for filing suit until the plaintiff can gather what information he needs.” *Santa Maria v. Pacific Bell*, 202 F.3d 1170, 1178 (9th Cir. 2000).²¹ In citing this doctrine, Yeager not only fails to identify any supporting and admissible evidence in the record, he also ignores the District Court’s analysis concerning the accrual of these two claims, wherein the District Court explained in detail why Yeager was or should have been on notice of his claims well outside of the statutory periods. (5 ER 1315-18.)²²

Yeager also fails to confront the significance of his retention of counsel. Equitable tolling ceases upon the retention of counsel, as then the plaintiff “has gained the ‘means of knowledge’ of her rights and can be charged with

²¹ The term “equitable tolling” has been used to refer to distinct doctrines. California courts, for example, have used the term in reference to situations where a plaintiff has several legal remedies, and, in good faith, pursues one rather than another. *See, e.g., Lantzy v. Centex Homes*, 31 Cal. 4th 363, 370 (2003). This Court has used the term in a manner that overlaps with the discovery rule. *See Santa Maria*, 202 F.3d at 1178. Given the thrust of Yeager’s new argument on appeal, the Bowlins assume Yeager is referring to the latter use of the term, not the former.

²² *Aronsen v. Crown Zellerbach*, 662 F.2d 584 (9th Cir. 1981), cited by Yeager, is inapposite. There are no disputed issues of fact here; indeed, Yeager introduced no admissible evidence to support his contentions. Moreover, the statement from *Aronsen* cited by Yeager was specific to the claim then before the Court, which arose under the Age Discrimination in Employment Act, 29 U.S.C. § 621-634: “In ADEA cases, equitable tolling or estoppel almost invariably involves the credibility of the various witnesses” *Id.* at 595.

constructive knowledge of the law’s requirements.” *Leorna v. U.S. Dep’t of State*, 105 F.3d 548, 551 (9th Cir. 1997). Yeager retained attorneys as early as 2004 to address issues concerning the Bowlins. (2 ER 409 (in email dated June 27, 2004, Yeager advises the Bowlins in connection with intra-family dispute “to be available by phone for our attorney during the week of the trial July 5-9 [2004]”); 4 ER 970 (accountings produced by Bowlins pursuant to subpoena); 2 ER 438-39, 468 (Sullivan & Cromwell letters)). Tolling, in other words, would have ceased well outside of the relevant statutory periods.

The District Court’s rejection of this doctrine should be affirmed.

b. Yeager Has Not Established that Equitable Estoppel Should Apply.

Equitable estoppel applies in circumstances “in which a party will be estopped from asserting the statute of limitations as a defense to an admittedly untimely action because his conduct has induced another into forbearing suit within the applicable limitations period.” *Lantzy*, 31 Cal. 4th at 383. The defendant’s “statement or conduct must amount to a misrepresentation bearing on the *necessity* of bringing suit; the defendant’s mere denial of *legal liability* does not set up an estoppel. *Id.* at 384 & n.18, citing *Vu v. Prudential Property & Casualty Ins. Co.*, 26 Cal. 4th 1142, 1152-1153 (2001). The plaintiff therefore must establish both a false representation by the defendant concerning the need to file suit, and reasonable reliance thereupon. *Id.* at 384, 385. In essence, the defendant

must have “directly prevented [the plaintiff] from filing their suit on time.” *Id.* at 385; *see also Santa Maria*, 202 F.3d at 1176.

In this case, undisputed evidence supports the District Court’s rejection of equitable estoppel. As the intra-family litigation progressed, Yeager never relied upon anything stated by the Bowlins, aggressively challenged the Bowlins on all issues, and accused them of behaving unlawfully and in a deceptive manner. (5 ER 1326.)²³ The Bowlins, for their part, never instructed Yeager not to take action, but instead simply stated what they, the Bowlins, would be doing: Waiting for the intra-family lawsuit to end before delivering these three sets of prints to one side or the other. (2 ER 443.) The District Court’s decision on this issue should be affirmed.

6. Yeager Has Not Contested the District Court’s Grant of Summary Judgment on the Breach of Written Contract, Accounting or Rescission Claims.

The District Court granted summary judgment on Yeager’s claims for Breach of Written Contract, Accounting and Rescission. (5 ER 1327, 1330.) Yeager does not challenge these findings.

²³ Citing 2 ER 404, 406-07, 411-12, 429-50, 454, 468, 470.

7. The District Court's Grant of Summary Judgment Should Be Affirmed on the Alternative Ground that Yeager Did Not Meet His Burden of Proof.

The Bowlins submitted extensive evidence in meeting their initial burden on the motion for summary judgment. Yeager, as the nonmoving party, was therefore required to come forward with admissible evidence from which a reasonable trier of fact could find in his favor. *See In re Oracle Sec. Litig.*, 627 F.3d at 385-386, 387; *Triton Energy Corp. v. Square D. Co.*, 68 F.3d 1216, 1221 (9th Cir. 1995). He could not simply rest on his allegations. *See Nissan Fire & Marine Ins. Co.*, 210 F.3d at 1103. In this case, Yeager failed to support his claims with admissible evidence. The large bulk of his affirmative evidence was excluded, leaving only contentions and allegations. On this alternative ground, the decision of the District Court should be affirmed. *N.L.R.B. v. Int'l Ass'n of Bridge, Structural & Ornamental Ironworkers, AFL-CIO, Local 433*, 549 F.2d 634, 639 (9th Cir. 1977) (summary judgment is proper when a plaintiff fails to provide the court with admissible evidence to support its claims); *Draper v. Coeur Rochester, Inc.*, 147 F.3d 1104, 1111 (9th Cir. 1998).

C. The District Court Correctly Awarded the Bowlins Their Attorney's Fees.

The District Court awarded the Bowlins their reasonable attorney's fees and costs as the prevailing party on Yeager's Section 3344 Statutory Right of Publicity claim, which contains a mandatory fee shifting provision. Cal. Civ. Code

§ 3344(a). Yeager raises only *one* point of alleged error: That the District Court erred in considering additional evidence submitted by the Bowlins' counsel regarding the allocation of time to particular billed tasks.²⁴ In Yeager's view, it would have been better for the District Court to apply an arbitrary percentage reduction across the board, or deny the request outright, rather than consider whether the additional evidence could reasonably be relied upon to assess the reasonableness of the fee request. Nothing in the law compels such an absurd result.

The Bowlins submitted detailed contemporaneous billing records, extensive declarations, and other documentation in support of their original fee application. (5 ER 1378 - 6 ER 1635.) Upon review of those materials, the District Court raised the concern that a number of time entries did not allocate a specific amount of time to each task; in other words, the District Court was concerned that "block billing" might impair its ability to determine the reasonableness of the hours expended. (7 ER 1831.)

The District Court provided the Bowlins the "opportunity to submit an amended billing statement that [would] allow the court to determine the

²⁴ Yeager also argues this decision should be reversed because the District Court was incorrect in finding Yeager's claims to be time-barred. For the reasons set forth above, this argument lacks merit.

reasonableness of defendants' fee request." (7 ER 1832.) Upon receipt of the amended invoices providing this information, Yeager filed an additional opposition brief in which he failed to identify even one allocation as unreasonable. (7 ER 1834-1966; 1967; 1981.)²⁵ Instead, Yeager argued, just as he does here, only that the Court should not consider the amended billing statements at all. (7 ER 1967.)

Yeager acknowledges, however, that the "Ninth Circuit has held that it is not an abuse of discretion for district courts to accept reconstructed time records." (AOB 62.) "An abuse of discretion is found only when there is a definite conviction that the court made a clear error of judgment in its conclusion upon weighing relevant factors." *Welch v. Metropolitan Life Ins. Co.*, 480 F.3d 942, 945 (9th Cir. 2007). In this case, far from constituting an abuse of discretion, the District Court's approach was diligent, careful, and well-reasoned.

Indeed, Ninth Circuit law authorizes the approach taken by the District Court. Contrary to Yeager's assertion, it would have been error for the District Court to deny the Bowlins' fee application outright because of the presence of block-billed entries. In this respect, Yeager notably fails to cite the Ninth Circuit's recent pronouncement on block billing, *Mendez v. County of San Bernardino*,

²⁵ Such a challenge would have been without merit. The case was leanly staffed, efficiently litigated, and counsel for the Bowlins wrote off tens of thousands of dollars in fees before invoices were even issued. (8 ER 1998, 2008; 6 ER 1417, 1420, 1430.)

where it confirmed that while block billing may provide the basis for reducing or eliminating certain claimed hours, it does *not* provide the basis for denying all fees. 540 F.3d 1109, 1128-1129 (9th Cir. 2008); *see also Welch*, 480 F.3d at 948. As a starting point, therefore, the District Court did not abuse its discretion in not denying the Bowlins' fee application outright because a number of time entries were block-billed.²⁶

As for the amended invoices, ample Ninth Circuit authority supports reliance upon reconstructed time records, "if reasonable under the circumstances and supported by other evidence such as testimony or secondary documentation." *Frank Music Corp. v. Metro-Goldwyn-Mayer Inc.*, 886 F.2d 1545, 1557 (9th Cir. 1989); *see also Fischer v. SJB-P.D. Inc.*, 214 F.3d 1115, 1121 (9th Cir. 2000) ("fee requests can be based on 'reconstructed records developed by reference to litigation files'") (citations omitted); *Davis v. City & County of San Francisco*, 976 F.2d 1536, 1542 (9th Cir. 1992) ("The district court, however, properly allowed appellees' counsel to supplement their time sheets with additional documentation

²⁶ In fact, the District Court would have been within its discretion to award the Bowlins the fees sought on the original record. *See, e.g., Hensley v. Eckerhart*, 461 U.S. 424, 437 n.12 (1983) (counsel not required to record in "great detail how each minute of his time was expended"); *Fitzgerald v. City of Los Angeles*, 2009 WL 960825, *8 (C.D. Cal. April 7, 2009) (finding block billing acceptable where "[m]any of [the] entries identified as block-billing are actually different parts of the same task....")

of their efforts. ‘Basing the attorneys’ fee award in part on reconstructed records developed by reference to litigation files and other records is not an abuse of discretion.’”) (citing *Bonnette v. Cal. Health & Welfare Agency*, 704 F.2d 1465, 1473 (9th Cir. 1983), *rev’d in part on other grounds*, *Davis v. City & County of Sacramento*, 984 F.2d 345 (9th Cir. 1993); *U.S. v. \$12,248 U.S. Currency*, 957 F.2d 1513, 1521 (9th Cir. 1991) (same); *United States v. City and County of San Francisco*, 748 F. Supp. 1416, 1420 (N.D. Cal. 1990) (declining to reduce fee award after court ordered supplementation of allegedly vague time records based upon the litigation file and “the temporal and factual context of the challenged events”); *Montgomery v. Etreppid Tech., LLC*, 2008 WL 820072, *6 (D. Nev. March 24, 2008) (court ordered and considered supplemental billing statements itemizing date, time, and services performed in motion for attorney’s fees).

Moreover, the “reconstruction” in this case was limited. The contemporaneous, detailed billing statements that had been sent to the Bowlins throughout the case were filed with the District Court in support of the original motion. (5 ER 1378; 6 ER 1415-1540.) The reconstruction, therefore, was limited to allocating time among the discrete tasks that had already been identified in the contemporaneously prepared statements. (7 ER 1834-1966.) Such an effort is a far cry from the complete reconstruction of a billing record, and counsel’s

methodology and the sources consulted were described in a comprehensive declaration. *Id.*

The Bowlins having met their *prima facie* burden, it was Yeager's burden to come forward with evidence, not mere argument, in opposition to Defendants' fee request. *Gates v. Deukmejian*, 987 F.2d 1392, 1397-1398 (9th Cir. 1992) ("The party opposing the fee application has a burden of rebuttal that requires submission of evidence to the district court challenging the accuracy and reasonableness of the hours charged or the facts asserted by the prevailing party in its submitted affidavits."). Yeager did not do so. As on this appeal, Yeager did not identify even one allocation as unreasonable.

In nonetheless claiming error, Yeager, as he did below, instead relies primarily on inapplicable and distinguishable out-of-circuit authority. For example, Yeager relies on *Grendel's Den, Inc. v. Larkin*, 749 F.2d 945, 952 (1st Cir. 1984), which announces the rule in the First Circuit: "[I]n cases involving fee applications for services rendered after the date of this opinion, the absence of detailed contemporaneous time records, except in extraordinary circumstances, will call for a substantial reduction in any award or, in egregious cases, disallowance." Yeager also relies on *New York State Ass'n. for Retarded Children, Inc. v. Carey*, 711 F.2d 1136, 1148 (2d Cir. 1983), setting forth the rule in the Second Circuit: "Hereafter, any attorney . . . who applies for court-ordered

compensation in this Circuit for work done after the date of this opinion must document the application with contemporaneous time records.” These cases do not reflect the rule in the Ninth Circuit, which does not have a *per se* rule against reconstructed records. *E.g., Fischer*, 214 F.3d at 1121; *\$12,248*, 957 F.2d at 1521. Further, these cases do not address block-billing, and the Bowlins *did* originally submit contemporaneously prepared billing statements – the statements just did not comprehensively allocate time to each specific described task. These two out-of-circuit cases, therefore, are not controlling or even adverse to the Bowlins.

While this Court’s precedents authorize limited percentage reductions to block-billed entries, they do not *mandate* them. A District Court does not abuse its discretion by requesting and then carefully assessing a full record on the reasonableness of the fees sought. The experienced District Court judge in this case diligently analyzed a complete evidentiary record and then awarded the Bowlins – who achieved complete success in this case – most but not all of the fees requested. (8 ER 1994.) The order should be affirmed in full.

VIII. CONCLUSION

Accordingly, the Judgment of the District Court, and its award to the Bowlins of their attorney's fees and costs, should be affirmed in full.

Respectfully Submitted

Dated: March 28, 2011

/s/ Todd M. Noonan
Todd M. Noonan
Stevens, O'Connell & Jacobs LLP
Attorneys for Defendants/Appellees
Connie and Ed Bowlin, et al., Appellees

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 32(a)(7)(C), I certify that this brief is proportionally spaced, has a typeface of 14-point, and contains 14,291 words, excluding the parts of the brief exempted by Federal Rules of Appellate Procedure 32(a)(7)(B)(iii). All printed copies of this brief are identical to the electronically filed copies.

Dated: March 28, 2011

/s/ Todd M. Noonan

STATEMENT OF RELATED CASES

I certify that there are no other known cases in this Court deemed related to this case pursuant to Circuit Rule 28.2.6.

Dated: March 28, 2011

/s/ Todd M. Noonan

CHARLES YEAGER, et al. v. CONNIE BOWLIN, et al.
United States Court of Appeals for the Ninth Circuit
Appellate Court Case No. 10-15297
District Court Case No. 2:08-cv-00102-WBS-JFM

CERTIFICATE OF SERVICE

**When All Case Participants are Registered for the Appellate
CM/ECF System**

I am employed in the county of Sacramento, State of California. I am over the age of 18 and not a party to the within action; my business address is 400 Capitol Mall, Suite 1400, Sacramento, California 95814.

I, the undersigned, hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on March 28, 2011.

APPELLEES' ANSWERING BRIEF

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

I also hereby certify that on March 28, 2011, I served the following document(s) by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

APPELLEES' SUPPLEMENTAL EXCERPTS OF RECORD

Jon R. Williams Boudreau Williams LLP 666 State Street San Diego, CA 92101	Clerk, Ninth Circuit Court of Appeals 95 7th Street San Francisco, CA 94119 (4 sets)
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X (BY OVERNIGHT DELIVERY) I placed each such sealed envelope, with delivery fees provided for, for collection and overnight delivery at Stevens, O'Connell & Jacobs LLP, Sacramento, California following ordinary business practices. I am readily familiar with the practice of Stevens, O'Connell & Jacobs LLP for collection and processing of correspondence for overnight delivery, said practice being that in the ordinary course of business, correspondence is deposited in the facility

regularly maintained by the express services carrier the same day as it is placed for collection.

Dated: March 28, 2011

/s/ DANIELLE Y. POWERS
DANIELLE Y. POWERS

Docket Nos. 10-15297/10-16503

United States Court of Appeals
For the Ninth Circuit

CHARLES E. "CHUCK" YEAGER, et al.,

Plaintiffs and Appellants,

v.

CONNIE BOWLIN, et al.,

Defendants and Appellees.

Appeal from the United States District Court
for the Eastern District of California, Sacramento
Case No. 2:08-cv-00102-WBS-JFM

Honorable William B. Shubb, United States District Court Judge

**UNOPPOSED MOTION TO FILE OVERSIZED BRIEF
[CIRCUIT RULE 32-2]**

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Attorneys for Defendants and Appellees
CONNIE BOWLIN, et al.

Defendants and appellees Connie Bowlin, Ed Bowlin, Aviation Autographs, and Bowlin & Associates, Inc. (“Appellees”), pursuant to Ninth Circuit Rule 32-2 and based upon the Declaration of Todd M. Noonan attached hereto, hereby move this Court for permission to file an oversized Appellees’ Answering Brief totaling 14,921 words.

The grounds for this motion are that the proposed oversized brief contains briefing on two separate appeals: The first (Docket No. 10-15297) addresses the District Court’s original Judgment, and the second (Docket No. 10-16503) addresses the District Court’s subsequent award of attorneys’ fees and costs. Taken separately, Appellees’ discussion in their Answering Brief of each appeal would be less than the applicable word count limitations. Because both appeals share the same underlying lawsuit and the same facts, as well as the same record, this Court ordered them consolidated upon the parties’ stipulated motion on November 2, 2010. Together, the discussion of both appeals exceeds the 14,000-word count limitation.

Accordingly, for much the same reason that Appellants requested and received permission to file an over-sized brief, Appellees request permission to file a brief in excess of the word count limitation.

Respectfully Submitted

Dated: March 28, 2011

STEVENS, O'CONNELL & JACOBS LLP

/s/ Todd M. Noonan
Todd M. Noonan
Attorneys for Appellees

DECLARATION OF TODD M. NOONAN

I, Todd M. Noonan declare:

1. I am an attorney duly admitted to practice before this Court, and a partner at the law firm of Stevens, O'Connell & Jacobs LLP. I am counsel of record for the Appellees in this matter and the attorney primarily responsible for the handling of this appeal.

2. Consolidation: As the Court's docket reflects, this is a consolidated appeal, including for purposes of briefing both Docket No. 10-15297 (addressing the District Court's original Judgment), and Docket No. 10-16503 (addressing the District Court's subsequent award of attorneys' fees and costs). Because both appeals share the same underlying lawsuit and the same facts, as well as the same record, this Court ordered the two appeals consolidated upon the parties' stipulated motion on November 2, 2010.

3. Numerosity of the Issues: Appellant's Opening Brief raises numerous issues relating to application of the Single Publication Rule, including with respect to application of that rule to claims brought pursuant to the Lanham Act and California's Unfair Competition Law. These are issues that require substantial analysis. From Appellees' perspective, important issues of waiver are also implicated by Appellants' Opening Brief,

which require separate discussion. And, of course, the separate issue of the propriety of the award of attorney's fees needed to be addressed. Indeed, for similar reasons, Appellant was granted permission to file an over-sized Opening Brief.

4. Diligence and Good Cause: I have diligently attempted to draft the Appellees' Answering Brief to conform to the word count limitations set forth in Rule 32. In so doing, I have substantially edited each draft in an effort to fall within the 14,000 word count limit, but have been unable to further do so without compromising the quality of my clients' presentation and arguments on appeal. Thus, I respectfully request that the Court allow the filing of this oversized Appellees' Answering Brief containing 14,921 words, as it exceeds the word count limitation only by 921 words, and only does so because of the consolidation of the appeal, as the discussion of the attorney's fees appeal itself required 1,427 words.

5. Non-Opposition of Opposing Counsel: I contacted Jon R. Williams, counsel of record for Plaintiffs and Appellants to inquire about his position regarding my filing of the proposed oversized Appellees' Answering Brief. Mr. Williams graciously responded that he has no opposition to this motion under the circumstances.

I declare under penalty of perjury under the laws of the State of California and the United States of America that the foregoing is true and correct. Executed this 28th day of March 2011, at Sacramento, California.

/s/ TODD M. NOONAN
TODD M. NOONAN

CHARLES YEAGER, et al. v. CONNIE BOWLIN, et al.
United States Court of Appeals for the Ninth Circuit
Appellate Court Case No. 10-15297
District Court Case No. 2:08-cv-00102-WBS-JFM

CERTIFICATE OF SERVICE

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I, the undersigned, hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on March 28, 2011.

**UNOPPOSED MOTION TO FILE OVERSIZED BRIEF
[CIRCUIT RULE 32-2]**

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: March 28, 2011

/s/ DANIELLE Y. POWERS
DANIELLE Y. POWERS