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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

BARBARA HUBBARD,)	Civil No. 09-1581-JLS (WVG)
)	
Plaintiff,)	ORDER AFTER ORDER TO
)	SHOW CAUSE HEARINGS
v.)	
)	
PLAZA BONITA, L.P., et al.,)	
)	
Defendants.)	
)	
_____)	

I

PROCEDURAL BACKGROUND

On July 22, 2009, Plaintiff Barbara Hubbard (hereafter "Plaintiff" or "Barbara"), filed a Complaint against the Plaza Bonita Shopping Center, and most, if not all, of the tenants at the shopping center.^{1/} The Complaint alleges that all of the named Defendants violated the Americans With Disabilities Act (hereafter "ADA").

After the Complaint was filed, Plaintiff settled her action with numerous named Defendants. On February 25, 2010, the Court

^{1/} Plaintiff's Complaint names at least 44 Defendants.

1 conducted a Settlement Disposition Conference with the remaining
2 Defendants. Lynn J. Hubbard III (hereafter "Plaintiff's counsel"),
3 appeared in person at the conference on behalf of Plaintiff. David
4 Peters appeared in person at the conference on behalf of Defendant
5 Flava Enterprises (hereafter "Flava"). Jonathan Block appeared by
6 telephone at the conference on behalf of Hot Topic. Tony Bucchignani
7 appeared by telephone on behalf of Defendant Westfield America. At
8 that time, Defendants Hot Topic and Westfield America, *inter alia*,
9 had entered into settlement agreements with Plaintiff, but Defendant
10 Flava had not. At the conference, Plaintiff's counsel informed the
11 Court that Plaintiff had passed away on November 13, 2009.^{2/}

12 After the conference, the Court directed Plaintiff's counsel
13 to file a Notice of Death pertaining to Plaintiff, pursuant to
14 Federal Rule of Civil Procedure 25. On March 17, 2010, Plaintiff's
15 counsel filed the Notice of Death of Plaintiff. The Notice states
16 that Plaintiff passed away on November 13, 2009.

17 On March 29, 2010, Plaintiff's counsel filed a Motion to
18 Substitute Barbara with Barbara's surviving husband, Lynn J.
19 Hubbard, II (hereafter "Lynn").^{3/}

20 On May 12, 2010, Plaintiff's counsel filed an Ex Parte Motion
21 to Dismiss this action as to the remaining Defendant Flava. On June
22 1, 2010, Defendant Flava filed an Opposition to the Motion to
23 Dismiss and requested that an Order To Show Cause (hereafter "OSC"),
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26 ^{2/} Flava's counsel received a proposed settlement agreement from
27 Plaintiff's counsel. However, Flava's counsel suspected that someone
28 other than Plaintiff may have signed the proposed settlement
agreement because it was faxed to him on December 9, 2009, nearly a
month after Barbara had died.

^{3/} Plaintiff's counsel was the son of Barbara and Lynn.

1 hearing be held regarding the potential falsification of Barbara's
2 signature, after her death, on the settlement agreement with Flava.

3 On June 2, 2010, the District Judge assigned to this case
4 denied Plaintiff's counsel's Motion to Substitute Barbara with Lynn
5 because, by that time, Lynn had also passed away.^{4/}

6 On June 23, 2010, Flava's Motion for an OSC was granted. The
7 Order Granting the Motion for an OSC directed Plaintiff's counsel to
8 address several topics raised by Flava's Motion. Thereafter,
9 Plaintiff's counsel and Flava filed briefs regarding the issues that
10 the Court directed to be addressed.

11 On June 28, 2010, the District Judge assigned to this case
12 referred the OSC to the undersigned.

13 On October 12, 2010, the Court held a hearing on the OSC.^{5/}
14 Prior to the hearing, Plaintiff's counsel filed his own declaration,
15 supported by four of his other clients, that stated that the

16 standard operating procedure for (Plaintiff's coun-
17 sel) and the Disabled Advocacy Group is for clients
18 to sign a document - it's called '(S)ignature
19 (A)greement' and all it characterizes is basically a
20 special *power of attorney* that allows the Disabled
21 Advocacy Group to execute any kind of settlement
agreement and/or endorse any settlement check or document in connection with the specific lawsuit in question in which the client is being represented... (OSC Hearing Transcript, October 12, 2010 at 12) (emphasis added).^{6/}

22 ^{4/} Plaintiff's counsel informed the Court that on March 31, 2010, Lynn
23 passed away.

24 ^{5/} The original OSC hearing was set for August 24, 2010. However,
25 counsel requested extensions of time to file the requested briefing.
Therefore, the Court rescheduled the OSC hearing to October 12,
2010.

26 ^{6/} The "Signature Agreement" states: "I hereby agree that the Disabled
27 Advocacy Group, APLC has my permission to execute any kind of
settlement agreement and/or endorse any settlement check or document

28 (continued)
in connection with my Americans with Disabilities Act Lawsuit
against [name of defendant(s)]." The Court refers to the "Signature

1 Pursuant to the Power of Attorney, the Court found that the
2 signature on the Settlement Agreement provided to Mr. Peters on
3 behalf of Flava, was not in fact, the signature of Barbara. (OSC
4 Hearing Transcript, October 12, 2010 at 12).^{1/}

5 At the hearing, the Court requested that counsel file further
6 briefing on several topics discussed at the hearing. Also, the Court
7 continued the OSC hearing to January 27, 2011. Thereafter, counsel
8 filed the requested further briefing.

9 On January 27, 2011, the Court held a continued OSC hearing.
10 At the hearing, the Court ordered Plaintiff's counsel to file
11 Supplemental Declarations regarding the authentication of Barbara's
12 signature. On February 10, 2011, the Supplemental Declarations were
13 filed with the Court.

14 On March 24, 2011, the District Judge assigned to this case
15 denied Plaintiff's Ex Parte Motion to Dismiss without prejudice,
16 pending the issuance of this Order.

17 II

18 ISSUES RAISED AT THE OSC HEARING

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22 Agreement as "Power of Attorney" or "POA."

23 The Power of Attorney signed by Barbara in connection with this
24 action is attached to the Declaration of Lynn Hubbard III in
25 Response to Order To Show Cause, filed August 3, 2010, Exh. D. The
26 Power of Attorney signed by Barbara in connection with another
lawsuit, Hubbard v. Otay Ranch Town Center, is attached to the
Declaration of Lynn Hubbard III in Response to Order To Show Cause,
filed August 3, 2010, Exh. E. The Court notes that the signatures on
Exhs. D and E appear to be different.

27 ^{1/} The Court notes that Plaintiff's counsel's Declaration directly
28 contradicts his February 25, 2010 statement to the Court that
"Barbara had signed numerous blank settlement agreements (prior to
her death)." The February 25, 2010 statement was made during a
Settlement Disposition Conference that was not on the record and was
not recited under oath.

1 The June 23, 2010 Order directed Plaintiff's counsel to
2 address the following topics:

3 1. Why he should not be required to present to the Court
4 documents and evidence that Plaintiff signed Exh. A,^{8/} attached to
5 Defendant's Supplemental Opposition to Plaintiff's Ex Parte Motion
6 to Dismiss and Request for Order To Show Cause (Doc. #182);

7 2. Why he should not be required to provide to the Court
8 additional known and genuine signatures of Plaintiff;

9 3. Why he should not be required to identify appearances that
10 Plaintiff personally made in this Court and any documents signed in
11 connection with those appearances;

12 4. Why a hearing should not be held as to whether the
13 signatures of Plaintiff in some or all of the settlement agreements
14 in this matter have been falsified, and if so, what actions are
15 appropriate to achieve accountability and deter those who would
16 engage in this conduct;

17 5. Why he should not be sanctioned for vexatious and
18 unreasonable multiplication of legal proceedings for:

19 (a) prolonging the litigation in this matter by
20 demanding settlements involving commitments to make changes to
21 settlement agreements after Plaintiff's death, including provisions
22 in settlement agreements awarding attorneys fees even if the changes
23 were not made;

24 (b) failing to timely disclose to the Court Plaintiff's
25 death;

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28 ^{8/} Exh. A. is identified as containing a purportedly known genuine
signature of Barbara.

1 6. Why his conduct should not be reported to the State Bar of
2 California;

3 7. Why he and his law firm (Law Offices of Lynn Hubbard III,
4 Disabled Advocacy Group, APLC) and the attorneys involved in this
5 matter should not be disqualified from further representation of
6 parties in litigation matters in this Court.

7 A. Plaintiff's Counsel's Factual Response To The OSC

8 On August 3, 2010, in response to the OSC, Plaintiff's
9 counsel described the circumstances under which Barbara signed the
10 settlement agreement with Flava Enterprises:

11 On November 11, 2009, Plaintiff's counsel met with Barbara,
12 who was hospitalized at the time, and told her that she was too
13 frail to continue prosecuting ADA cases. Barbara agreed and told
14 him to settle her last case for whatever he could and give the
15 proceeds to his father (Barbara's husband, Lynn).

16 On November 12, 2009, Plaintiff's counsel instructed his
17 assistant, Kaina Schukei, to offer to settle with Defendant Hot
18 Topic. Hot Topic counter-offered and the counter offer was accepted.

19 On November 13, 2009, Barbara passed away. She did not have
20 a will. Lynn was Barbara's sole beneficiary under California law and
21 could decide what to do with her case. Lynn instructed Barbara's
22 counsel to "finish up" the pending lawsuit.

23 Over the next six weeks, Plaintiff's counsel finalized, or
24 attempted to finalize, settlements with the remaining Defendants in
25 the case. However, neither David Peters (hereafter "Peters"), nor
26 his client Flava, signed the Settlement Agreement and when pressed

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1 to do so, cited Barbara's death^{2/} and his client's unwillingness to
2 make changes to its facility because her lawsuit was moot.

3 On March 15, 2010, David Chamberlin (then employed by
4 Plaintiff's counsel) sent Peters a letter informing Peters that Lynn
5 intended to substitute himself as Plaintiff under Fed. R. Civ. Pro.
6 25(a)(1), and was willing to agree to the original settlement.
7 Peters did not respond.

8 On March 29, 2010, Lynn moved to substitute himself as
9 Plaintiff. However, on March 31, 2010, Lynn passed away.

10 Plaintiff's counsel and his staff immediately asked Peters to
11 stipulate to dismiss the lawsuit because there was no Plaintiff left
12 in the case and no other person to substitute for Plaintiff. Most
13 defense attorneys probably would have jumped at the opportunity to
14 get out of the litigation. However, Peters declined the invitation.

15 Five weeks later, Plaintiff's counsel requested dismissal of
16 this action because the action was moot.

17 B. Flava's Response to Plaintiff's Counsel's Factual Response
18 To The OSC

19 Flava objected to Plaintiff's counsel's recitation of the
20 facts. He asserted that settlement offers which had been made to
21 Flava and Hot Topic had not been accepted prior to Barbara's death.
22 Instead, Flava and Hot Topic filed documents with the Court which
23 show that the offers for settlement were accepted after Barbara's
24 death.

24 The Certificate of Death filed by Plaintiff's counsel states
25 that Barbara passed away on November 13, 2009 at 12:55 PM. On
26 November 13, 2009 at 1:25 PM, Flava's counsel preliminarily accepted

27
28 ^{2/} Counsel for Flava learned of Barbara's death, not through any
communication initiated by Plaintiff's counsel, but coincidentally
from reading an article in The San Diego Reader newspaper.

1 Plaintiff's counsel's offer for settlement. After several changes
2 were made to the settlement agreement, on December 30, 2010, Peters
3 informed Plaintiff's counsel that Flava agreed to sign the settle-
4 ment agreement without any further changes. Plaintiff's counsel did
5 not respond to Peters.

6 C. Hot Topic's Position Regarding Settlement Of The Case

7 Hot Topic states, via the Declaration of Donna S. Gin, its
8 attorney:

9 On November 12, 2009, I received a letter via facsim-
10 ile from (Plaintiff's counsel's) office offering to
11 settle the case against Hot Topic... *I verbally*
12 *countered Plaintiff's offer... sometime on or after*
13 *November 16, 2009. Our counter-offer was accepted*
14 *verbally by (Plaintiff's counsel's) office on or*
15 *around December 1, 2009. On that day, I was told by*
16 *Kaina Schukei, (Plaintiff's counsel's) senior*
17 *paralegal that she would send over a draft settlement*
18 *agreement the following day. Until that point, we*
19 *had not discussed any of the terms of the settlement*
20 *agreement except for the dollar amount...*

21 On December 7, 2009, Ms. Schukei responded (to me)
22 via e-mail that our changes (to the settlement
23 agreement) were acceptable to Plaintiff's counsel and
24 that *she would get me signatures shortly.*

25 When Ms. Schukei told me she would "get signatures,"
26 I assumed she meant she would get the signatures of
27 Plaintiff Barbara and her attorney Lynn Hubbard
28 (III), as those were the only signature lines on the
agreement besides Hot Topic's.

On December 8, 2009, I received via facsimile a copy
of the settlement agreement which had a signature in
the blank for Barbara Hubbard. I believed the signa-
ture on the document was indeed that of Barbara
Hubbard because I had no reason to believe otherwise.
I forwarded this document to my client for signa-
ture...

Hot Topic was dismissed from this action on or about
January 11, 2010.

Even with all of the foregoing communications, no one
from (Plaintiff's counsel's) office ever informed me
of the death of Plaintiff Barbara Hubbard, nor did I
become aware of the same until long after Hot Topic
was dismissed from the action. Had I known about
(Barbara's) death at any time during the negotiation
of the settlement, I would have immediately halted
settlement discussions and notified my client of this
development.

1 (Declaration of Donna S. Gin re: Plaintiff's Ex Parte Motion
2 to Dismiss at 2-3) (emphasis added).

3 D. October 12, 2010 OSC Hearing

4 At the OSC hearing, the Court discussed with counsel the
5 topics enumerated in Section II of this Order. The Court was
6 satisfied with Plaintiff's counsel's explanations regarding several
7 of the topics noted.^{10/} However, the authenticity of Barbara's
8 signature on the Power of Attorney, and the survivability of the
9 Power of Attorney after Barbara's death^{11/} continued to be issues
10 that required further briefing. Therefore, the Court ordered
11 counsel to address those issues in further briefing. A continued
12 OSC hearing was held on January 27, 2011.

13 E. January 27, 2011 OSC Hearing

14 Prior to the January 27, 2011 hearing, counsel submitted
15 further briefing required by the Court on October 12, 2010. At the
16 hearing, counsel were given the opportunity to argue their respec-
17 tive positions regarding the authenticity of Barbara's signature and
18 the survivability of the Power of Attorney after Barbara's death.

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21 III

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23 ^{10/} While the Court initially and tentatively was satisfied with
24 Plaintiff's counsel's explanation, and was willing to give him "the
25 benefit of the doubt," it became apparent after full and final
26 reflection of the entire record and the case law presented, that
27 Petitioner's counsel did not deserve, nor was he entitled to enjoy,
28 the Court's continued willingness to give him the "benefit of the
doubt."

26 ^{11/} In addition to the issues noted above, the following issues also
27 remained unresolved: The imposition of sanctions on Plaintiff's
28 counsel for his conduct in this litigation, whether the Court should
report his conduct in this litigation to the State Bar of
California, and whether Plaintiff's counsel and his law firm should
be disqualified from further representation of parties in litigation
matters in this Court.

1 the case quickly. (Plaintiff's counsel's Declaration at
2 paras. 3-10; OSC Hearing Transcript, October 12, 2010, at 5-
3 6);

4 • As early as November 17, 2009, but certainly no later than
5 December 8, 2009, Lynn had assumed "unofficial"^{12/} control of
6 this lawsuit upon Barbara's passing and that Lynn was
7 "ratifying" settlement agreements. (Plaintiff's counsel's
8 Declaration at paras. 17-21; OSC Hearing Transcript, October
9 12, 2010, at 6-10). Nowhere in the Declaration does Plain-
10 tiff's counsel even mention that Mr. Kohler was being
11 considered as Barbara's successor in interest.

12 • Barbara did not, in fact, sign numerous blank settlement
13 agreements, but rather executed a power of attorney giving
14 Plaintiff's counsel authority to sign a settlement agreement
15 on her behalf, which was standard and customary practice of
16 Plaintiff's counsel's law firm. (Plaintiff's counsel's
17 Declaration at paras. 34-36; OSC Hearing Transcript, October
18 12, 2010, at 11-12).

19 B. Authenticity of Barbara's Signature

20 At the January 27, 2011 hearing, the Court found that on the
21 record presented to it at that time, Plaintiff's counsel had failed
22 to properly authenticate Barbara's signature on the Power of
23 Attorney. (OSC Hearing Transcript, January 27, 2011, at 4-9).
24 Therefore, the Court ordered Plaintiff's counsel to file supplemen-
25 tal declarations of two of Barbara's family members to properly
26 authenticate Barbara's signature. On February 10, 2011, Plaintiff's
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28 ^{12/} "Unofficial" because no Motion for Substitution of Plaintiff had
been filed.

1 counsel filed the Supplemental Declarations of Douglas Hubbard and
2 Elora Hubbard, which properly authenticated Barbara's signature.^{13/}

3 C. Survivability of Power of Attorney^{14/}

4 It is an elementary rule of law that the relation of attorney
5 and client is terminated by the death of the client..." Mallory v.
6 Rittenhouse, 99 Cal. App. 96, 104 (1929); see also Lanza v. Bank of
7 America National Trust & Savings Assoc., 229 Cal. App. 2d 720, 724
8 (1964). "Generally, a power of attorney terminates on the death of
9 the principal. People v. Fenderson, 188 Cal. App. 4th 625, 634
10 (2010); see also California Probate Code § 4152(a)(4); Rest. 3d
11 Agency §3.06 and 3.07.

12 In Mallory, the court held that the attorney-client relation-
13 ship is terminated on the death of the client, "but an exception is
14 made in the case of a special contract of employment, such as a
15 specific contract to conduct a suit to final judgment, or some
16 agreement on a fee for the entire case." Mallory at 104. Mallory was
17 cited approvingly in Lanza, supra. In Mallory, the exception was
18 applied to a "contract to conduct a suit to final judgment," which
19 disposed of the whole case.

20 Plaintiff's counsel argues that Barbara's oral instructions
21 to him were that he was to immediately settle the case for whatever
22 he could get and give the funds to his father, Lynn. Therefore,
23 Barbara's oral instructions created a "specific contract to bring
24

25 ^{13/} Flava's objection to the Supplemental Declarations of Douglas
26 Hubbard and Elora Hubbard are overruled. Flava's request for an
expert handwriting analysis of Barbara's signature is denied.

27 ^{14/} As previously noted, someone other than Barbara signed the
28 Settlement Agreement sent to Peters, pursuant to the Power of
Attorney. As noted in footnote 7, Barbara did not sign numerous
blank settlement agreements prior to her death, as Plaintiff's
counsel originally stated to the Court.

1 (this) suit to final judgment," as quickly as possible. For this
2 reason, the attorney-client relationship did not terminate on
3 Barbara's death.

4 Flava argues that the Mallory exception does not apply
5 because the attorney-client relationship creates an agency relation-
6 ship, wherein the attorney acts as an agent for the client. To
7 support this position, Flava cites Stoll v. Stoll, 5 Cal. 3d 687,
8 692 (1936). The Stoll court held that contract liability may survive
9 the death of a contractor, but the contractor's agent's power to act
10 on behalf of the decedent contractor may not survive the decedent's
11 death. Flava's position is supported by Webster Real Estate v.
12 Rickard, 21 Cal. App 3d 612, 616-617 (1972). Webster dealt with a
13 real estate owner-broker contract in which the owner died before the
14 property was sold. The court held that death of the owner of the
15 property terminated the broker's agency and the authority of the
16 broker to represent the owner in seeking a buyer for the property.
17 The court cited the Restatement Second of Agency, which states: "One
18 cannot act on behalf of a non-existent person." Further, an agency
19 is terminated by the death of the principal. Estate of Friedman, 20
20 Cal. App. 3d 399 (1971); Jay v. Dollarhide, 3 Cal. App. 3d 1001
21 (1970) *superceded by statute on other grounds*; California Civil Code
22 §§ 2355(b) and 2356(a).

23 As a result, Flava concludes that in this case, the agency
24 was created and held for the benefit of Barbara, for her desire that
25 she be able to gain barrier-free access to the stores at Plaza
26 Bonita. The agency was not created for the benefit of Plaintiff's
27 counsel. As a result of Barbara's death, the agency terminated and
28 Plaintiff's counsel did not have the authority to act on Barbara's

1 behalf. Consequently, Plaintiff's counsel had no authority to sign
2 settlement agreements on Barbara's behalf after her death. The Court
3 agrees.

4 The Mallory exception may apply if the Court views Plain-
5 tiff's counsel's acts in settling Barbara's case, as bringing the
6 suit "to final judgment." However, to bring a case to "final
7 judgment," is obviously different from bringing a case to settle-
8 ment, where a judgment is not entered. Nevertheless, a fair reading
9 of Mallory might suggest that bringing a case to "final judgment"
10 may be equivalent to ending the case by settlement. However, neither
11 Plaintiff's counsel nor Flava provided the Court with any authority,
12 nor could the Court find any authority, that defines whether
13 bringing a case to "final judgment" is the equivalent of ending a
14 case by settlement. Therefore, the Court does not adopt the view
15 that the two ways of ending a case, as noted above, are equivalent.

16 Regardless of whether "final judgment" and "settlement" are
17 functional equivalents or whether the attorney-client relationship
18 survived Barbara's death, the Mallory exception does not excuse or
19 justify Plaintiff's counsel's failure to inform opposing counsel
20 that Barbara had died, that the signature on the settlement
21 agreement was not hers, and that Plaintiff's counsel was relying on
22 Mallory for authority to sign the settlement agreement and bring the
23 case to conclusion. In other words, Plaintiff's counsel's conduct
24 lacked the transparency and candor expected of counsel practicing
25 before this Court.

26 D. The Appropriateness of Signing Barbara's Name To The
27 Settlement Agreement

28 Even assuming the agency relationship extended beyond
Barbara's death, Flava argues that the Mallory exception does not

1 support Plaintiff's counsel's signing Barbara's name on an agreement
2 without informing Flava's counsel that the signature was not
3 Barbara's signature.

4 Flava goes further by accusing Plaintiff's counsel of forgery
5 of Barbara's name. It cites to U.S. v. Price, 655 F.2d 958, 960 (9th
6 Cir. 1981), which states that forgery is a:

7 "false making, with intent to defraud, of a document
8 which is not what it purports to be, as distinct from
9 a document which is genuine but nevertheless contains
10 a term or representation known to be false." "A
11 document signed by a third person using the signature
12 of another is a forgery..." "Forgery contemplates a
13 writing which falsely purports to be the writing of
14 another person than the actual maker..." "Signing
15 one's own name with the intent that the writing be
16 received as written by another person, or *impersonat-*
17 *ing another in the signature of the instrument... or*
18 *signing in such a way as to make the writing purport*
19 *to be that of another... are all acts of forgery."*
20 (citations omitted) (emphasis added).

21 Therefore, Flava argues that Plaintiff's counsel's signing
22 Barbara's name on settlement agreements, without informing its
23 counsel that the signature on the document was not, in fact,
24 Barbara's signature, constitutes forgery.

25 Flava goes even farther by accusing Plaintiff's counsel of
26 committing fraud. Extrinsic fraud is the failure to disclose
27 material information. Estate of Anderson, 149 Cal. App. 3d 336
28 (1983). The fraud need not be completed to establish it. Intent to
defraud is required. People v. Russell, 214 Cal. App. 2d 445 (1963).
It is not necessary that no actual harm result from the fraud to
merit disciplinary action. Resnik v. Cal. State Bar, 1 Cal. 3d 198
(1969).

29 Flava alleges that it acted upon the signed settlement
30 documents as having Barbara's genuine signature on them. One of the

1 Defendants (Hot Topic), paid money to settle its action with
2 Barbara, in reliance that Barbara actually signed the settlement
3 agreement. Flava asserts that it incurred significant time and
4 expense in believing the same thing and acting pursuant thereto.

5 In Hallinan v. State Bar of Cal., 33 Cal. 2d 246 (1948),
6 defense counsel in that case explicitly requested that plaintiff
7 personally sign a release as part of the settlement of the case.
8 However, the plaintiff's attorney instead signed the release under
9 a power of attorney to do so, but did not inform opposing counsel
10 that the signature was that of the attorney, not the plaintiff. The
11 court held that an attorney who puts his client's signature on a
12 release, with the power of attorney to do so, without informing
13 opposing counsel that the signature is not the client's signature,
14 is deceptive and punishable conduct. The punishable conduct was not
15 that the attorney put his client's signature on the release, because
16 he had the authority to do so. Rather, the punishable conduct was
17 the failure to inform defense counsel that the signature on the
18 release was not his client's signature, but his own.^{15/} Hallinan has
19 been followed for the same purpose and reasoning in Aronin v. Cal.
20 State Bar, 52 Cal. 3d 276, 286-287 (1990).

21 The Court finds that the situation in Hallinan is analogous
22 to the situation presented here. Plaintiff's attorney in Hallinan
23 had a power of attorney from his client to sign documents on the
24 client's behalf. The attorney signed the client's signature on a
25 release and did not inform defendant's counsel that the signature on
26 the release was not the client's signature, despite the defendant's
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28 ^{15/} In Hallinan, the attorney was punished with a three month suspension
from the practice of law.

1 attorney's request that the client sign the release.^{16/} The court held
2 that the attorney's conduct in signing the release on behalf of his
3 client, *without informing defense counsel that the signature on the*
4 *release was not his client's signature*, was deceptive and punishable
5 conduct. The Court noted that the attorney's signing of his client's
6 name on the release was not the objectionable conduct. Rather, *not*
7 *informing* defense counsel that the signature on the release was not
8 the client's signature was objectionable.

9 The Court concludes that Plaintiff's counsel (or someone at
10 his direction) placed Barbara's signature on the Settlement
11 Agreements with Flava and Hot Topic under an expired power of
12 attorney to do so, but *without informing* Flava's or Hot Topic's
13 counsel that he had done so. Plaintiff's counsel's conduct in *not*
14 *informing* Flava's and Hot Topic's counsel that the signatures on the
15 settlement agreements were not, in fact, Barbara's signature, was
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^{16/} The fact that defendant's counsel in Hallinan specifically requested that the client sign the release is one of the only distinguishing factors from the situation presented here. In this case, there was no specific request that Barbara personally sign the Settlement Agreement. Rather, Flava (and Hot Topic) tacitly understood that Barbara had personally signed the Settlement Agreements, by viewing what they believed to be Barbara's original signature on the Settlement Agreements, and by relying on communications with Plaintiff's counsel's firm which created and reinforced this false impression.

1 deceptive and punishable conduct. "This was an intentional deception
2 and thus constituted moral turpitude." Aronin, 52 Cal 3d at 287.^{17/18/}

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4 ^{17/} The Court finds that Plaintiff's counsel may have violated the
5 following statutes and rules:
6 California Business & Professions Code §6106, which states:
7 The commission of any act involving moral turpitude, dishonesty or
8 corruption, whether the act is committed in the course of his
9 relations as an attorney or otherwise, and whether the act is a
10 felony or misdemeanor or not, constitutes a cause for disbarment or
11 suspension.

12 If the act constitutes a felony or misdemeanor, conviction thereof
13 in a criminal proceeding is not a condition precedent to disbarment
14 or suspension from practice therefor.

15 California Rule of Professional Conduct 3-110, which states in
16 pertinent part:

17 (a) A lawyer shall not knowingly:
18 (1) make a false statement of fact or law to a tribunal or fail to
19 correct a false statement of material fact or law previously made to
20 the tribunal by the lawyer...

21 California Rule of Professional Conduct 5-220, which states:
22 A member shall not suppress any evidence that the member or the
23 member's client has a legal obligation to reveal or to produce.

24 American Bar Association Model Rule of Professional Conduct 3.3,
25 which states in pertinent part:

26 (a) A lawyer shall not knowingly:
27 (1) make a false statement of fact or law to a tribunal or fail to
28 correct a false statement of material fact or law previously made to
the tribunal by the lawyer;...
(c) The duties stated in paragraphs (a)... continue to the
conclusion of the proceeding...

American Bar Association Model Rule of Professional Conduct 4.1,
which states in pertinent part:

In the course of representing a client a lawyer shall not knowingly:
(a) make a false statement of material fact or law to a third
person;...

American Bar Association Model Rule of Professional Conduct 7.1,
which states:

A lawyer shall not make a false or misleading communication about
the lawyer or the lawyer's services. A communication is false or
misleading if it contains a material misrepresentation of fact or
law, or omits a fact necessary to make the statement considered as
a whole not materially misleading.

American Bar Association Model Rule of Professional Conduct 8.4,
which states pertinent part:

It is professional misconduct for a lawyer to:

...
(c) engage in conduct involving dishonesty, fraud, deceit or
misrepresentation;

(continued)

(d) engage in conduct that is prejudicial to the administration of
justice;...

Southern District of California Local Rule 83.4 which states in

IV

SANCTIONS

There are two sources of authority under which a court can sanction a party for improper conduct: (1) 28 U.S.C. § 1927 and (2) the inherent power of federal courts to levy sanctions in response to abusive litigation practices. Lahiri v. Universal Music and Video Distribution Corp., 606 F.3d 1216, 1219 (9th Cir. 2010); B.K.B. v. Maui Police Dept., 276 F.3d 1091, 1107-1108 (9th Cir. 2002).

1. 28 U.S.C. § 1927

28 U.S.C.A. § 1927 states:

Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

Imposition of sanctions under 28 U.S.C. § 1927 (hereafter "§ 1927") requires a finding of recklessness or bad faith on the part of the attorney sanctioned. B.K.B., 276 F.3d at 1107; Lahiri, 606 F.3d at 1219.

pertinent part:

...
b. Standards of Professional Conduct. Every member of the bar of this court and any attorney permitted to practice in this court must be familiar with and comply with the standards of professional conduct required of members of the State Bar of California, and decisions of any court applicable professional conduct which are now adopted as standards of professional conduct of this court. This specification will not be interpreted to be exhaustive of the standards of professional conduct. In that connection, the Code of Professional Responsibility of the American Bar Association should be noted. No attorney permitted to practice before this court will engage in any conduct which degrades or impugns the integrity of the court or in any manner interferes with the administration of justice within the Court.

^{18/} The Court declines to address whether Plaintiff's counsel committed perjury or fraud, because these issues were not fully briefed by counsel. The Court leaves to others whether to investigate Plaintiff's allegations in these regards.

1 The plain language of § 1927 establishes that, when a court
2 issues a sanctions award, it may include the costs, expenses and
3 attorney's fees that were incurred by the aggrieved party by the
4 sanctionable conduct. Sanctions imposed under § 1927 "must bear a
5 financial nexus to the excess proceedings and may not exceed the
6 "costs, expenses and attorney's fees reasonably incurred because of
7 the sanctionable conduct." Norelus v. Denny's Inc., 628 F.3d 1270,
8 1297 (11th Cir. 2010). Several courts have held that a sanctions
9 award under § 1927 may include the costs arising from the sanctions
10 proceedings themselves. See In re Tutu Wells Contamination Litiga-
11 tion, 120 F. 3d 368, 387-388 n. 21 (3rd Cir. 1997) *overruled on other*
12 *grounds by* Comuso v. Nat. R.R. Passenger Corp., 267 F.3d 331, 331
13 (3rd Cir. 2001); Brandt v. Schal Assoc., Inc., 960 F.2d 640, 649-651
14 (7th Cir. 1992); In re Stauffer Seeds, Inc., 817 F. 2d 47, 50 (8th
15 Cir. 1987).

16 Further, exclusion from a sanctions award the costs incurred
17 in obtaining the award undermines the purposes of providing for
18 sanctions. "The time, effort and money a party must spend to get
19 another party sanctioned... is part of (the) harm caused by the
20 other party's wrongful conduct." Norelus, 628 F.3d at 1298.
21 Moreover, exclusion from a sanctions award undermines the goal of
22 deterring future similar sanctionable conduct because it would
23 discourage the aggrieved party from pursuing sanctions. Id., at
24 1298-1299.

25 2. Court's Inherent Powers

26 Under its "inherent powers," a district court may award
27 sanctions in the form of attorneys' fees against a party or counsel
28 who acts "in bad faith, vexatiously, wantonly, or for oppressive

1 reasons." Primus Auto. Fin. Servs., Inc. v. Batarse, 115 F.3d 644,
2 648 (9th Cir. 1997); Adams v. AllianceOne, Inc., 2011 WL 2066617 at
3 *5 (S.D. Cal. 2011). "This inherent power derives from the lawyer's
4 role as an officer of the court which granted admission." In re
5 Snyder, 472 U.S. 634, 643 (1985). Under this inherent power, and
6 unlike statutory sanctions provisions, the Court may sanction a
7 "broad range of improper litigation tactics." Knupfer v. Lindblade
8 (In re Dyer), 322 F.3d 1178, 1196 (9th Cir. 2003); Adams, supra, at
9 *5.

10 Before awarding such sanctions, the Court must make an
11 express finding that the sanctioned party's behavior "constituted or
12 was tantamount to bad faith." Roadway Express v. Piper, 447 U.S.
13 752, 767 (1980), *superceded by statute on other grounds as recog-*
14 *nized in* 749 F.2d 217, 222 n.4 (5th Cir. 1984)); Lahiri, 606 F.3d at
15 1219; B.K.B., 276 F.3d at 1108. "[A] finding of bad faith 'does not
16 require that the legal and factual basis for the action prove
17 totally frivolous; where a litigant is substantially motivated by
18 vindictiveness, obduracy, or mala fides, the assertion of a
19 colorable claim will not bar the assessment of attorney's fees.'" Id.,
20 at 1108 [quoting Fink v. Gomez, 239 F.3d 989, 992 (9th Cir.
21 2001)]. "(S)anctions are available if the court specifically finds
22 bad faith conduct or conduct tantamount to bad faith. Sanctions are
23 available for a variety of types of willful actions, including
24 recklessness when combined with an additional factor such as
25 improper purpose." Id., at 1108 (quoting Fink, 239 F.3d at 994). Bad
26 faith can consist of "delaying or disrupting the litigation." M.M.
27 v. Lafayette School Dist., 2011 WL 830261 (N.D. Cal. 2011) [quoting
28 Hutto v. Finney, 437 U.S. 678, 689 n.14 (1978)].

1 The focus of the bad faith inquiry is the sanctioned party's
2 abuse of the judicial process. Roadway Express, 447 U.S. at 765-66.
3 The bad faith requirement ensures that the district court's exercise
4 of its broad power is properly restrained, and "preserves a balance
5 between protecting the court's integrity and encouraging meritorious
6 arguments." Id.; Adams, supra at *5.

7 Moreover, "the amount of an inherent powers sanction is meant
8 to do something very different than provide a substantive remedy to
9 an aggrieved party. An inherent powers sanction is meant to
10 'vindicate judicial authority.'" Mark Indus. v. Sea Captain's
11 Choice, 50 F.3d 730, 733 (9th Cir. 1995) (quoting Chambers v. NASCO,
12 Inc., 501 U.S. 32, 55 (1991). Nonetheless, the amount of monetary
13 sanctions based on attorneys' fees must be "reasonable." Brown v.
14 Baden (In re Yagman), 796 F.2d 1165, 1184-85 (9th Cir. 1986) *amended*
15 *on other grounds by* 803 F.2d 1085 (9th Cir. 1986); Adams, supra, at
16 *6.

17 Here, the Court finds that Plaintiff's counsel's conduct in
18 this litigation, as discussed in this Order, warrants the imposition
19 of sanctions under §1927 and its inherent authority. Specifically,
20 Plaintiff's counsel submitted to counsel for Flava and Hot Topic a
21 proposed settlement agreement that was represented to contain
22 Barbara's genuine signature, when the signature was not, in fact,
23 Barbara's signature. In presenting the settlement agreement to
24 counsel for Flava and Hot Topic, Plaintiff's counsel failed to
25 inform counsel for Flava, Hot Topic and the Court that the signature
26 on the settlement agreement was not that of Barbara, but instead,
27 penned by someone else.

28

1 The Court notes that Plaintiff's counsel first represented to
2 it at the February 25, 2010 Settlement Disposition Conference that
3 Barbara had signed numerous blank settlement agreements prior to her
4 death. This representation could have been made for only one
5 purpose: Plaintiff's counsel wanted the Court to believe that
6 Barbara had signed the proposed settlement agreement prior to her
7 death. However, when Flava's counsel informed the Court that the
8 proposed settlement agreement he had received from Plaintiff's
9 counsel was dated after Barbara's death, Plaintiff's counsel was
10 apparently forced to provide another explanation. It stretches
11 credulity to believe that Plaintiff's counsel simply and honestly
12 made several mistakes of fact on February 25, 2010. The circumstan-
13 tial evidence points to a different conclusion. However, the
14 resolution of the propriety of sanctions does not turn on a
15 resolution of the *mens rea* behind the February 25, 2010 misrepresen-
16 tations. Whether Plaintiff's counsel was intentionally deceptive or
17 honestly mistaken on February 25, 2010, one thing is undisputable:
18 Plaintiff's counsel informed no one that Barbara had died while he
19 continued to try to settle this action against Flava and Hot Topic
20 while at the same time leading opposing counsel to believe Barbara
21 was still alive and that she signed the settlement agreement.
22 Plaintiff's counsel's failure to inform all counsel concerned that
23 the signature on the proposed settlement agreements was not, in
24 fact, Barbara's signature, would have never come to light absent
25 Flava's counsel's presentation to the Court of Plaintiff's counsel's
26 conduct.

27 After Flava's counsel discovered that the signature on the
28 proposed settlement agreement that he received from Plaintiff's

1 counsel did not bear Barbara's genuine signature, he brought this
2 fact to the attention of the Court. Since the Court was presented
3 with Plaintiff's counsel's potentially objectionable conduct at that
4 time, the Court was required to have Plaintiff's counsel explain his
5 conduct with respect to Barbara's signature appearing on documents
6 dated after her death.

7 The Court finds that Plaintiff's counsel's conduct in this
8 regard, and the settlement agreements he submitted to Flava's and
9 Hot Topic's counsel and the Court, constitute recklessness and were
10 done in bad faith. Had Plaintiff's counsel been candid with counsel
11 and the Court, the briefing requested by the Court by both Plain-
12 tiff's counsel and Flava's counsel, and the hearings held by the
13 Court, would not have been necessary. As a result, the Court
14 concludes that Plaintiff's counsel unreasonably and vexatiously
15 multiplied the proceedings in this case.

16 Further, the Court concludes that Plaintiff's counsel's
17 conduct, as discussed in this Order, was done for the purpose of
18 leading opposing counsel to believe that the proposed settlement
19 agreements received by them contained Barbara's genuine signature,
20 when in fact, they did not. Plaintiff's counsel's conduct disrupted
21 the proceedings in this litigation and has delayed its conclusion.

22 Therefore, the Court concludes that any sanctions to be
23 imposed on Plaintiff's counsel will suffice to deter Plaintiff's
24 counsel from repeating the conduct as discussed in this Order.

25 As a result, on or before June 27, 2011, Flava's counsel
26 shall submit to the Court, for *in camera* review, his billing
27 statements for all work and expenses incurred that directly resulted
28 from Plaintiff's counsel's submitting to him a proposed settlement

1 agreement in this case which purported to bear Barbara's genuine
2 signature, but was not, in fact, Barbara's genuine signature. After
3 the Court reviews Flava's counsel's billing statements *in camera*, it
4 will issue appropriate monetary sanctions against Plaintiff's
5 counsel.

6 D. Report of Conduct to the State Bar of California

7 Since Plaintiff's counsel's conduct, as discussed in this
8 order, may have violated statutes and Rules of Professional Conduct,
9 (see fn. 17), the Court will report Plaintiff's counsel's conduct to
10 the State Bar of California.

11 E. Disqualification From Further Representation In This
12 Court

13 In footnote 17 of this Order, the Court noted that Plain-
14 tiff's counsel's conduct in this litigation may have violated
15 statutes and Rules of Professional Conduct. At this time, the Court
16 declines to determine whether Plaintiff's counsel should be
17 disqualified from further representation in this Court. However,
18 pursuant to Local Rule 83.5, the Court refers Plaintiff's counsel to
19 the Standing Committee on Discipline.

20 DATED: June 13, 2011

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22 

23 Hon. William V. Gallo
24 U.S. Magistrate Judge

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