

No. 13-35390

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HUONG HOANG, an individual,
Plaintiff—Appellant,

v.

AMAZON.COM, INC., a Delaware Corporation;
IMDB.COM INC., a Delaware Corporation,
Defendants—Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON
MARSHA J. PECHMAN, DISTRICT JUDGE • CASE No. 11-cv-01709-MJP

APPELLANT'S OPENING BRIEF

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Defendants—Appellees.

APPELLANT’S OPENING BRIEF

INTRODUCTION

IMDb.com (IMDb), a subsidiary of Amazon.com (Amazon), is a public website that provides information about the entertainment industry to fans and professionals alike. To Hollywood aficionados, the site is a fun, free resource for settling bar bets or following favorite performers’ careers. To industry professionals however, the site is serious business. IMDb has become an essential tool for aspiring actors to locate job opportunities and casting professionals to make hiring decisions, but IMDb maintains exclusive, unilateral control of the information it publishes.

In an industry in which perfecting the illusion of one's stage persona and maintaining control of one's image are essential to success, actors' inability to control the information IMDb provides to their potential employers on what has become their de facto resume can hurt their ability to manage their careers, and can enable casting directors to indulge the discriminatory potential inherent in the subjective nature of casting. As this Court's Chief Judge presciently observed, "An important aspect of personal autonomy is the right to shape one's public and private persona by choosing when to tell the truth about oneself, when to conceal and when to deceive." *United States v. Alvarez*, 638 F.3d 666, 675 (9th Cir. 2011) (Kozinski, C.J., concurring in denial of rehearing en banc), *aff'd*, 132 S. Ct. 2537 (2012). IMDb's goal of providing comprehensive, true information, however noble in the abstract, thus comes at the expense of Hollywood's working actors, who cannot "opt out" of IMDb's watch.

Junie Hoang is a working actress who purchased a subscription to IMDb's fee-based service, IMDbPro, accepting its subscriber agreement and privacy policy. She sued IMDb for breach of the subscriber agreement and privacy policy for using confidential information to obtain and publish her true age without her consent and refusing to remove it upon request.

However, Hoang never really got a fair trial. Her first counsel essentially abandoned discovery and forfeited Hoang's ability to marshal her supporting evidence due to debilitating illness, and upon his death when new lead counsel discovered what occurred and filed a motion to reopen discovery, the district court denied the motion and forced Hoang to go to trial with almost no evidence. Then, at trial, the district court incorrectly instructed the jury that Hoang, rather than IMDb, had the burden to prove that she was not in material breach of IMDb's subscriber agreement, even though this was IMDb's affirmative defense. This instruction added an extra element to Hoang's case, one that prevented the jury from properly considering her case and was not harmless. For both of these reasons, this Court should vacate the judgment and remand for new trial.

JURISDICTIONAL STATEMENT

Plaintiff and appellant Hoang filed this action against defendants and appellees IMDb.com, Inc. and Amazon.com, Inc. in the United States Court for the Western District of Washington at Seattle. (2 ER 11-23.) The district court acquired subject matter jurisdiction under 28 U.S.C. § 1332(a). (2 ER 14.)

The court entered final judgment for IMDb.com on April 12, 2013, and for Amazon.com on April 30. (1 ER 10; 4 ER 849.) Hoang filed a timely notice of appeal under 28 U.S.C. § 2107(a) on May 3, 2013. (4 ER 850.) This Court has jurisdiction under 28 U.S.C. §§ 1291 and 1294(1).

STATEMENT OF ISSUES PRESENTED

1. Whether Hoang showed good cause for relief from the consequences of prior counsel's virtual abandonment such that the district court abused its discretion when it denied Hoang's motion to allow her new lead counsel to take limited further essential discovery.

2. Whether it was reversible error for the district court to instruct the jury that on defendant IMDb's affirmative defense, it was plaintiff Hoang, not IMDb, that had the burden to prove she was *not* in material breach of the IMDb agreement.

STATEMENT OF THE CASE

IMDb.com offers both a free public website and IMDbPro, a fee-based service requiring a subscription contract that provides enhanced features for entertainment industry professionals. This is a breach of contract action arising under IMDbPro's Subscription Agreement and Privacy

Policy (collectively, the agreement), which Hoang accepted when she purchased an IMDbPro subscription.

In her complaint, Hoang alleged, inter alia, that IMDb breached the agreement by misusing confidential information Hoang provided solely for the purpose of allowing IMDb to charge her credit card. (2 ER 11-23, 67-82.) She alleged IMDb, without her permission and in breach of the agreement, used this information to: (1) run a public records search on a third-party website to discover Hoang's real age, a professional secret that she had fiercely guarded; and (2) publish Hoang's real age without her consent on IMDb.com. (*Id.*) Hoang alleged that IMDb's publication of her real age damaged her career prospects by breaking the professional illusion of the age range she could portray and facilitating age discrimination among potential employers. (*Id.*)

The district court granted summary judgment for Amazon and partial summary judgment for IMDb. (4 ER 795.) Upon stipulation of the parties, Amazon is no longer a party to this appeal. (Stipulation to Dismiss Amazon.Inc. from Appeal, Oct. 30, 2013.) Hoang proceeded to trial on her contract claim against IMDb, and the jury returned a defense

verdict on April 11, 2013. (1 ER 8-9.) The district court entered judgment for IMDb. (1 ER 10.)

STATEMENT OF FACTS

A. Hoang, a working actress who must maintain the image of being younger than her actual age to book jobs, learns IMDb published her profile without her knowledge.

Hoang is an actress who has appeared in over one hundred films, shows, music videos, and print ads. (5 ER 873, 886, 952-53, 954, 956-58, 1003, 1010, 1158; 6 ER 1214-19.) Hoang uses the name “Junie Hoang” as a stage name rather than her legal name, Huong Thu Hoang. (5 ER 873.) Hoang has always been cast as characters younger than her actual age because she looks young. (5 ER 875, 955; *see* 5 ER 1000, 1012; 6 ER 1214.) At the time of trial, although Hoang was forty-one years old, she was only being hired to play characters in their late twenties or early thirties. (5 ER 874-76, 1008-09, 1012.)

Throughout her career, Hoang kept her age hidden from potential employers by being careful never to use her legal name in public and never to allow her real age to be associated with her stage name. (5 ER 877-80.) Hoang keeps her age secret because in the entertainment industry, most casting decisions are based on appearance. (5 ER 877.) Casting agents

understand they may not ask Hoang her age when she auditions. (5 ER 878.) Instead, casting agents ask what range she can *play*, which permits Hoang to give an age range befitting her appearance. (*Id.*) However, as Hoang explained at trial, “[i]f you tell them what age you are, subconsciously it affects them and they won’t really think of you as any other age except the one that you give them.” (5 ER 877.)

IMDb.com is a free website that publicly displays information about movies, television shows, and the actors, directors, and other professionals who make them. (5 ER 865-66.) IMDb features over one hundred and thirty million data items, including more than two million movies, television, and entertainment programs, and over four million cast and crew members. (5 ER 866, 1066.)

IMDb’s policy is that “we won’t delete factually correct information,” but “[i]f information is incorrect we will correct it.” (5 ER 1073; *see* 5 ER 1093.) Thus, if IMDb maintains a profile of someone because she has a film or television credit, she cannot delete it. (5 ER 1073.) Similarly, although a person is not required to list her birth date on her profile, once a person’s birth date is listed, IMDb will not remove that information, even if it was submitted by a third party without the profiled individual’s

consent, and even if the submission was incorrect.¹ (*Id.*) Most of IMDb's data—including actors' birth dates—is supplied by users. (5 ER 869-70, 1067-68, 1093, 1112.)

IMDb is “considered to be the Bible of the industry” by actors and entertainment professionals. (5 ER 869, 898-99, 1093.) An IMDb profile confers professional legitimacy and functions as an actor's resume. (5 ER 898.) IMDb has received complaints about its policy of refusing to remove birth dates from actors contending that it disadvantages them professionally. (5 ER 1074-75.)

In 2001, a friend informed Hoang there was a profile of Hoang on IMDb.com. (5 ER 890, 1021.) Hoang visited the site for the first time and discovered the profile. (5 ER 890-91.) She later registered as an IMDb user under her stage name and began updating her profile regularly. (5 ER 891, 895-96, 1021.)

¹ Trial testimony and information submitted with summary judgment motions showed that IMDb's strictly additive information policy has exceptions: IMDb will not publish information about someone's religion or sexual orientation (3 ER 324-25), and IMDb will remove birth dates of child actors at the request of parents (5 ER 1113).

B. Hoang provides her legal name to make credit card payments for one-time services on IMDb. She submits an incorrect birth date and then decides she wants the date removed.

IMDbPro is IMDb's fee-based subscription service, providing content tailored specifically for the needs of entertainment professionals, such as a database of industry contact information and a resume builder. (5 ER 865-66, 890, 1069-70.) IMDbPro markets itself to aspiring entertainers as “your industry calling card” (5 ER 1070) and lets actors view and submit themselves for casting calls.² (5 ER 887-88, 890, 1070; *see* 3 ER 333; 4 ER 806.)

In 2004, Hoang obtained a free trial subscription to IMDbPro, registered under her stage name, which she cancelled within two weeks. (5 ER 866, 1024, 1059, 1076-78; 6 ER 1188.) That year, Hoang paid IMDb using her credit card for various one-time services, and provided her legal

² In a recent article, IMDb's founder and CEO explained that “[h]aving an IMDbPro account, which by turn gets you an IMDb résumé subscription, enables you to manage your presence and how you present yourself to the rest of the industry. If you're looking for jobs, ideally it helps you find a job. If you're seeking talent, it helps you seek talent.” Jenelle Riley, *Col Needham Is the Man Behind IMDb*, Backstage (Aug. 2, 2013, 2:00 PM), <http://www.backstage.com/advice-for-actors/inside-job/col-needham-man-behind-imdb/>. He explained how IMDb facilitates age-based casting decisions, bragging that the production company for the movie “Twilight” used IMDbPro to search specifically “for actors 15 to 25 . . . and found Rob [Pattinson] via his IMDbPro page.” (*Id.*)

name to IMDb during these transactions solely because it was the name on her credit card and she believed all billing information would be kept confidential. (5 ER 866, 895-97, 1060; 6 ER 1188; *see* 5 ER 1027, 1071, 1079.)

On June 19, 2004, Hoang submitted biographical information for her IMDb profile and incorrectly claimed she was born in 1978. (5 ER 901, 1017-18, 1024, 1042; 6 ER 1204.) She submitted this date because she knew it was an age she could portray, she wanted to prevent anyone else from posting an incorrect older age on her profile, and she wanted to avoid publishing biographical information on the Internet that could facilitate identity theft. (5 ER 900-01, 1044.) Hoang submitted this date using a friend's e-mail account because she believed it enhanced her professional image to make it appear she had a publicist or agent managing her IMDb profile. (5 ER 902-03; 6 ER 1204; *see* 5 ER 889.)

In 2007, Hoang moved to Los Angeles to improve her acting career and booked approximately thirty jobs. (5 ER 884, 955-56.) She obtained an agent—an extremely difficult accomplishment for any aspiring actor—and he successfully submitted her for roles in feature films, network television shows, and commercials. (5 ER 884-86, 1001-03, 1010.)

Hoang had postponed moving to Los Angeles for years to care for sick relatives in her home town, and so she was already 35 years old by the time she moved. (5 ER 881-84.) Hoang decided she wanted IMDb to delete the birth date she previously posted on her profile so she could promote herself for roles with a broader age range. (5 ER 904-05.) Over the next year, Hoang sent numerous communications to IMDb, all with the sole purpose of convincing IMDb to remove the birth date. (5 ER 904-07, 918-19, 1080-81; *see, e.g.*, 6 ER 1166, 1167, 1173, 1183, 1189-1206.)

Hoang soon learned of IMDb's official policy that it would correct inaccurate birth dates but not remove them. (5 ER 1023; 6 ER 1201.) Hoang decided she would try to push IMDb to delete the birth date by: (1) convincing IMDb that the currently posted birth date was incorrect (which it was); (2) expecting that IMDb would not be able to correct the birth date (because there was no public documentation of any birth date for "Junie Hoang"); and (3) hoping that IMDb would choose to delete an inaccurate birth date that it could not correct rather than leaving it up uncorrected. (*See* 5 ER 906, 920, 932-35, 1032, 1035-38, 1045-47; 6 ER 1198, 1201; *see also* 6 ER 1166.)

Hoang's requests were elevated to IMDb's customer service manager, Giancarlo Cairella. (5 ER 1062, 1096.) Cairella, one of IMDb's founding employees, claims he personally shares IMDb's passion for truth—although when he communicates with IMDb's users, he prefers to use multiple false identities because it makes it “easier” to avoid dealing with “disgruntled customers.” (5 ER 1062-65.) Thus, Cairella responded to Hoang using the fictitious names “George” and “Roger.” (5 ER 908-09, 925-26, 1062, 1064-65, 1096-97; 6 ER 1162, 1166.)

In January 2008, “George” responded to Hoang: “We have reason to believe that our information is correct. However, if you provide documentary evidence (a complete unredacted photocopy of the first page of your passport) . . . we will be pleased to investigate this matter and take prompt measures to remedy any verifiable inaccuracies.” (5 ER 909, 1096; 6 ER 1166.) Hoang did not have a passport at that time. (ER 909.) Even if she had one, Hoang would not have wanted to provide it because if IMDb saw her real birth date IMDb would have posted it to her profile, the very thing she wished to avoid. (5 ER 909-11, 914.)

C. Hoang buys a subscription to IMDbPro and tries increasingly desperate measures to get IMDb to remove her date of birth.

On March 25, 2008, Hoang purchased a \$99.95 annual subscription to IMDbPro, accepting the agreement as part of the registration process. (5 ER 866, 893-95, 1026, 1034, 1080; 6 ER 1171, 1187.)

IMDbPro's Subscriber Agreement details subscription fees, payments, copyright authorizations, and user conduct. (6 ER 1177-79.) The agreement states: "You acknowledge that . . . [IMDb] shall have the right (but not the obligation) in their sole discretion to refuse or move any content." (6 ER 1177.)

Section 9, "Representations and Warranties," provides: "You represent and warrant to IMDb that: . . . all information submitted by you to the Site is true and accurate." (6 ER 1178; *see also id.* ("7. Submissions. . . You represent and warrant . . . that the content [of your submissions] is accurate").)

IMDbPro's Privacy Policy begins: "IMDb knows that you care how information about you is used and shared, and we appreciate your trust that we will do so carefully and sensibly." (6 ER 1180.) The policy then outlines the customer information IMDb gathers and its potential uses, including:

Information You Give Us: We receive and store any information you enter on our Web site or give us in any other way. You can choose not to provide certain information, but then you might not be able to take advantage of many of our features. We use the information that you provide for such purposes as responding to your requests, customizing future browsing for you, improving our site, and communicating with you.

...

Information from Other Sources: For reasons such as improving personalization of our service (for example, providing better movie recommendations or special offers that we think will interest you), we might receive information about you from other sources and add it to our account information. . . .

(6 ER 1180, 1181 (“you can always choose not to provide information, even though it might be needed to take advantage of [certain] features”).)

Another section, titled “**Does IMDb Share the Information It Receives?**” provides:

Information about our users is an important part of our business, and we are not in the business of selling it to others. Thus, for example, IMDb does not sell, and will never sell, information about you to external marketers, list brokers, or other third parties without user consent. Nor will we give such information to affiliated businesses or companies that we team up with to provide co-branded or jointly-owned offerings unless you choose to take advantage of those offerings, and even then, any sharing of information is limited to information relating to the offering.

(6 ER 1180.) This provision then provides that IMDb will share user information without that user’s consent only in six specific circumstances:

(1) with affiliated subsidiaries; (2) for use in providing joint offerings with affiliated nonsubsidiary businesses; (3) with marketing vendors to assist

with e-mail marketing; (4) to send promotional offers on behalf of other companies to IMDb users; (5) in connection with corporate acquisitions involving IMDb; and (6) to comply with law enforcement, court orders, and fraud protection efforts. (*Id.*) This provision concludes:

Other than as set out above, you will always receive notice when information about you might go to third parties, and you will have an opportunity to choose not to share the information.

(*Id.*, (emphasis added).)

After Hoang purchased the IMDbPro subscription, she continued asking IMDb to remove her birth date. Hoang sent IMDb a copy of her birth certificate, in Vietnamese, with her legal name and birth date whited out. (5 ER 911-13, 915-17, 1037-39; 6 ER 1167; *compare* 6 ER 1174, *with* 6 ER 1172 (un-redacted birth certificate introduced at trial).) She did not inform IMDb that the birth certificate was redacted. (5 ER 1038-41, 1043.) She hoped that if she submitted a birth certificate in Vietnamese, they would not be able to read it, and that “maybe if I just gave them some kind of ID that they would just say, okay, she’s sending in ID, let’s just delete the birth date.” (5 ER 911-12, 1038-39.) IMDb did not remove the birth date. (6 ER 1167; *see* 6 ER 1183.)

By September of 2008, Hoang “felt very frustrated because I was a paying customer . . . [and] wanted someone to listen to me and just help

me out.” (5 ER 922; *see* 5 ER 919-20; 6 ER 1161.) She began writing, incorrectly, that “my previous agent/manager added my birthdate years ago and it was incorrect” (6 ER 1161), hoping that “if [IMDb believed] the birth date came from someone else, that maybe they would remove it.” (5 ER 920, 923-26; ER 1043, 1046; *see also* 6 ER 1197, 1223.) Hoang tried reasoning with IMDb: “There are tons of people in the database who don’t even have their birthdates listed! Why am I being singled out?” (6 ER 1161.) IMDb would not change Hoang’s date of birth unless she provided a copy of her passport. (6 ER 1162; *see* 5 ER 925-30; 6 ER 1163, 1164, 1183, 1222.) Hoang still had no passport. (5 ER 924, 927, 930.) Hoang felt “[l]ike I wasn’t getting anywhere. I was running around in a circle.” (5 ER 930.)

Finally, on October 2, 2008, in a “last ditch effort” (5 ER 935), Hoang messaged:

THE BIRTHDATE YOU HAVE LISTED ON MY PROFILE IS INCORRECT. . . . PLEASE GO BACK ON YOUR FILES AND SEE IF YOU HAVE ANY DOCUMENTATION, VERIFICATION OR IDENTIFICATION THAT MY BIRTHDATE IS IN 1978. IF YOU DO, PLEASE EMAIL IT TO ME BECAUSE I NEED TO SEE WHAT YOU’RE GOING OFF OF. YOU WON’T FIND ANY PROOF ON RECORD BECAUSE I KNOW THAT 1978 ISN’T MY DATE OF BIRTH, SO PLEASE DELETE IT.

(5 ER 930-34; 6 ER 1165; *see also* 6 ER 1195.) In this message, Hoang told IMDb to tell her what records it was relying on “because [she] knew they didn’t exist,” and her instruction was that since IMDb could not find any verification, it should delete the birth date. (5 ER 933-34.) Hoang was not giving IMDb permission to use the confidential information about her stored in its billing files to begin an independent search of public records through a third-party website to determine her birth date. (5 ER 933-34, 1032-33, 1049.) Her sole authorization—as it had been in all prior communications—was for IMDb to delete the birth date. (5 ER 934; *see* 5 ER 906, 912-15, 917, 919, 920, 935, 1032.)

D. IMDb uses Hoang’s confidential information to run a public records search and immediately publishes her true date of birth. Hoang makes a fruitless attempt to have it removed.

On November 12, 2008, Cairella purchased and ran a public records search on the website PrivateEye.com by entering the name “June Hoang” into the search box. (5 ER 1020, 1081-83, 1086-87, 1092, 1103; 6 ER 1212.) The search yielded no results. (5 ER 1083, 1104.)

Cairella then accessed IMDb’s payment system, which stores the information customers provide to make repeated credit card transactions without re-entering their billing information, and obtained Hoang’s legal

name. (5 ER 1084-86, 1092; *see* 5 ER 1072, 1104-05, 1115.) Cairella did not ask Hoang's permission to search the IMDb payment system for her legal name (5 ER 1086), but contended that Hoang's e-mail gave him permission to do so (5 ER 1088). Cairella then ran a PrivateEye.com search on "Huang Thu Hoang," which returned a birth date with the same day and month as the date that was currently associated with IMDb's "Junie Hoang" profile, but in the year 1971. (5 ER 1090, 1106-07; 6 ER 1212.) Cairella deduced that Hoang was actually born in 1971. (5 ER 1090, 1107.)

Cairella then published Hoang's real birth date to her IMDb profile without giving Hoang notice or an opportunity to choose not to share the information. (5 ER 1107-08, 1111 ("Q: Did you provide Ms. Hoang with notice? A: No.")) He knew he did not have Hoang's permission to publish her real age. (5 ER 1089.) He knew that Hoang's request was to *delete* the birth date, but "her request was not really relevant at this point." (5 ER 1089-90; *see* 5 ER 1107-08, 1119.)

Hoang soon discovered that IMDb had published her true birth date without her consent. (5 ER 935-36.) She "freaked out," because prior to that point, although it might have been technically available to someone

with the time and ability to search for it, her true birth date was not readily available to the public. (*Id.*) Having her birth date included on her IMDb profile was “like having my age stapled to every job resume,” which would facilitate age discrimination in casting. (5 ER 943, 945-46.) Furthermore, the 1971 date showed her to be even older than the 1978 date, making it more difficult to market herself for the younger characters she was suitable for. (5 ER 874-75, 938-39, 945-46; *see* 5 ER 1006 (Hoang’s agent testified, “[T]here’s a bias in a lot of cases against actors and actresses who play younger than their age. And through my experience, when they do find out if somebody is out of category, they can definitely put the kibosh on their career.”).)

Hoang wrote to IMDb: “Somebody has gone in and changed my birthdate from 1978 to 1971!!! This is not correct. I didn’t make this change and no one that represents me did it either.” (6 ER 1168; *see* 5 ER 937-38; 6 ER 1194.) Cairella, now purporting to be “Roger,” responded that he would not delete the 1971 date unless Hoang provided a copy of a passport proving it was incorrect—which he now knew was impossible. (6 ER 1168; *see* 5 ER 939.) Cairella did not inform Hoang that he believed

the birth date was correct because he had performed a public records search using Hoang's legal name. (*Id.*)

After that, Hoang "got really desperate," because she knew once IMDb displayed her true age online, the information would spread. (5 ER 940.) Hoang sent IMDb a doctored image that a friend made for her on a computer, purporting to be the first page of her passport.³ (5 ER 940-41, 1050, 1055-57; 6 ER 1221.) She also sent IMDb a scan of the front of a fake ID, neglecting to send a scan of the ID's back, which stated "Non-government issued. Novelty only." (5 ER 941-42, 1052-55; 6 ER 1220; *see also* 6 ER 1194.) Cairella detected that the passport image had been doctored and refused to delete the birth date. (5 ER 1114; 6 ER 1169-70; *see also* 6 ER 1184, 1208-09.)

E. Hoang's acting career suffers, and Hoang sues.

In the year after IMDb published Hoang's true age, she obtained only half as many acting jobs as the year before, from approximately forty parts to approximately twenty. (5 ER 950, 957, 960.) Starting with 2010, she

³ Hoang admits this was an "extreme" measure that "was absolutely wrong to do," which she now "regret[s]." (5 ER 949, 1058.)

was cast in fewer roles each year, dwindling down to only approximately five roles in 2012. (5 ER 960; *see* 5 ER 1008.)

Hoang filed suit against IMDb, alleging it breached the agreement when it accessed the legal name she provided solely for billing purposes and, without providing notice or an opportunity to choose not to share the information with third parties: (1) shared the name with PrivateEye.com to run a records search on Hoang; and (2) published Hoang's true birth date on IMDb.com.⁴ (2 ER 11-23, 31-42, 67-81.)

Hoang alleged that IMDb's breach caused her to suffer a decrease in acting auditions, jobs, and earnings. Hoang alleged that age discrimination is rampant among movie makers and casting professionals and that potential employers will not give an actress such as Hoang the same opportunities, regardless of her appearance or talent, if she is perceived to be approaching forty. (2 ER 71.) Hoang further alleged that when casting directors see on her IMDb profile that she is forty, they

⁴ Hoang also alleged claims for fraud, wiretapping, and consumer protection act violations, which were eventually dismissed. (2 ER 19-22, 38-41, 55-66, 74-80, 212-17; 4 ER 794-95, 807-08.) Hoang named Amazon.com as a co-defendant, but the district court granted summary judgment for Amazon, and Hoang is no longer appealing that ruling. (4 ER 795, 799-800; Stipulation, Oct. 30, 2013.)

become unwilling to audition her for the younger roles she is physically suited to play. (2 ER 72.)

In opposing IMDb's motion to dismiss, Hoang submitted the declaration of Duncan Crabtree-Ireland, the Deputy National Executive Director and General Counsel of the Screen Actors Guild (SAG). (2 ER 26-30.) Crabtree-Ireland testified that those who control casting have plenary control of access to employment opportunities for actors, a power enhanced by the subjective nature of casting decisions. (2 ER 27 (¶ 3).) He testified that as IMDb has become a popular resource for research during casting, IMDb has accumulated "extraordinary influence and power" over actors' career opportunities by imposing unilateral control over what information about actors appears on their profiles. (*Id.* (¶ 4).)

Crabtree-Ireland further stated SAG's data

consistently shows that actors and performers over the age of 40 are very significantly underrepresented in roles cast. Recent data shows that roles portrayed by female actors over age forty are less than half their actual representation in the population. Given that many actors can portray a range of ages that can be as much as a ten year span, or even more, allowing oneself to be prematurely pigeon-holed as an "over 40" actress can be very harmful [to one's career].

(2 ER 28 (¶ 5).) Dozens of actors had complained to him personally about the unauthorized publication of birth date information on IMDb and "the

issue of the facilitation of age discrimination that results from IMDb's conscious decision to publish the full date of birth for actors who are not high-profile or well known to the public.”⁵ (*Id.* (¶ 6).)

F. Hoang's counsel abandons discovery due to failing health, covering his actions by misrepresenting his conduct as “strategy.”

Hoang's trial counsel was John Dozier, of Dozier Internet Law, P.C., an Internet law specialist in Virginia. (2 ER 24-25.) Dozier appeared pro hac vice upon application of local counsel, Derek Newman of Newman Du Wors LLP. (2 ER 24-25.) By the time Hoang retained Dozier, he was already suffering from serious illnesses that would soon prove fatal. (See 2 ER 266 (¶ 5).) Among other critical ailments, in the eighteen months before his death Dozier underwent open heart surgery, brain surgery, daily dialysis, kidney removal, and numerous infections. (*Id.*; 3 ER 319.)

Dozier engaged in a pattern of attempting to delay pretrial activities, starting by requesting a discovery period of twelve months—while

⁵ As will be discussed, over Hoang's express direction, her former counsel, John Dozier, subsequently stipulated to exclude this declaration and refrain from offering further testimony from this witness rather than have to defend his deposition. (*See infra* Statement of Facts, Part F and Argument, Part I.C; 2 ER 245, 263-64.)

claiming Hoang needed only a one-to-two-day trial—and unsuccessfully seeking numerous extensions. (2 ER 47, 51-52, 54, 83-88, 196, 203, 218-19.) Dozier did not propound interrogatories on IMDb until over five months after Hoang filed her original complaint and nearly three months after the parties’ Rule 26(f) conference.⁶ (2 ER 90; *see* 2 ER 97-211; 3 ER 319 (¶7).)

Dozier allowed the expert disclosure deadline to pass without disclosing any experts, including a damages expert, despite the fact that Hoang needed to prove that IMDb’s breach resulted in lost future earnings by damaging Hoang’s marketability in an industry with rampant age discrimination. (2 ER 91, 95 (¶ 22), 266; 3 ER 319 (¶ 8).)

Dozier failed to adequately investigate witnesses that Hoang requested Dozier contact, including “other acting professionals that have had their personal information misused by IMDb and whose careers have been impacted by disclosure of their actual age.” (2 ER 263.) Dozier represented to Hoang that these witnesses would be “a distraction.” (*Id.*) Instead, Dozier entered into a “Stipulation and Order Regarding Excluded Witnesses” with IMDb. (2 ER 244-47.) In this stipulation, Dozier agreed

⁶ All citations to “rules” cite the Federal Rules of Civil Procedure.

not to conduct further discovery on or present at trial twelve witnesses that Hoang had previously identified as having relevant knowledge about her career, Hollywood casting, and her damages. (2 ER 244-45; *see, e.g.*, 2 ER 183-85.) Dozier further stipulated, against Hoang's express direction, to exclude the previously filed Crabtree-Ireland (SAG) declaration. (2 ER 245, 263-64; *see* 2 ER 26-30, 266.) Dozier represented that these witnesses would not have relevant information. (3 ER 308 (¶ 6).) The stipulation stated the parties agreed to this in order to avoid the "time and expense" of Hoang's witnesses' depositions. (2 ER 244.)

When IMDb deposed Hoang, Dozier attended the deposition but fell asleep during the examination. (2 ER 263 (¶ 7); 3 ER 308 (¶ 5).) Instead, Dov Szego, a family law attorney who had recently joined Dozier's firm, took the lead. (3 ER 308 (¶ 5), 319 (¶ 4).) Dozier also left the deposition of Cairella, IMDb's lead witness, to this same Mr. Szego, who did not take Cairella's deposition until a week before the discovery cut-off and nearly a month after the motion to compel deadline, leaving no time to take follow-up discovery. (2 ER 51; 3 ER 301, 312-13, 319 (¶ 9).)

G. Hoang’s counsel dies, and the district court denies Hoang’s motion for limited relief from discovery deadlines.

On August 6, Dozier died. (2 ER 266.) Hoang promptly met with the law firm of Newman Du Wors, and on August 10—the discovery cut-off date—Hoang appointed Derek Newman and Newman Du Wors as lead counsel. (2 ER 51, 248.) Dozier Internet Law immediately ceased to represent her. (2 ER 248-49.)

On August 13, Hoang’s new lead counsel filed an unopposed motion to continue all trial deadlines to allow new counsel to get up to speed. (2 ER 250-54.) The district court extended the dates, setting trial for April 8, 2013. (2 ER 255-56.)

Upon reviewing the record, Hoang’s new lead counsel discovered Dozier’s gross negligence and on September 29, filed a motion under Rule 16(b)(4) and Rule 60(b) for “limited relief from deadlines.” (2 ER 257, 265-66.) Specifically, Hoang asked to extend discovery deadlines until December 5, 2012, so she could disclose: (1) an “industry expert” to testify about age discrimination and casting in Hollywood and how IMDb’s publication of Hoang’s birth date harmed her career; and (2) a damages expert regarding projected earnings. (2 ER 261, 261-A, 266-67.) Hoang also sought to rescind the stipulation to exclude SAG’s General Counsel’s

testimony and to propound limited interrogatories and requests for production to follow up on Cairella's deposition. (2 ER 257-58, 266-67.) Hoang did not ask to delay the trial, which was set for six months later on April 8, 2013. (2 ER 255-56, 258.)

IMDb opposed Hoang's motion, arguing Hoang was engaging in a pattern of delay and her new counsel was attempting to "second-guess" Dozier's "litigation strategy." (3 ER 293-302, 308.) IMDb further argued that, whatever health problems he may have had, Dozier was assisted by two attorneys at his own firm and by local counsel, who had now become lead counsel. (3 ER 293-95, 299-300, 307-08.) IMDb never argued that the discovery Hoang sought was not relevant or material. Also, IMDb did not argue that granting Hoang's motion would prejudice IMDb by preventing it from conducting further discovery to refute her new evidence, and IMDb in fact admitted that Hoang's request provided fifteen days for IMDb to disclose rebuttal experts. (3 ER 304; *see* 2 ER 261 to 261-A.)

In reply, Hoang's new counsel (Newman Du Wors) explained that: (1) as local counsel for Dozier, their firm had been retained solely to consult on local rules and procedures and assist with filings, and were given no active involvement; (2) the two attorneys from Dozier's firm that assisted

Dozier were an associate who had been admitted to the bar for less than a year and a family-law attorney with no experience in internet law who joined the firm just months before Dozier died; and (3) neither of Dozier's associates was admitted to appear in the district court on Hoang's behalf. (3 ER 315, 318-19.) From the inception of the case until Dozier's death, Dozier himself made all strategic decisions without consulting local counsel or deferring to associates, and Dozier's firm filed and argued all motions and conducted all discovery. (2 ER 265-66; 3 ER 315, 319, 320.)

The district court denied Hoang's motion, stating, "This appears to be simply Plaintiff's latest attempt to delay this case." (1 ER 2.) Furthermore, "while Plaintiff's current counsel may disagree with strategic decisions made by Plaintiff's former counsel, Plaintiff makes no showing why her current counsel should be allowed to second guess decisions that have already been made." (*Id.*) The court stated "Plaintiff fails to offer any facts showing that her former lead counsel was too sick to adequately represent her." (*Id.*) The court ruled that Derek Newman, as local counsel filing Dozier's *pro hac vice* application, necessarily represented that he would be prepared to handle this matter in the event that Dozier was unavailable. (1 ER 3.) The court also ruled that opening

“one-sided discovery” and “allowing a one-sided departure from a stipulation” to exclude witnesses would prejudice IMDb. (*Id.*)

H. Hoang proceeds to trial with no experts and limited evidence supporting her claim that IMDb’s breach caused harm to her career.

Before trial, as a result of Hoang’s not being able to reopen discovery, the district court granted IMDb’s motion in limine precluding Hoang from presenting: (1) documents not produced in discovery; (2) evidence and testimony regarding age discrimination in Hollywood casting or the role that IMDb profiles play in the casting process; and (3) evidence of other actors whose birth date was published without their consent on IMDb and suffered decreased career opportunities. (3 ER 335-47, 348-4 ER 779; 4 ER 813-14, 852-60.) The district court held such evidence could not be admitted unless Hoang could “show a direct link” between that evidence and Hoang’s case—either from someone who refused to hire Hoang after seeing her age or through expert testimony. (4 ER 859-60; *see* 4 ER 813.) However, casting agents rarely volunteer that they are denying someone an audition or role because they are too old (5 ER 943-44, 1015), and the district court’s earlier order prevented Hoang from calling any experts (1 ER 1-2).

The evidence Hoang was thus prevented from presenting at trial included the live testimony of Crabtree-Ireland (SAG's Deputy National Executive Director and General Counsel), who Dozier had stipulated away (2 ER 245, 263-64), and SAG's press release deploring the fact that "IMDb publishes the actual dates of birth of thousands of actors without their consent, . . . [and] [w]hen their actual ages then become known to casting personnel, the 10+ year age range that many of them can portray suddenly shrinks, and so do their opportunities to work,"⁷ (4 ER 774). The court likewise excluded a petition signed by over 5,000 actors and writers imploring IMDb to remove birth dates upon request. (3 ER 438-523.)

Similarly, the district court sustained numerous objections throughout trial whenever Hoang tried to introduce circumstantial evidence that IMDb's publishing of Hoang's true birth date caused damage to her career. (5 ER 899-900, 921-23, 944-45, 950-51, 1003-07, 1016, 1074-75.)

⁷ SAG's claim was supported by an empirical study. (3 ER 530.) Hoang withdrew this study after the district court dismissed Hoang's non-contract claims on summary judgment. (4 ER 811 (noting withdrawal of Pl.'s Ex. 350).)

Hoang's inability to reopen discovery also forced her to proceed with no damages expert and instead rely on the testimony of herself and her agent, neither of whom had any economic expertise, leaving her unable to present evidence that IMDb caused a loss to her future earnings. (*See, e.g.,* 5 ER 864, 1011, 1013-14, 1061, 1100.)

I. The court instructs the jury that Hoang must prove she did not materially breach the agreement, and the jury finds for IMDb.

IMDb devoted a substantial portion of its trial defense to arguing that Hoang could not enforce the agreement because she was in material breach of the provision in which she warranted that all of her submissions were true. (5 ER 1129-48, 1152-54.)

Hoang proposed a jury instruction on the elements a plaintiff must prove for a breach of contract claim that omitted any mention of the issue of plaintiff's material breach, arguing that: (1) IMDb's claim that Hoang's alleged material breach of the agreement excused IMDb's breach was an affirmative defense on which IMDb bore the burden of proof; and (2) the facts did not support instructing the jury on this issue because Hoang submitted the false birth date four years *before* entering the agreement and Hoang submitted the fake ID and doctored passport image *after* IMDb

breached.⁸ (4 ER 815-19.) IMDb asked the court to instruct that Hoang had the burden to prove she was *not* in material breach of the agreement. (4 ER 817.)

The court rejected Hoang's arguments and instructed the jury that in addition to proving that IMDb's breach of a valid contract resulted in damages, Hoang had the burden to prove that Hoang was *not* in material breach of the contract. (1 ER 5, 7; 4 ER 815-19, 863, ER 1126-27, 1152.)

The jury returned a verdict for IMDb. (1 ER 8; 5 ER 1156.) Hoang appealed.

SUMMARY OF THE ARGUMENT

This Court should vacate the judgment and remand for new trial for two reasons that each independently support relief. First, the district court abused its discretion when it denied Hoang's motion for limited relief from discovery deadlines. Prior counsel's fatal illnesses led him to abandon discovery and stipulate away or otherwise forfeit the ability to

⁸ IMDb supported its affirmative defense by presenting evidence—over Hoang's objections on motions in limine (4 ER 782-93, 852-54)—of Hoang's submission of the false birth date using someone else's account, the redacted birth certificate, the fake ID, and the doctored passport image. (5 ER 1017-18, 1022-31, 1035-47, 1049-59.)

use at trial key experts and lay witnesses, including those Hoang had brought to his attention—one of whom, the General Counsel of SAG, had already provided sworn testimony that prior counsel filed in support of pretrial motions. Prior counsel did this in order to contend with his health issues while simultaneously misleading Hoang to believe he was acting in her interest. The court's ruling forced Hoang to trial with limited evidence and no experts on how IMDb's nonconsensual publication of actors' ages facilitates age discrimination in casting and damages their careers, which would have supported the inference that IMDb's publishing Hoang's age similarly damaged her career.

Second, the court prejudicially erred when it instructed the jury that Hoang had the burden to prove she was not in material breach of the agreement. This was an affirmative defense that IMDb should have had to prove. Adding an extra element to the plaintiff's claim is not harmless. Furthermore, there is no way to rule out the possibility that the jury's general verdict in favor of IMDb was a result of this erroneous instruction.

ARGUMENT

I. THE DISTRICT COURT ABUSED ITS DISCRETION IN DENYING HOANG’S MOTION TO REOPEN DISCOVERY AFTER HER COUNSEL EFFECTIVELY ABANDONED HER DUE TO HIS DEBILITATING AND ULTIMATELY FATAL ILLNESSES.

A. Where “good cause” exists, it is an abuse of discretion to refuse to modify a discovery scheduling order as a means to penalize a litigant for the gross negligence or abandonment by her counsel.

The district court’s order denying Hoang’s motion for limited relief from discovery deadlines is reviewed for abuse of discretion. *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 607 (9th Cir. 1992). However, “while appellate review is limited by the binding authority of *Link* [*v. Wabash Railroad Co.*, 370 U.S. 626, 633-34 (1962)] to whether judicial discretion has been abused, a sound discretion hardly comprehends a pointless exaction of retribution.” *Jackson v. Wash. Monthly Co.*, 569 F.2d 119, 123 (D.C. Cir. 1977) (footnote omitted). Orders holding litigants accountable “for misconduct attributable to lawyers and in no wise to their clients invariably penalize the innocent and may let the guilty off scot-free.” *Id.*

Thus, although broad, the district court’s discretion is not unlimited. This principle applies to a district court’s discretion to modify pretrial

discovery scheduling orders, which “may be modified only for good cause and with the judge’s consent.” Fed. R. Civ. P. 16(b)(4); *see also Johnson*, 975 F.2d at 608. “Rule 16(b)’s ‘good cause’ standard primarily considers the diligence of the party seeking the amendment.” *Johnson*, 975 F.2d at 609; accord *Zivkovic v. S. Cal. Edison Co.*, 302 F.3d 1080, 1087 (9th Cir. 2002). However, this Court has also recognized that scheduling orders may be amended for a variety of reasons. *See, e.g., C.F. ex rel. Farnan v. Capistrano Unified Sch. Dist.*, 654 F.3d 975, 984 (9th Cir. 2011) (affirming modification of scheduling order because the “tenor of the case changed significantly” after summary judgment); *El-Hakem v. BJY Inc.*, 415 F.3d 1068, 1077 (9th Cir. 2005) (affirming modification of pretrial order to add a defense because other defenses raised in the pretrial order put plaintiff on notice). Prejudice may also play a role in the district court’s analysis. *Johnson*, 975 F.2d at 609; *see Farnan*, 654 F.3d at 984-85 (evaluating prejudice to both movant and non-movant); *El-Hakem*, 415 F.3d at 1077 (noting absence of prejudice to non-movant).

A court evaluating “good cause” to amend a scheduling order should also consider the equities relevant to motions for relief from other orders or judgments. “[A]s a practical matter, extraordinary circumstances is a

close correlate of good cause.” *Johnson*, 975 F.2d at 610. To demonstrate extraordinary circumstances, “[t]he party must demonstrate both injury and circumstances beyond his control that prevented him from proceeding with the prosecution or defense of the action in a proper fashion.” *Cnty. Dental Servs. v. Tani*, 282 F.3d 1164, 1168 (9th Cir. 2002).

B. Prior counsel’s gross negligence or client abandonment constitute “good cause” to allow amendment of a scheduling order.

As a general rule, because a party “voluntarily chose [his] attorney as his representative in the action,” he is responsible for “the consequences of the acts or omissions of this freely selected agent.” *Link*, 370 U.S. at 633-34. However, the Supreme Court recognizes an exception to the general rule where the attorney abandons or fails to act on behalf of the client. *Maples v. Thomas*, 132 S. Ct. 912, 914-15 (2012). In *Maples*, the Court held, “A markedly different situation arises . . . when an attorney abandons his client without notice, and thereby occasions the default.” *Id.* (holding habeas petitioner demonstrated “cause” to excuse procedural default where attorneys abandoned client when leaving their law firm). “Having severed the principal-agent relationship, an attorney no longer acts, or fails to act, as the client’s representative.” *Id.* at 922-23.

“Common sense dictates that a litigant cannot be held constructively responsible for the conduct of an attorney who is not operating as his agent in any meaningful sense of that word.” *Id.* at 923. “Nor can a client be faulted for failing to act on his own behalf when he lacks reason to believe his attorneys of record, in fact, are not representing him.” *Id.* at 924.

The exception that the Supreme Court recently formally adopted in *Maples* has long been recognized in this Circuit. In *Tani*, this circuit held that a district court abused its discretion when it denied a motion for relief from default judgment where the defendant’s counsel “virtually abandoned [him] by failing to proceed with [his] defense despite court orders to do so,” while at the same time “explicitly represent[ing] to [him] that the case was proceeding properly.” 282 F.3d at 1170-71. *Tani* distinguished between “a client’s accountability for his counsel’s neglectful or negligent acts—too often a normal part of representation—and his responsibility for the more unusual circumstance of his attorney’s extreme negligence or egregious conduct.” *Id.* at 1168. *Tani* explained that “[w]hen an attorney is grossly negligent, as counsel was here, the judicial system loses credibility as well as the appearance of fairness, if the result is that an innocent party is forced to suffer drastic consequences.” *Id.* at 1170. *Tani* held that the

attorney's gross negligence constituted "extraordinary circumstances" that justified granting his client's request for relief from default and reversed the district court. *Id.* at 1169.

Although this circuit has cautioned that *Tani* arose in the default judgment context and may not apply in every circumstance, *see Latshaw v. Trainer Wortham & Co.*, 452 F.3d 1097, 1103-04 (9th Cir. 2006), it has extended *Tani* to many other contexts. *See Mackey v. Hoffman*, 682 F.3d 1247, 1253 (9th Cir. 2012) (when a client "has been inexcusably and grossly neglected by his counsel in a manner amounting to attorney abandonment in every meaningful sense," a district court may grant relief from judgment); *Lal v. California*, 610 F.3d 518, 524-25 (9th Cir. 2010) (attorney's gross negligence warrants relief from dismissal for failure to prosecute). The unifying principle in these cases is that an attorney's gross negligence "vitiat[es] the agency relationship that underlies our general policy of attributing to the client the acts of his attorney." *Mackey*, 682 F.3d at 1251 (internal quotation marks omitted).

Furthermore, this and other circuits have generally recognized serious illness of counsel as a reason not to hold a client accountable for counsel's gross negligence. *See, e.g., TCI Grp. Life Ins. Plan v. Knoebber*,

244 F.3d 691, 698 n.5 (9th Cir. 2001) (“counsel’s physical or mental illness is a common ground for finding conduct non-culpable when considering whether to lift a default judgment”); *Leshore v. Cnty. of Worcester*, 945 F.2d 471, 472 (1st Cir. 1991) (affirming district court’s determination that defendant’s attorney’s illness was “good cause” to grant relief under Rule 55(c)); *United States v. Cirami*, 563 F.2d 26, 34 (2d Cir. 1977) (“the ‘constructive disappearance’ of defendants’ attorney, who was allegedly suffering from a psychological disorder which led him to neglect almost completely his clients’ business while at the same time assuring them that he was attending to it” merited relief from default); *Vac-Air, Inc. v. John Mohr & Sons, Inc.*, 471 F.2d 231, 233-34 (7th Cir. 1973) (holding district court abused its discretion in denying relief from default where attorney suffered severe illnesses requiring “treatment and necessitating a reduction of his attention to practice”); *see also Feinstein v. Serv. Solutions Grp. LLC*, 464 F. App’x 670, 671-72 (9th Cir. 2012) (holding district court abused its discretion in denying motion to reopen case where previous counsel “requir[ed] numerous hospitalizations during the pendency of her suit”).

These principles similarly apply to a motion for relief from a pretrial scheduling order. *See Matrix Motor Co. v. Toyota Jidosha Kabushiki Kaisha*, 218 F.R.D. 667, 674 (C.D. Cal. 2003). Therefore if, as Hoang demonstrates in the next section, her lawyer was “guilty of gross negligence or abandonment, then, applying *Johnson* and *Tani*, a finding of extraordinary circumstances or good cause, justifying a modification of the scheduling order, would be warranted.” *Id.*

C. Under the circumstances of this case, denying Hoang’s motion improperly held her accountable for prior counsel’s gross negligence and gutted her case.

In the last eighteen months before his death, Dozier underwent open heart surgery, brain surgery, daily dialysis, kidney removal, and treatment for numerous infections. (2 ER 266; 3 ER 319.) Dozier’s desire to cling to his practice despite his fatal illnesses led him to virtually abandon prosecution of Hoang’s case while ignoring her specific orders and misrepresenting that his strange behavior was really a litigation strategy. Dozier took every opportunity to try to delay discovery deadlines. (2 ER 47, 54, 83-88, 196, 203, 218-19.) Dozier failed to adequately investigate witnesses that Hoang identified, including other actors “whose careers

have been impacted by disclosure of their actual age.” (2 ER 263.) Dozier represented to Hoang that these witnesses would be “a distraction.” (*Id.*)

Dozier was dilatory in propounding interrogatories, and left deposing IMDb’s key witness until it was too late to properly follow up on the deposition. (2 ER 90; *see* 2 ER 51, 93-211; 3 ER 301, 312-313, 319 (¶¶ 7, 9).) Dozier fell asleep during his client’s deposition and delegated defending that deposition to a recently hired family law attorney. (2 ER 263 (¶ 7); 3 ER 308 (¶ 5), 319 (¶ 4).)

Perhaps most devastatingly, Dozier identified no experts, even though Hoang’s case depended on showing that IMDb’s breach facilitated age discrimination and caused lost future earnings.⁹ (2 ER 91, 95 (¶ 22), 266; 3 ER 319 (¶ 8).)

⁹ This Court has recognized that a website that assists users to provide a public service in which discrimination is prohibited could facilitate discrimination by requiring users to disclose that they have characteristics that service providers often discriminate against—even though that information itself is public. *See Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1164-70 (9th Cir. 2008) (en banc) (housing-brokering website could facilitate discrimination by forcing users to answer questions about gender, sexual orientation, and family status, and requiring answers to be posted on site), 1169 n.25 (suggesting same rationale also applies to websites providing employment opportunities). Here, IMDb markets itself as a broker for entertainment (continued...)

Dozier then stipulated to exclude *twelve* witnesses that Hoang had identified as having relevant knowledge. (2 ER 244-47; *see, e.g.*, 2 ER 183-85.) And, over Hoang’s express direction, Dozier stipulated to exclude testimony from SAG’s general counsel—including *essentially withdrawing evidence already submitted*—regarding how IMDb’s posting of actors’ ages without their consent damages their careers. (2 ER 245, 263-64, 266; *see* 2 ER 26-30.) Dozier represented to IMDb that these witnesses lacked relevance and excluded them rather than have to deal with the “time and expense” of defending their depositions. (*See* 2 ER 244; 3 ER 308 (¶ 6).) An attorney’s stipulation to surrender his client’s substantial rights to present her case, against her express direction to the contrary, is considered non-binding on the client and a serious violation of his professional duties. *See Graves v. P. J. Taggares Co.*, 616 P.2d 1223, 1227-28 (Wash. 1980) (holding defendant’s attorney’s stipulations that “compromised the substantial right to present [damages] evidence” where amount of damages was highly disputed and that conceded vicarious liability despite conflicting evidence on the issue were invalid and ordering

(...continued)

employment opportunities, yet IMDb invites users to submit actors’ ages and refuses to remove them upon actors’ requests.

new trial); *In re Houts*, 499 P.2d 1276, 1279-80 (Wash. Ct. App. 1972) (holding trial court violated client's due process rights by accepting as valid attorney's stipulation that prevented his client from presenting key evidence); *In re Disciplinary Proceeding Against Romero*, 94 P.3d 939, 942 & n.10 (Wash. 2004) (disciplining attorney for failing to consult with client and abide by client's decisions); Washington Rules of Professional Conduct, Rule 1.2(a) (lawyer shall abide by client's decisions and consult with client on means to pursue objectives).¹⁰

Had the court granted Hoang's motion, IMDb would have faced little prejudice because Hoang sought relief only from discovery deadlines, not a delay of trial. (2 ER 258.) The district court ruled that IMDb would be prejudiced because Hoang sought "one-sided discovery" and "a one-sided departure from a stipulation between the parties to exclude witnesses . . . requiring [IMDb] to revisit their defense strategy, likely incurring additional costs." (1 ER 3.) However Hoang's motion did not seek to limit

¹⁰ State law provides the rule of decision on the question of an attorney's authority to bind his client to a stipulation in a diversity case. *Edwards v. Born, Inc.*, 792 F.2d 387, 389 (3d Cir. 1986). Attorneys in the Western District of Washington must abide by the Washington Rules of Professional Conduct and interpreting decisions. *FMC Techs., Inc. v. Edwards*, 420 F. Supp. 2d 1153, 1157 (W.D. Wash. 2006); Local Rules W.D. Wash. LCR 83.3(a).

IMDb's ability to conduct additional necessary discovery if Hoang's motion were granted. Indeed, IMDb admitted that Hoang's motion provided IMDb fifteen days to disclose rebuttal experts after Hoang disclosed her experts, without delaying the trial date. (2 ER 261 to 261-A; 3 ER 304.) In any event, IMDb never claimed it had any additional witnesses it would want to use if discovery were reopened. To the extent that IMDb's "defense strategy" (1 ER 3) was dependent on Hoang's counsel having self-destructively excluded almost all of Hoang's witnesses against her wishes, forcing IMDb to revisit this strategy merely negated the windfall for IMDb occasioned by Dozier's gross negligence.

On the other hand, denying the motion caused Hoang significant prejudice. Because Hoang could not reopen discovery to disclose an expert, the district court subsequently prohibited Hoang from presenting *all* evidence regarding age discrimination and the role that IMDb profiles play in Hollywood casting, ruling she failed to "show a direct link" between the circumstantial evidence and her case. (3 ER 335-347, 438-523; 4 ER 813-14, 852-60; *see generally* 3 ER 348-4 ER 779.) The court likewise sustained objections whenever Hoang's counsel attempted to introduce this crucial

evidence during trial. (5 ER 899-900, 921-23, 944-45; 950-51, 1003-07, 1016, 1074-75.)

The excluded evidence was critical for a number of reasons. It directly affected Hoang's case on the key issues of causation, breach, credibility, and damages:

For causation, it tended to show that publishing Hoang's true age would break the illusion of Hoang's portrayable age range and facilitate age discrimination, which is difficult to prove because casting executives rarely inform an actor that they are discriminating against her. *See* Russell K. Robinson, *Casting and Caste-ing: Reconciling Artistic Freedom and Antidiscrimination Norms*, 95 Calif. L. Rev. 1, 7 (2007) (“[T]o the extent that discrimination influenced the casting decision, an outsider might find it very difficult to locate the origin of that discrimination, except where the discrimination appears on the face of the breakdown.”); *id.* at 26-28 (discussing how widespread Hollywood ageism limits females' career opportunities).

Regarding breach, it showed that IMDb knew that thousands of actors have protested IMDb's practice of publishing their ages without their consent, and therefore that IMDb could not have interpreted Hoang's

e-mail messages as providing permission for IMDb to run a public records search on her legal name and publish her age.

And, as to credibility, this evidence would have helped the jury understand why Hoang was so desperate that she resorted to extremes to try to manipulate IMDb into removing her birth date—she was a working actress trying to protect her career.

Regarding damages—both their existence and amount—the district court’s refusal to reopen discovery also forced Hoang to proceed through trial with no economic expert, further hindering her from showing that IMDb’s breach resulted in economic damages. (*See, e.g.*, 5 ER 864, 1011, 1013-14, 1061.) Tellingly, the district court ultimately refused to instruct the jury on lost future earnings. (5 ER 1100.)

The exclusion of this evidence left Hoang’s case so truncated that IMDb was emboldened to move for a directed verdict precisely on the basis that Hoang had presented no evidence that IMDb’s actions caused any damages—specifically faulting Hoang for failing to present an expert. (*See* 5 ER 1121-25.)

The court stated that Hoang’s new lead counsel’s discovery motion “appears to be simply Plaintiff’s latest attempt to delay this case” (1 ER 2),

but this begs the question whether to hold Hoang responsible for being a dilatory plaintiff when it was her prior counsel who caused the delay, not Hoang. Hoang obtained new representation within days of Dozier's death. (2 ER 248.)

The district court's other reasons for denying relief were illogical, implausible, or without support from the record. *See Ahanchian v. Xenon Pictures, Inc.*, 624 F.3d 1253, 1258 (9th Cir. 2010). The court stated that Hoang "fail[ed] to offer any facts showing that her former lead counsel was too sick to adequately represent her." (1 ER 2.) Yet Hoang submitted declarations stating that Dozier recently underwent open heart surgery, brain surgery, kidney removal, and daily dialysis. (2 ER 266; 3 ER 319.) The life-altering nature of these treatments should be self-evident. This Court has never required that a plaintiff must attempt to obtain her deceased counsel's private medical records to prove that his illness was too severe to permit competent representation.

The district court stated that new lead counsel should not be given any "extra time to get up to speed" (1 ER 3) because he was previously engaged as local counsel, but Hoang's motion did not *ask* for additional time for new counsel to "get up to speed." The motion requested the

opportunity to conduct discovery on the witnesses and experts that Dozier had forfeited. (2 ER 257-58.) To the extent the district court endorsed IMDb's argument that Hoang's motion should be denied because new lead counsel, as the previous local counsel, could have managed the litigation in Dozier's absence (1 ER 3; *see* 3 ER 298-300), the Supreme Court recently rejected a similar argument in *Maples*. *See Maples*, 132 S. Ct. at 916, 919, 926. The Seventh Circuit also rejected a similar argument, holding that a district court abused its discretion by denying relief from default caused by the lead attorney's illness even though local counsel "had some responsibility for moving the case in a timely and orderly fashion." *Vac-Air*, 471 F.2d at 234. Here, prior to becoming lead counsel, Newman Du Wors was engaged solely as local counsel to assist with filings and local rules, not strategy. (3 ER 315, 318-19, 320.)

The district court indicated that Dozier's two associates were assisting him, rejecting new counsel's argument that neither associate had ever entered an appearance in Hoang's case or received a pro hac vice admission. (1 ER 2; 3 ER 316-17.) The district court was wrong. In *Maples*, 132 S. Ct. at 925-26, the Supreme Court held that regardless of what work other attorneys at prior counsel's law firm may have done

behind the scenes on a case, if at the time of the lead attorney's abandonment the other attorneys have not been admitted pro hac vice in the local forum and entered appearances on the client's behalf, those other attorneys were not the client's "authorized agents" and therefore could not fill the gap in the agent-client relationship caused by the lead attorney's abandonment. Here, Dozier's two associates were a first-year attorney and a recently hired family law attorney. (3 ER 315, 319.) Neither was admitted before the district court. (*Id.*) Tellingly, within four days of Dozier's death, his law firm completely ceased to be Hoang's counsel. (2 ER 248-49.)

Finally, the district court denied Hoang's motion because "her current counsel should [not] be allowed to second guess" Dozier's "strategic decisions." (1 ER 2.) Describing Dozier's failure to disclose experts and his stipulating to exclude Hoang's witnesses as a "strategy" is difficult to reconcile with the fact that, as a result of the court's order binding her to this "strategy," Hoang was forced to go to trial with almost no witnesses or experts on the causation or damages elements of her claim. *Cf. Mann v. Fernandez*, 615 F. Supp. 2d 1277, 1288-89 (D.N.M. 2009) (explaining that the claim that counsel's misconduct was a strategy "might be undercut

were the apparent strategy one that a lawyer would be unlikely to deliberately make,” such as “where counsel notes that he or she will get an expert and then never follows through”).

In sum, the district court’s order preventing Hoang’s new counsel from conducting the discovery that prior counsel abandoned unfairly sent Hoang to trial with one hand tied behind her back and improperly held her accountable for her prior counsel’s gross negligence.

II. IT WAS PREJUDICIAL ERROR TO INSTRUCT THE JURY ON IMDB’S AFFIRMATIVE DEFENSE THAT HOANG HAD THE BURDEN TO PROVE SHE WAS NOT IN MATERIAL BREACH OF IMDB’S AGREEMENT.

A. The material breach instruction erroneously reversed the burden of proof.

1. A claim of instructional error is reviewed de novo.

“Whether a jury instruction misstates the elements that must be proved at trial is a question of law that is reviewed de novo.” *Caballero v. City of Concord*, 956 F.2d 204, 206 (9th Cir. 1992). In an appeal challenging jury instructions as an incorrect statement of the law, “the prevailing party is not entitled to have disputed factual questions resolved in his favor because the jury’s verdict may have resulted from a misapprehension of law rather than from factual determinations in favor

of the prevailing party.” *Clem v. Lomeli*, 566 F.3d 1177, 1179 (9th Cir. 2009) (internal quotation marks omitted).

2. Under Washington law, IMDb’s material breach claim is an affirmative defense on which IMDb, not Hoang, should have had the burden of proof.

The substantive law of the State of Washington applies in this diversity action. *Feldman v. Allstate Ins. Co.*, 322 F.3d 660, 666 (9th Cir. 2003). In Washington, the claim that a plaintiff may not enforce a contract against the defendant because the plaintiff materially breached the contract is an affirmative defense. *Wise v. Farden*, 332 P.2d 454, 456-58 (Wash. 1958); *see De Blasio v. Town of Kittitas*, 356 P.2d 606, 608 (Wash. 1960) (same); *Wlasiuk v. Whirlpool Corp.*, 914 P.2d 102, 112-13 (Wash. Ct. App. 1996) (same); 25 David K. DeWolf et al., *Washington Practice Series: Contract Law & Practice* § 10:3 (2012) (“Where a defendant asserts as an affirmative defense that the plaintiff has failed to perform a contractual duty, the burden is on the defendant to establish nonperformance.”).

Here, IMDb claimed Hoang was not entitled to enforce the agreement against IMDb because Hoang was in material breach of the provisions in the agreement promising that “all information submitted by [her] to the Site is true and accurate.” (6 ER 1178 (¶¶ 7 & 9); *see* 5 ER

1129-47). This was an affirmative defense on which IMDb should have born the burden of proof, but the district court instructed the jury that Hoang had the burden to prove that she was *not* in material breach. (1 ER 5, 7; 4 ER 815-19; 5 ER 1128, 1152.) Thus, the district court erroneously shifted the burden of proof from IMDb to Hoang.

The only exception to the rule that the defense bears the burden to prove plaintiff's material breach is where the contract specifically makes the provision that the plaintiff allegedly breached a condition precedent. *See Walter Implement, Inc. v. Focht*, 730 P.2d 1340, 1342 (Wash. 1987) (“The party seeking enforcement of the contract has the burden of proving performance of an express condition precedent.”); *accord Ross v. Harding*, 391 P.2d 526, 533 (Wash. 1964). “A condition precedent is an event occurring subsequent to the making of a valid contract which must exist or occur before there is a right to immediate performance.” *Walter Implement*, 730 P.2d at 1342. A contract does not create a condition precedent unless its language clearly indicates that intent. *See, e.g., id.* (language “in which event” indicated condition precedent); *Willener v. Sweeting*, 730 P.2d 45, 50 (Wash. 1986) (no condition precedent where contract did not specify an order on who must perform first); *Ross*, 391

P.2d at 529-31 (language “[i]t is specifically understood and agreed that this offer is made subject to the written consent of the lessor” created condition precedent). When in doubt, courts will not construe a provision as a condition precedent. *Ross*, 391 P.2d at 531.

IMDb has never argued that the agreement made it a condition precedent that Hoang had to be truthful in all her submissions before IMDb was bound to comply with its own privacy policy. Nor could it, as the agreement lacks any language indicating this provision was a condition precedent: “You represent and warrant to IMDb that: . . . all information submitted by you to the Site is true and accurate.” (6 ER 1178 (¶9); *see also id.* (¶7, “ You represent and warrant . . . that the content is accurate”).)

Before the district court, IMDb argued that the court should instruct that Hoang bore the burden on this element because the Washington pattern jury instructions include this element in the plaintiff’s case-in-chief. (4 ER 817.) However, the pattern instruction’s comments state: “**Affirmative defense.** Under some contracts, the plaintiff’s performance of a contractual obligation is not made a condition precedent to the defendant’s performance. For these contracts, *the burden of proving*

whether the plaintiff breached the contract rests with the defendant, rather than the plaintiff, as an affirmative defense.” 6A Washington Practice Series: Washington Pattern Jury Instructions: Civil 300.02, comment (6th ed. 2013) (emphasis added); *see also id.*, note on use (indicating that parties should select whether to include this element “[d]epending upon the issues remaining in the case”).¹¹

By reversing the burden of proof on IMDb’s affirmative defense, the jury instruction misstated the law by adding an extra element to Hoang’s case. *See Sanders v. City of Newport*, 657 F.3d 772, 780-81 (9th Cir. 2011) (holding that district court erred by instructing jury in FMLA case that plaintiff had to prove that defendant lacked reasonable cause for refusing to reinstate her after pregnancy leave because burden was on employer to show reasonable cause). Improperly adding an extra element to the plaintiff’s burden “[does] not ‘allow the jury to determine the issues presented intelligently,” because it prohibits the jury from finding in the

¹¹ In any event, this Court has held “jury instructions improper even when they accorded with model instructions.” *United States v. Garcia*, ___ F.3d ___, No. 11-30348, 2013 WL 4056181, at *6 (9th Cir. Aug. 13, 2013) (collecting cases); *Clem*, 566 F.3d at 1181 n.2 (“The use of a model jury instruction does not preclude a finding of error.”) (internal quotation marks omitted).

plaintiff's favor even if she has otherwise proven her case. *Clem*, 566 F.3d at 1182 (holding that district court erred by instructing jury in a § 1983 civil rights action that not only did inmate have to prove prison guard disregarded a known risk of harm to inmate but also that that guard committed a harmful affirmative act); *Caballero*, 956 F.2d at 206 (holding that district court erred by instructing jury that plaintiff in § 1983 action must prove defendant "specifically intended" to violate plaintiff's constitutional rights).

B. The instructional error was not harmless: it added an extra element to Hoang's case and there is no way to rule out the possibility that the jury found for IMDb based on Hoang's failure to prove that element.

"An error in instructing the jury in a civil case requires reversal unless the error is more probably than not harmless." *Sanders*, 657 F.3d at 781. This Court will "presume prejudice where civil trial error is concerned and the burden shifts to the defendant to demonstrate that it is more probable than not that the jury would have reached the same verdict had it been properly instructed." *Id.*; accord *Gantt v. City of Los Angeles*, 717 F.3d 702, 707 (9th Cir. 2013).

“[W]hen ‘the trial court erroneously add[s] an extra element to [the plaintiff’s] burden of proof,’ it is ‘unlikely that the error w[ill] be harmless.’” *Sanders*, 657 F.3d at 781 (internal quotation marks omitted) (holding that district court’s erroneous instruction that reversed burden of proof on affirmative defense caused prejudice requiring reversal); accord *Clem*, 566 F.3d at 1182 (instruction that added an extra element to plaintiff’s burden required reversal); *Caballero*, 956 F.2d at 206 (same).

Here, the district court added an extra element to Hoang’s case that should have been IMDb’s burden to prove. Whether Hoang’s alleged misrepresentations to IMDb were significant enough to justify IMDb’s repudiating its privacy policy, i.e., whether she materially breached the agreement, was a contentious, subjective, and contested issue at trial. (*Cf. Alvarez*, 638 F.3d at 673-74 (Kozinski, C.J., concurring in denial of rehearing en banc) (explaining that “the white lies, exaggerations and deceptions that are an integral part of human intercourse,” are not necessarily culpable, with examples of how “[w]e lie to protect our privacy[;] . . . for career advancement[;] . . . to achieve an objective[;] . . . to maintain a public image”). This was particularly so here because only those few alleged misrepresentations made in the period *after* Hoang

accepted the agreement and *before* IMDb breached that agreement could support IMDb's claim that they justified IMDb's breach.¹² And, none of those could be a material breach excusing IMDb from performance because IMDb expressly conceded that it was *unaware* of them until long after it breached the agreement by using Hoang's confidential information to obtain and publish her birth date. *See Willener*, 730 P.2d at 50 (real estate buyer could not claim it was excused from performance by seller's material breach because buyer did not know seller was going to breach before buyer failed to perform); 5 ER 867-68, 1090, 1098-99, 1130, 1134-35, 1137.

Moreover, whereas IMDb should have had to prove that Hoang's representations between March 25 and November 12 were so serious that they justified IMDb in repudiating all responsibility to protect Hoang's personal information from third parties and the entire internet-viewing

¹² In the period between March 25, 2008, and November 12, 2008 (i.e., between when Hoang entered the contract and before IMDb breached by using Hoang's confidential billing information to search public records and publish her birth date (5 ER 1084-86; 6 ER 1171)), Hoang's alleged misrepresentations were omitting to tell IMDb that Hoang was the individual who originally submitted the incorrect birth date, telling IMDb that her prior agent submitted it, and implying IMDb had requested a copy of her birth certificate. (5 ER 908, 916-18, 923-24, 931-32, 1036-38, 1043, 1045-47; 6 ER 1161, 1165-67; 1173.)

public, the erroneous instruction placed the burden of proof on Hoang. (5 ER 1152-54.)

Prejudice is also generally more likely than not if nothing about the verdict indicates that the result would have been the same without the instructional error. *Sanders*, 657 F.3d at 781; *Clem*, 566 F.3d at 1182; *Caballero*, 956 F.2d at 207. Here, the entire verdict consisted of the response “No” to the question, “[h]as Plaintiff proven her breach of contract claim?” (1 ER 8; 5 ER 1156.) There is no way from this verdict to determine whether the jury found that IMDb did *not* breach the agreement when it used Hoang’s billing information to search public records and publish her birth date without her consent, or whether the jury found that IMDb *did* breach the agreement through these acts but—based on the erroneous instructions—that Hoang failed to prove she was not in material breach and therefore IMDb’s breach was excused. *See, e.g., Clem*, 566 F.3d at 1183 (prejudice found where general verdict left no way to determine basis for jury’s decision).

There is another reason this instructional error was prejudicial. There was substantial evidence upon which the jury could have found that IMDb breached its agreement with Hoang. (5 ER 1072, 1084-92, 1104-07,

1115; 6 ER 1212-13.) This evidence precludes this Court from speculating that the jury would have found in IMDb's favor regardless of the instructional error. The evidenced showed that IMDb's agreement covers "Information You Give Us," and promises that it will only share users' personal information without obtaining their consent in six enumerated circumstances: (1) with affiliated subsidiaries; (2) for use in providing joint offerings with affiliated non-subsidiary businesses; (3) with marketing vendors to assist with e-mail marketing; (4) to send promotional offers on behalf of other companies to IMDb users; (5) in connection with corporate acquisitions; and (6) to comply with law enforcement, court orders, and fraud protection efforts. (6 ER 1180.) None of those circumstances apply to IMDb's conduct here. IMDb's agreement promises that other than in these six circumstances, "you will always receive notice when information about you might go to third parties, and you will have an opportunity to choose not to share the information." (*Id.*) IMDb conceded that it never gave Hoang notice or an opportunity to choose not to share before it took personal information that she provided solely to make credit card transactions and shared it with a third party, PrivateEye.com, in order to uncover her true age, which she had deliberately and successfully kept

secret. (5 ER 877-80; 1084-86, 1088, 1090, 1092, 1098-99, 1106-07; 6 ER 1212; *see* 5 ER 1072, 1104-05, 1115.)

IMDb's agreement extends this same promise not to share information with third parties without user consent to "Information from Other Sources" that "we might receive . . . about you." (6 ER 1180.) Yet IMDb *also* conceded it never gave Hoang notice or an opportunity to object when it took the information about her true age that it received from PrivateEye.com and published it on its web site for viewing by the general public. (5 ER 1089-90; 1107-08, 1111 ("Q: Did you provide Ms. Hoang with notice? A: No."), 1119.)

IMDb argued that the provision requiring it to obtain consent before "sharing" a user's personal information applies only to "selling" information. (5 ER 1111, 1116-18.) However, this argument was belied by the plain text of the provision, which is titled "**Does IMDb Share the Information It Receives**," and which covers many forms of transferring information aside from "selling," such as allowing agents to "access" the information, "shar[ing]" it with or "giving" it to affiliated businesses, and "releas[ing]" the information to government agencies. (5 ER 1116-18 (conceding agreement's text is not limited to "selling"); 6 ER 1180.)

In this respect, it should be noted that a growing consensus of courts, guided by U.S. Supreme Court reasoning, has found that “birth dates are in fact private information,” and “[t]he public availability of birth dates does not negate privacy interests.” *Scottsdale Unified Sch. Dist. No. 48 of Maricopa Cnty. v. KPNX Broad. Co.*, 955 P.2d 534, 538-39 (Ariz. 1998) (holding government employee birth dates are exempt from disclosure under state freedom of information law); accord *Okla. Pub. Emps. Ass’n v. State ex rel. Okla. Office of Pers. Mgmt.*, 267 P.3d 838, 851 (Okla. 2011); *Garden Grove Police Dep’t v. Superior Court*, 89 Cal. App. 4th 430, 433-34 & n.3 (2001). “[B]oth the common law and the literal understandings of privacy encompass the individual’s control of information concerning his or her person.” *U.S. Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 763 (1989). “An individual’s interest in controlling the dissemination of information regarding personal matters does not dissolve simply because that information may be available to the public in some form.” *U.S. Dep’t of Def. v. Fed. Labor Relations Auth.*, 510 U.S. 487, 500 (1994); cf. *Joffe v. Google, Inc.*, ___ F.3d ___, No. 11-17483, 2013 WL 4793247, at *14 n.8 (9th Cir. Sept. 10, 2013) (some personal information is not considered “readily accessible to the general public” even though it is

public and Internet companies with enough technical skill and can obtain it).

“[G]overnmental agencies and the courts have a special obligation to protect the public’s interest in individual privacy by acknowledging that public records are being harvested for personal information about individuals, contributing to a surge in identity theft, consumer profiling, and the development of a stratified society where individuals are pigeonholed according to the electronic trail they leave of transactions that disclose personal details.” *Okla. Pub. Emps. Ass’n*, 267 P.3d at 851 (footnote omitted) (discussing birth dates).

The bottom line is that the material breach instruction was erroneous. It reversed the burden of proof and added an additional element to Hoang’s case. There was substantial evidence upon which the jury could have found IMDb breached its agreement with Hoang, and the jury’s verdict in favor of IMDb may be the result of the erroneous instruction placing the burden of proof on Hoang to prove she did not commit a material breach excusing IMDb’s breach. Under these circumstances, this error cannot be shown to have been harmless.

CONCLUSION

For the foregoing reasons, this Court should vacate the judgment in favor of IMDb and remand for new trial.

October 30, 2013

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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Hoang is unaware of any related case pending in this Court.

CERTIFICATE OF SERVICE

I hereby certify that on October 30, 2013, 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.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Signature: s/ Mark A. Kressel