

How does a Court impose effective punitive damages against an individual such as Jeffrey Borer. An individual who not only willfully refused to provide any financial information to rebut the evidence of his vast holdings and wealth but without impunity checked into and stayed at the five star Ritz Carlton Hotel in Marina Del Rey in order to serve his "house arrest" sentence. A months long sentence of house arrest imposed by a Federal Judge as a result of a Federal conviction.

FILED
LOS ANGELES SUPERIOR COURT

FEB 29 2008

JOHN A. CLARKE, CLERK
K. Tollack
BY K. TOLLACK, DEPUTY

Michael Jackson, et.al.

v.

XtraJet, Inc., et.al.

BC301d668

Courthouse News Service

1
2
3
4 **I. Background**

5 **A. Factual Summary**

6 The underlying facts are largely undisputed. On November 21, 2003, Plaintiffs Mark
7 J. Geragos and Eugene Patterson Harris, and their client Michael Jackson chartered a
8 private Gulfstream aircraft from Defendant XtraJet, Inc. (hereafter "XtraJet") to fly them
9 from Clarke County, Nevada to Santa Barbara County, California. XtraJet is owned by
10 Defendant Jeffrey Borer ("Borer"), who also operates Pavair, Inc. ("Pavair"). The
11 arrangements for the chartered flight were made by travel agent, Defendant Cynthia
12 Montgomery ("Montgomery"), who worked for Travel 21, Inc.

13 Unbeknownst to Plaintiffs, Defendants had covertly installed a video recorder in the
14 cabin of the plane which made a video and audio recording of the interior of the cabin
15 during the entirety of Plaintiffs' flight. The videotape and recording (hereafter collectively
16 referred to as the "recording") included the filming and recording of privileged attorney-
17 client communications between Mr. Jackson and his lawyers, Plaintiffs Geragos and Harris.
18 Defendants had not received consent, permission or authority from Mr. Jackson, Mr.
19 Geragos or Mr. Harris to make the recording.

20 On November 24, 2003, Plaintiff Geragos received numerous calls from news outlets
21 informing him of the existence of the recording. Plaintiffs learned that Defendants had
22 shown the recording to a number of third parties, including various news organizations, in
23 an effort to sell the recording and the information contained therein regarding the
24 conversations and actions by Plaintiffs. Plaintiff Geragos also learned that the recording
25 was being shopped around for a minimum of one million dollars.

26 At no time did Plaintiffs give Defendants permission to videotape or record their
27 confidential conversations while on the privately chartered jet on November 21, 2003, to
28 sell the recording or to publicize information contained on the recording, or to use

1 Plaintiffs' names, likenesses or identities in their efforts to sell the recording.
2

3 **B. Procedural Summary**

4 On November 25, 2003, Plaintiffs Michael Jackson, Geragos & Geragos, APC, Mark
5 J. Geragos, and Eugene Patterson Harris filed a Complaint against Defendant XtraJet, Inc.
6 alleging seven causes of action, namely invasion of privacy, public disclosure of private
7 facts, common law misappropriation of name and likeness, use of name and likeness,
8 violation of their constitutional right of privacy, recording of confidential information, and
9 unfair business practices. That same day, Plaintiffs also filed an application with the Court
10 for a temporary restraining order enjoining Defendants from further marketing or
11 distributing the recording, which the Court granted.

12 On December 26, 2003, Defendant XtraJet filed its Answer to Plaintiffs' Complaint,
13 denying generally and specifically each and every allegation of each cause of action. On
14 March 22, 2004, Plaintiffs filed their First Amended Complaint, adding an eighth cause of
15 action for negligence, and naming Pavair, Borer, Travel 21, Inc., and Cynthia Montgomery
16 as additional defendants.¹ Defendants thereafter filed their Answer to Plaintiffs' First
17 Amended Complaint, denying generally and specifically each and every allegation of each
18 cause of action. On March 6, 2006, in the criminal matter *United States of America v.*
19 *Jeffrey Borer and Arvel Jett Reeves* (Case No. CR05-921-AHM), Defendant Jeffrey Borer
20 pled guilty to a felony, violating Title 18 United States Code, Sections 371 and 2511.
21

22 **II. Discussion**

23 **A. First Cause of Action – Invasion of Privacy**

24 The elements for invasion of privacy as provided in the Judicial Council of
25 California Civil Jury Instructions are as follows:

- 26 • Plaintiff had a reasonable expectation of privacy in his conversation;

27
28 ¹ Subsequently, Michael Jackson withdrew as a plaintiff and Travel 21 was dismissed
without prejudice as a defendant.

- 1 • Defendant intentionally intruded in the conversation;
- 2 • Defendant's intrusion would be highly offensive to a reasonable person. In
- 3 deciding whether an intrusion is highly offensive, you should consider, among
- 4 other factors, the following:
- 5 (a) The circumstances surrounding the intrusion;
- 6 (b) Defendant's motives and goals;
- 7 (c) The setting in which the intrusion occurred;
- 8 (d) How much privacy Plaintiff could expect in that setting
- 9 • Injury to the plaintiff;
- 10 • Defendant's conduct was a substantial factor in causing the injury
- 11

12 Plaintiffs Geragos and Harris testified that they had a reasonable expectation of

13 privacy when they specifically chartered a private jet. They testified that since the Jackson

14 case was attracting international attention, they chartered a jet so they could privately advise

15 and escort their client to a legal proceeding. They testified that they specifically intended

16 that the public not be privy to anything going on in the plane. Geragos and Harris further

17 testified that they believed the privately chartered jet was a confidential environment where

18 they could have confidential communications with their client. The Court finds Geragos

19 and Harris' testimony to be credible, and that it was reasonable for Plaintiffs to expect their

20 communications on the privately chartered jet to remain confidential. Accordingly,

21 Plaintiffs had a reasonable expectation of privacy in their conversations.

22 To establish Defendant Borer's intent, Plaintiffs submitted into evidence Borer's

23 Plea Agreement and attached Statement of Facts in the criminal matter *United States of*

24 *America v. Jeffrey Borer and Arvel Jett Reeves* (Case No. CR05-921-AHM). The

25 Statement of Facts provided the following details on how Borer illegally videotaped

26 Plaintiffs and their client: On or about November 19, 2003, Borer learned that Michael

27 Jackson would charter a private XtraJet aircraft to fly from Las Vegas to Santa Barbara;

28 Borer contacted Arvel Jett Reeves, a codefendant and convicted coconspirator in the

1 criminal trial, and instructed him to install audio-video recording equipment on the XtraJet
2 aircraft; shortly thereafter, pursuant to Borer's instructions, Reeves purchased two Sony
3 mini-camcorders, extension microphones, and remote lenses for the camcorders; Borer and
4 Reeves intended to create audio and video recordings of Michael Jackson and his attorney,
5 and then sell these recordings to the media for a large sum of money; two recordings of
6 Plaintiffs and their client, Michael Jackson, were created. The Statement of Facts attached
7 to Borer's Plea Agreement effectively established that Defendant Borer intentionally
8 intruded in the private conversations between Plaintiffs and their client.

9 Furthermore, the Statement of Facts established that in November 2003, Defendant
10 Borer was the owner of Afta Incorporated, doing business as XtraJet. XtraJet was a
11 California corporation that provided charter aircraft service to private parties. This Court
12 finds that Borer was acting within the course and scope of his employment at XtraJet when
13 he conspired to secretly videotape the attorney-client communications between Plaintiffs
14 and their client and thereafter sell the recording for profit because his conduct was an
15 outgrowth of his employment with XtraJet and was broadly incidental to the enterprise
16 undertaken by XtraJet. Therefore, Borer's actions are imputed to Defendant XtraJet and
17 Defendant XtraJet is vicariously liable for its managing agent Borer's tortious acts.

18 To establish Defendant Montgomery's intent, Plaintiffs introduced evidence that
19 Montgomery went to the site where the chartered jet landed to ensure that the flight would
20 be recorded. A strong inference can be drawn from the evidence that Montgomery was part
21 of the scheme to record Plaintiffs and expected a pecuniary gain from such a recording.

22 The Court has considered the circumstances surrounding the intrusion, each of the
23 Defendants' motives in profiting from the intrusion, and the fact that Plaintiffs had a
24 reasonable expectation of privacy on the privately chartered jet. In light of these factors, the
25 Court finds that the intrusion would be highly offensive to a reasonable person.

26 Plaintiffs Geragos and Harris testified that they suffered injury as a result of this
27 incident. Geragos testified that he was extremely angry and upset upon learning that his
28 confidential attorney-client communications had been surreptitiously recorded and

1 videotaped. He was even more outraged that the recording was being shopped around to
2 the media and that upon demand to Defendants' representatives, it was not turned over to
3 him. Rather, he was told that Defendants believed obtaining the recording was like "hitting
4 the lottery."

5 Geragos testified that this incident was one of the most outrageous things he had
6 ever experienced in his practice. Harris testified that this was one of the angriest he had
7 ever seen Geragos. Geragos testified that since the incident, he is not comfortable speaking
8 with clients about sensitive matters over the telephone and even in places where he used to
9 feel relatively secure about his communications.

10 Geragos also testified that he has suffered substantial monetary loss because of the
11 incident. Geragos testified that he handles many cases involving high-profile clients or that
12 otherwise attract media attention. Geragos testified that he must now go to extraordinary
13 lengths with certain clients because this incident apprised him of the lengths some people
14 will go to insinuate themselves into the attorney-client relationship. He testified that in an
15 abundance of caution, he must now spend a great deal of time and money to take extra and
16 unreasonable steps in an attempt to avoid another intrusive and embarrassing violation of
17 his privacy rights. Geragos testified that his actions now border on being paranoid.
18 Specifically, Geragos testified that this incident led him to purchase his own office building
19 so that he could have 24-hour security and surveillance of the premises at all times.

20 Plaintiff Harris testified that the incident was extraordinarily embarrassing. He
21 explained that part of their legal strategy had been to try to circumvent the circus-like
22 atmosphere the media had created around the Jackson case. Despite their efforts, however,
23 the recording actually put Jackson at the forefront of another media spectacle and the
24 incident depicted his attorneys as unprofessional and ineffective at protecting their client's
25 confidences. To compound matters, the incident was widely reported and publicized,
26 causing further distress to Plaintiffs. Harris testified that the incident undoubtedly affected
27 his and Geragos' national reputations, as the media thereafter ridiculed them for what had
28 transpired.

1 Harris further explained that the incident also had financial consequences for himself
2 and Plaintiff Geragos, as they believe it affected their relationship with Mr. Jackson. Harris
3 testified that it is their belief that this incident was partly why Mr. Jackson chose to
4 terminate them as counsel on the biggest international cases at the time.

5 Both Geragos and Harris testified that as a result of the incident, they were and
6 continue to be humiliated and embarrassed and suffered and continue to suffer mental
7 distress and anxiety, especially when engaging in private communications with their present
8 and prospective clients. Law professor Stan Goldman, who testified as a media expert,
9 agreed that it is reasonably certain that this incident may have damaged Plaintiffs' national
10 reputations as attorneys who are sought after to represent high-profile clients.

11 Based on Geragos, Harris, and Goldman's testimony, this Court finds that Plaintiffs
12 suffered injury as a result of each of Defendants' conduct. The Court also finds that each of
13 the Defendants' conduct was a substantial factor in causing Plaintiffs' injury, as
14 Defendants' intentional intrusion into Plaintiffs' confidential communications with their
15 client was the direct and proximate cause of Plaintiffs' injury.

16 For all the foregoing reasons, this Court finds in favor of Plaintiffs on invasion of
17 privacy against Defendants Borer, XtraJet, and Montgomery.

18
19 **B. Second Cause of Action – Public Disclosure of Private Facts**

20 The elements for public disclosure of private facts as provided in the Judicial
21 Council of California Civil Jury Instructions are as follows:

- 22
- 23 • Defendant publicized private information concerning Plaintiff;
 - 24 • A reasonable person in Plaintiff's position would consider the publicity highly
25 offensive;
 - 26 • Defendant knew, or acted with a reckless disregard of the fact, that a
27 reasonable person in Plaintiff's position would consider the publicity highly
28 offensive;
 - The private information was not of legitimate public concern. In deciding

1 whether the information was a matter of legitimate public concern, you should
2 consider, among other factors, the following:

- 3 (a) The social value of the information;
4 (b) The extent of the intrusion into Plaintiff's privacy;
5 (c) Whether Plaintiff consented to the publicity explicitly or by voluntarily
6 seeking public attention or a public office;
- 7 • Injury to the plaintiff;
 - 8 • Defendant's conduct was a substantial factor in causing the injury

9 Plaintiff Geragos testified that on November 24, 2003, at approximately 3:00 p.m.,
10 he received numerous calls from news outlets informing him of the existence of the
11 recording. He also testified that he received numerous calls from people who claimed that
12 they themselves had seen the recording. Geragos testified that in response to this
13 information, he immediately called Defendant XtraJet. Geragos eventually spoke to Lloyd
14 Kirschbaum, who told Geragos that he was the attorney for Defendant XtraJet. Geragos
15 testified that after several calls back and forth between Mr. Kirschbaum and himself, that
16 Mr. Kirschbaum told him that there was, in fact, a videotape recording of the attorney-client
17 communications between Plaintiffs and Mr. Jackson on the private jet. Mr. Kirschbaum
18 explained that a video recorder had been covertly installed in the cabin of the plane and that
19 it recorded the interior of the cabin during the flight. Geragos testified that Mr. Kirschbaum
20 further told him that Defendant XtraJet was not going to turn over the recording to him, but
21 instead, was "shopping it around" to see how much money it could get for the recording.

22 Mr. Kirschbaum did not take the stand to deny these events or to controvert Geragos'
23 testimony in any way. Therefore, based on Geragos' testimony, this Court finds that
24 Defendant Borer and XtraJet publicized private information about Plaintiffs. The Court
25 also finds that a reasonable person in Plaintiffs' position would consider the publicity highly
26 offensive. Clients place their trust in their attorneys and expect that the information they
27 divulge to them remain confidential. A reasonable attorney would be highly offended by
28 publicity that their communications with their client were recorded and publicly disclosed.

1 As noted above, Harris testified that he and Geragos were indeed the butt of jokes in the
2 media as a result of the incident. Publicity of this sort would be highly offensive to a
3 reasonable attorney.

4 The Court also finds that the Statement of Facts attached to Defendant Borer's Plea
5 Agreement established that Defendants knew, or acted with a reckless disregard of the fact,
6 that a reasonable person in Plaintiffs' position would consider the publicity highly
7 offensive.

8 Moreover, it was foreseeable to Defendant Montgomery that the recording would be
9 disclosed to the public. In fact, based on Montgomery's conduct in going to the landing site
10 to ensure that the Plaintiffs on that flight were being recorded, there is a strong inference
11 that Defendant Montgomery intended that the recording eventually be disclosed to third
12 persons, and specifically, for pecuniary gain.

13 The Court has considered the social value of the recording, the extent of the intrusion
14 into Plaintiffs' privacy, and the fact that Plaintiffs did not either explicitly or implicitly
15 consent to the publicity resulting from the recording. In light of these factors, the Court
16 finds that the private information contained in the recording lacked social value and was not
17 of legitimate public concern. On the contrary, the attorney-client relationship is sacred and
18 intended to be a purely private matter.

19 For the same reasons explained above in Part IIA, Plaintiffs suffered injury as a
20 result of the public disclosure of private facts, and each of the Defendants' conduct was a
21 substantial factor in causing Plaintiffs' injury.

22 For all the foregoing reasons, this Court finds in favor of Plaintiffs on their second
23 cause of action, public disclosure of private facts, against Defendants Borer, XtraJet, and
24 Montgomery.

25
26 **C. Third Cause of Action – Common Law Misrepresentation of Name**
27 **and Likeness**

28 The elements for common law misrepresentation of name and likeness as provided in

1 the Judicial Council of California Civil Jury Instructions are as follows:

- 2 • Use of plaintiff's identity;
- 3 • To defendant's advantage, commercially or otherwise;
- 4 • Injury to the plaintiff;
- 5 • Defendant's conduct was a substantial factor in causing the injury;
- 6 • Plaintiff's privacy interest outweighs the public interest served by
- 7 Defendant's use
- 8

9 The Statement of Facts attached to Defendant Borer's Plea Agreement states that
10 Defendant Borer was trying to sell the recording for profit, thereby establishing that Borer
11 used Plaintiffs' identities for economic advantage.

12 Moreover, as explained above, Defendant Montgomery went to the site where the jet
13 landed to make certain that the Plaintiffs were recorded. It is, therefore, evident that
14 Defendant Montgomery intended to use Plaintiffs' name and likeness, and specifically,
15 intended to do so for pecuniary gain.

16 As explained above in Part IIA, Plaintiffs suffered injury as a result of the common
17 law misrepresentation of Plaintiffs' name and likeness, and Defendants' conduct was a
18 substantial factor in causing Plaintiffs' injury.

19 In balancing the relevant interests, the Court finds that Plaintiffs' legitimate and
20 sacred privacy interest in the attorney-client communications contained in the recording
21 outweighs any potential public interest that may be served by Defendants' making the
22 recording or disseminating and attempting to sell the recording thereafter.

23 For all the foregoing reasons, this Court finds in favor of Plaintiffs on their third
24 cause of action, common law misrepresentation of name and likeness, against Defendants
25 Borer, XtraJet, and Montgomery.

26

27

28

1 D. **Fourth Cause of Action – Use of Name and Likeness Pursuant to**
2 **Civil Code Section 3344**

3 The elements for use of name and likeness pursuant to Civil Code Section 3344 as
4 provided in the Judicial Council of California Civil Jury Instructions are as follows:

- 5 • Defendant knowingly used Plaintiff's likeness on merchandise or to advertise
6 or sell products or services;
- 7 • Defendant did not have Plaintiff's consent;
- 8 • Defendant's use of Plaintiff's likeness was directly connected to Defendant's
9 commercial purpose;
- 10 • Injury to the plaintiff;
- 11 • Defendant's conduct was a substantial factor in causing the injury
- 12

13 The Statement of Facts attached to Defendant Borer's Plea Agreement states that
14 Borer intended to videotape and record Mr. Jackson with his attorney and they thereafter
15 intended to sell the recording. The Court finds that this is sufficient to establish that Borer
16 and ~~Montgomery~~ ^{RB} Montgomery, were knowingly using Plaintiffs' likeness on the recording to
17 advertise and sell the recording and the information contained therein for personal profit.
18 The Court also finds that Borer's use of Plaintiffs' likeness was directly connected to Borer
19 and XtraJet's commercial purpose, as it was the identity of Mr. Jackson and his attorney
20 during a time when the Jackson case was attracting international attention that gave the
21 recording a high commercial value.

22 Plaintiffs Geragos and Harris testified that none of the Defendants had Plaintiffs'
23 consent to videotape or record them while on the privately chartered jet. They also testified
24 that they did not consent to the distribution or sale of the information contained on the
25 recording.

26 Moreover, as explained above, it is evident that Defendant Montgomery intended to
27 use Plaintiffs' name and likeness, and specifically, intended to do so for pecuniary gain.

28 For the same reasons explained above in Part IIA, Plaintiffs suffered injury as a

1 result of the use of Plaintiffs' name and likeness, and each of the Defendants' conduct was
2 a substantial factor in causing Plaintiffs' injury.

3 For all the foregoing reasons, this Court finds in favor of Plaintiffs on their fourth
4 cause of action, use of name and likeness pursuant to Civil Code section 3344, against
5 Defendants Borer, XtraJet, and Montgomery.

6
7 **E. Fifth Cause of Action – Constitutional Right of Privacy**

8 The elements for constitutional right of privacy as provided in the Judicial Council
9 of California Civil Jury Instructions are as follows:

- 10 • Plaintiff had a reasonable expectation of privacy in his confidential
11 conversation under the circumstances;
- 12 • Defendant invaded Plaintiff's privacy in his confidential conversation;
- 13 • Defendant's conduct was a serious invasion of Plaintiff's privacy;
- 14 • Injury to the plaintiff;
- 15 • Defendant's conduct was a substantial factor in causing the injury
- 16

17 As explained above in Part IIA, Plaintiffs had a reasonable expectation of privacy in
18 their confidential communications on the privately chartered jet and Borer invaded
19 Plaintiffs' privacy in these confidential communications by surreptitiously videotaping and
20 recording Plaintiffs and their client during the entirety of their flight on November 21, 2003.
21 In light of the sacred and private nature of attorney-client communications, this Court finds
22 that Borer's conduct was a serious invasion of Plaintiffs' privacy.

23 Moreover, as explained above, the evidence established that, by going to the site
24 where the plane landed to ensure Plaintiffs were being recorded, Defendant Montgomery
25 intended to invade Plaintiffs' confidential conversations, and did, in fact, invade such
26 conversations.

27 For the same reasons explained above in Part IIA, this Court finds that Plaintiffs
28 suffered injury as a result of each of the Defendants' violation of Plaintiffs' constitutional

3/3/06

1 right of privacy, and that each of the Defendants' conduct was a substantial factor in
2 causing Plaintiffs' injury.

3 For all the foregoing reasons, this Court finds in favor of Plaintiffs on their fifth
4 cause of action, violation of Plaintiffs' constitutional right of privacy, against Defendants
5 Borer, XtraJet, and Montgomery.

6

7 **F. Sixth Cause of Action – Recording of Confidential Information**
8 **Pursuant to Penal Code Sections 632 and 637.2**

9 The elements for recording of confidential information pursuant to Penal Code
10 Sections 632 and 637.2 as provided in the Judicial Council of California Civil Jury
11 Instructions are as follows:

- 12 • Defendant intentionally recorded Plaintiff's conversation by using an
- 13 electronic device;
- 14 • Plaintiff had a reasonable expectation that the conversation was not being
- 15 overheard or recorded;
- 16 • Defendant did not have the consent of all parties to the conversation to record
- 17 it;
- 18 • Injury to the plaintiff;
- 19 • Defendant's conduct was a substantial factor in causing the injury

20

21 The Statement of Facts attached to Defendant Borer's Plea Agreement established
22 that Borer intentionally recorded Plaintiffs' conversation by using an electronic device. As
23 explained above in Part IIA, it was reasonable for Plaintiffs to expect that their conversation
24 on a privately chartered jet was not being overheard or recorded. Plaintiffs Geragos and
25 Harris both testified that they never consented to the recording of their conversation by
26 Borer.

27 Moreover, the evidence established that, by going to the site where the plane landed
28 to ensure Plaintiffs were being recorded, Defendant Montgomery intentionally recorded

5/3/08

1 Plaintiffs' confidential conversations. Plaintiffs testified that none of them gave
2 Montgomery consent to record their confidential conversations.

3 For the same reasons explained above in Part IIA, this Court finds that Plaintiffs
4 suffered injury as a result of each of the Defendants' violation of Plaintiffs' constitutional
5 right of privacy, and that each of the Defendants' conduct was a substantial factor in
6 causing Plaintiffs' injury.

7 For all the foregoing reasons, this Court finds in favor of Plaintiffs on their sixth
8 cause of action, recording of confidential information pursuant to Penal Code sections 632
9 and 637.2, against Defendants Borer, XtraJet, and Montgomery.

10
11 **G. Seventh Cause of Action – Unfair Business Practices Pursuant to**
12 **California Business and Professions Code Section 17200 et seq.**

13 The elements for unfair business practices pursuant to California Business and
14 Professions Code Section 17200 et seq. as provided in the Judicial Council of California
15 Civil Jury Instructions are as follows:

- 16
- 17 • Defendant engaged in:
 - 18 ○ An unlawful business act or practice, or
 - 19 ○ An unfair business act or practice, or
 - 20 ○ A fraudulent business act or practice;
 - 21 • Injury to the plaintiff;
 - 22 • Defendant's conduct was a substantial factor in causing the injury

23 Defendant Borer's felony conviction in the criminal matter *United States of America*
24 *v. Jeffrey Borer and Arvel Jett Reeves* (Case No. CR05-921-AHM) established that
25 Defendant Borer engaged in an unlawful business act or practice, namely the violation of
26 Title 18 United States Code, Sections 371 and 2511. Specifically, Borer pled guilty to
27 entering into an agreement between two or more persons to intentionally:

- 28 (1) intercept an oral communication in violation of Title 18 United States Code, Section

1 2511(1)(a) ;

2 (2) use an electronic device, specifically digital camcorders with remote microphones to
3 intercept an oral communication, knowing and having reason to know that said
4 camcorder or any component thereof had been sent through the mail or transported
5 in interstate or foreign commerce, a violation of Title 18, United States Code,
6 Section 2511(1)(b)(iii);

7 (3) use an electronic device, specifically two digital camcorders with remote
8 microphones, to intercept an oral communication, knowing that such use and
9 endeavor to use would take place on the premises of a business and other
10 commercial establishment the operations of which affect interstate or foreign
11 commerce, in violation of Title 18, United States Code, Section 2511(1)(b)(iv); or
12 disclose to another person the contents of an oral communication, knowing and
13 having reason to know that the information had been obtained through the
14 interception of oral communication, in violation of Title 18, United States Code,
15 Section 2511(1)(c).

16 For the same reasons explained above in Part IIA, this Court finds that Plaintiffs
17 suffered injury as a result of Defendant Borer's engaging in an unlawful business act or
18 practice, and that Borer's conduct was a substantial factor in causing Plaintiffs' injury.

19 For all the foregoing reasons, this Court finds in favor of Plaintiffs on their seventh
20 cause of action, unfair business practices pursuant to California Business and Professions
21 Code section 17200 *et seq.* against Defendants Jeffrey Borer and XtraJet.

22
23 **H. Eighth Cause of Action – Negligence**

24 The elements for negligence as provided in the Judicial Council of California Civil
25 Jury Instructions are as follows:

- 26 • Defendant had a legal duty to conform to a standard of conduct to protect the
- 27 Plaintiff;
- 28 • Defendant failed to meet this standard of conduct;

3/2/06

- 1 • Defendant's failure was the proximate or legal cause of the resulting
2 injury;
3 • Injury to the plaintiff
4

5 A common carrier owes its passengers a heightened duty of care, which requires the
6 common carrier to exercise the utmost care and diligence of very cautious persons. *Gomez*
7 *v. Superior Court* (2005) 35 Cal.4th 1125, 1131. Common carriers are responsible for even
8 the slightest negligence. *Id.* Civil Code section 2100 similarly states that "[a] carrier of
9 persons for reward must use the utmost care and diligence for their safe carriage, must
10 provide everything necessary for that purpose, and must exercise to that end a reasonable
11 degree of skill." Cal. Civ. Code § 2100.

12 It is undisputed that XtraJet, Inc. and Pavair, Inc. were companies that were in the
13 business of chartering private jets. Accordingly, this Court finds as a matter of law that
14 Defendants XtraJet and Pavair were common carriers, and that as common carriers, they
15 owed Plaintiffs a duty to exercise the highest degree of care to prevent Plaintiffs from harm.

16 The Statement of Facts attached to Defendant Borer's Plea Agreement established
17 that Defendant Borer entered the XtraJet aircraft and worked into the early morning hours
18 of November 20, 2003 installing the camcorder. Ultimately, Borer and his cohorts covertly
19 installed a video recorder in the cabin of the plane, which recorded the interior of the cabin
20 during the entirety of Plaintiffs' flight on November 21, 2003. This Court finds that Borer
21 and XtraJet failed to use a duty of the highest care when they negligently and carelessly
22 supervised the aircraft and allowed Borer and his cohorts to have unauthorized access to the
23 private jet, which resulted in the invasion of Plaintiffs' privacy aboard the aircraft.

24 As a direct consequence of Borer and XtraJet's negligent supervision of the aircraft
25 and their employees, Plaintiffs Harris and Geragos suffered mental suffering and anguish,
26 personal humiliation, loss of standing and reputation, and financial losses, as described
27 more fully above in Part IIA. This Court finds that Borer and XtraJet were negligent and
28 careless in their supervision of the aircraft and their employees and that such neglect and

1 carelessness was a proximate result of Plaintiffs' injuries.

2 For all the foregoing reasons, this Court finds in favor of Plaintiffs on their eighth
3 cause of action, negligence, against Defendants Jeffrey Borer and XtraJet.

4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

II. Discussion of Damages

A. Compensatory Damages

Plaintiffs, having prevailed on their right of privacy claims, are entitled to recover damages for their actual injuries. A plaintiff's actual injuries are not limited to plaintiff's out-of-pocket losses, but include "impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering." *Diaz v. Oakland Tribune, Inc.* (1983) 139 Cal.App.3d 118, 137. Furthermore, the evidence submitted established that the recording was worth upwards of two million dollars (\$2,000,000.00) and was being shopped around for more than that amount. Accordingly, having prevailed on their invasion of privacy claims and misappropriation claims, this Court finds Plaintiff Geragos' actual injuries to be two million dollars (\$2,000,000.00) and Plaintiff Harris' actual injuries to be

\$250,000.00 to be paid by Defendants on a joint and several basis.
\$ fifty thousand dollars

B. Punitive Damages

"Punitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition." *BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559, 568. Moreover, punitive damages may be awarded to the injured party pursuant to section 3344 of the California Civil Code. As Plaintiffs have prevailed on their fourth cause of action for use of name and likeness pursuant to Civil Code section 3344, the imposition of punitive damages are specifically authorized in this case.

In imposing punitive damages, the court considers the reprehensibility of the defendant's conduct, the ratio between the punitive damages award and the plaintiff's harm, and the amount necessary to punish and deter the defendant from future wrongful conduct,

37 5/1/01

1 in view of the defendant's financial condition. *Kelly v. Haag* (2006) 145 Cal.App.4th 910,
2 914. In considering the constitutional due process limit to punitive damages, the United
3 States Supreme Court has consistently ruled that "courts must ensure that the measure of
4 punishment is both reasonable and proportionate to the amount of harm to the plaintiff and
5 to the general damages recovered." *State Farm Mutual Automobile Insurance Co. v.*
6 *Campbell* (2003) 538 U.S. 408, 426. Although there is no bright-line ratio that a punitive
7 damages award cannot constitutionally exceed, single-digit ratios are deemed constitutional
8 in most cases. *Id.* The trial court's role, in this regard, is to establish the necessarily higher
9 threshold – the maximum award of punitive damages that does not violate the Due Process
10 Clause of the Fourteenth Amendment. *Romo v. Ford Motor Co.* (2003) 113 Cal.App.4th
11 738, 806.

12 Generally, actual evidence of the defendant's financial condition is essential, as the
13 punitive damages award is based on the defendant's financial condition at the time of trial,
14 and the burden is on the plaintiff to establish the defendant's financial condition. *Id.* at 915-
15 916. However, when the defendant fails or refuses to comply with a valid order to produce
16 financial information, the defendant can be deemed to waive any right to challenge a
17 punitive damages award based on lack of wealth evidence. *Caira v. Offner* (2005) 126
18 Cal.App.4th 12, 37-38; *Mike Davidov Co. v. Issod* (2000) 78 Cal.App.4th 597, 608-610.

19 Here, in response to a comprehensive set of discovery requests that were narrowly
20 tailored to his financial condition, Defendant Borer produced a non-responsive, self-serving
21 set of documents, which failed to apprise the Court of his actual financial condition.
22 Thereafter, counsel for both sides met and conferred, and stipulated to the fact that Borer's
23 failure to produce adequate discovery responses concerning his financial worth bars him
24 from arguing that Plaintiffs have failed to produce evidence of his financial condition.
25 Therefore, this Court imposes punitive damages against Borer despite insufficient evidence
26 to gauge the true nature and extent of Borer's net worth. Based on information received
27 from Defendant Borer, Plaintiffs informed the Court that at the time of trial, Borer owned a
28 \$5 million dollar home. He had \$5 million to \$7 million in "toys," that are all allegedly

1 gone. He had \$500,000 in Porsche race cars, and a \$500,000 Juno race boat. Borer claims
 2 that he lost all of these luxury items in litigation when he was sued by Mark Talber. Borer
 3 also owns 33 1/3 % of a nutrition company called Natural Herbal which sells a natural
 4 AIDS herbal remedy. He is partnered with some doctors from Thailand. He receives
 5 \$7,500 per month from Natural Herbal. The Court was further informed that Borer told
 6 Plaintiffs' counsel that he stole \$1 million from his father-in-law. Lastly, Borer had been
 7 enjoying a ~~lengthy stay~~ ^{at a five-star hotel in Marina Del Rey,} ~~to serve his house arrest~~
~~sentence.~~ Defendant Borer was the mastermind behind a scheme to desecrate and exploit
 9 sacred attorney-client communications for personal profit. There can be no doubt that
 10 Defendant Borer's conduct was extremely reprehensible and in conscious disregard of
 11 Plaintiffs' rights. Defendant Borer maliciously and willfully placed his economic interest
 12 above Plaintiffs' rights to privacy.

13 The Court finds by clear and convincing evidence that Defendant Borer acted with
 14 malice when he intentionally engaged in despicable and felonious conduct which he carried
 15 on with a willful and conscious disregard of Plaintiffs' rights. Accordingly, the Court
 16 believes that a multiplier of ~~four~~ ^{four} times compensatory damages is reasonable and within the
 17 bounds of due process. As such, the Court assesses ~~eight~~ ^{eight} million dollars
 18 ~~\$8,000,000.~~ in punitive damages against Defendant Jeffrey Borer in favor of Plaintiff
 19 Mark Geragos, and in the amount of ~~one million dollars~~ ^{one million dollars} ~~(\$1,000,000.)~~ against Defendant
 20 Jeffrey Borer in favor of Plaintiff Harris.

21 Punitive damages are recoverable against an employer for acts of its employee when
 22 it is proven by clear and convincing evidence that the employee was acting within the
 23 course and scope of the employment and the employer authorized or ratified the employee's
 24 oppressive, malicious, or fraudulent conduct. Cal. Civ. Code § 3294. An act of oppression,
 25 fraud, or malice by a director, officer, or managing agent is sufficient to impose liability on
 26 the corporate employer without any additional showing of ratification by the employer.
 27 *Kelly-Zurian v. Wohl Shoe Co.* (1994) 22 Cal.App.4th 397, 420.

Handwritten initials/signature

Vertical text on the left margin

1 This Court finds by clear and convincing evidence that Borer was acting within the
 2 course and scope of his employment at XtraJet when he conspired to secretly videotape the
 3 attorney-client communications between Plaintiffs and their client and thereafter sell the
 4 recording for profit because his conduct was an outgrowth of his employment with XtraJet
 5 and was broadly incidental to the enterprise undertaken by XtraJet. The Court also finds by
 6 clear and convincing evidence that Borer, who was the owner, corporate leader, and
 7 managing agent of XtraJet, acted with malice when he intentionally engaged in wrongful
 8 conduct which was substantially certain to cause harm to Plaintiffs. Borer's malice is
 9 imputed to Defendant XtraJet and supports an award of punitive damages against XtraJet.
 10 Accordingly, the Court finds that Defendant XtraJet, having ratified Defendant Borer's
 11 wrongful conduct, is liable for eight million dollars (\$8,000,000.00) in favor of
 12 Plaintiff Mark Geragos, and in the amount of one million (\$1,000,000.00) in favor
 13 of Plaintiff Harris.

14 15 C. Attorneys' Fees

16 The prevailing party in any action under California Civil Code section 3344 is
 17 entitled to attorneys' fees and costs. As Plaintiffs have prevailed on their fourth cause of
 18 action, use of name and likeness pursuant to Civil Code section 3344, they are entitled to
 19 recover their attorneys' fees and costs from Defendants.

20 Civil Code section 1021.4 also allows the court, upon motion, to award reasonable
 21 attorneys' fees to a prevailing plaintiff in an action for damages against a defendant based
 22 upon that defendant's commission of a felony offense for which that defendant has been
 23 convicted. Accordingly, based on Defendant Borer's felony conviction pursuant to Title 18,
 24 United States Code, Sections 371 and 2511, this Court will grant reasonable attorneys' fees
 25 to Plaintiffs upon proper motion.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

IV. Conclusion

It is hereby ordered that Defendants destroy the original and all copies of the recording. Defendants are also permanently enjoined from the sale or further dissemination of the recording or information contained in the recording.

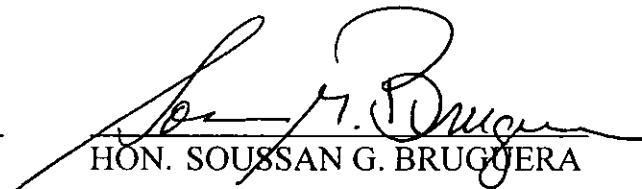
It is further ordered that Defendants pay compensatory damages to Plaintiff Geragos in the sum of \$2,000,000.00 and Plaintiff Harris in the sum of ^{\$150,000.00} on a joint and several basis. The Court awards ^{\$8,000,000.00} in punitive damages against Defendant Jeffrey Borer in favor of Plaintiff Mark Geragos, and ^{\$1,000,000.00} in punitive damages against Defendant Jeffrey Borer in favor of Plaintiff Harris. Defendant XtraJet is liable for ^{\$8,000,000.00} in favor of Plaintiff Mark Geragos and in the amount of ^{\$1,000,000.00} in favor of Plaintiff Harris.

Plaintiffs are entitled to attorneys' fees and costs upon proper motion to this Court.

IT IS SO ORDERED.

Date:

February 28, 2008


HON. SOUSSAN G. BRUGUERA