SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 6
Honorable Evette D. Pennypacker, Presiding

David Criswell, Courtroom Clerk
191 North First Street, San Jose, CA 95113
Telephone: (408) 882-2160

DATE: July 2, 2024 TIME: 9:00 A.M.

RECORDING COURT PROCEEDINGS IS PROHIBITED

FOR ORAL ARGUMENT: **Before 4:00 PM today you must notify the:**

(1) Court by calling (408) 808-6856 and

(2) Other side by phone or email that you plan to appear at the hearing to contest the ruling

(California Rule of Court 3.1308(a)(1) and Local Rule 8.E.)

FOR APPEARANCES: The Court strongly prefers in-person appearances. If you must appear virtually, you must use video. To access the courtroom, click or copy and paste this link into your internet browser and scroll down to Department 6:

https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml

FOR COURT REPORTERS: The Court does **not** provide official court reporters. If you want a court reporter to report your hearing, you must submit the appropriate form, which can be found here:

https://www.scscourt.org/general_info/court_reporters.shtml

FOR YOUR NEXT HEARING DATE: Use Court Schedule to reserve a hearing date for your next motion. Court Schedule is an online scheduling tool that can be found on the court's website here:

https://reservations.scscourt.org/

LINE	CASE NO.	CASE TITLE	TENTATIVE RULING
3	24CV431150	ALAN FIELD vs KAREN SIGGINS	Defendant's demurrer to Plaintiff's complaint is thus SUSTAINED WITH 20 DAYS LEAVE TO AMEND. Scroll to line 1 for complete ruling. Court to prepare formal order.
4	24CV431552	ASURE SOFTWARE, INC. vs MD-MART, INC., A CALIFORNIA CORPORATION	Plaintiff's motion to strike MD-Mart, Inc.'s answer is GRANTED. Defendant received notice of this hearing date and time by U.S. mail sent on May 6, 2024 and served no opposition. "[T]he failure to file an opposition creates an inference that the motion or demurrer is meritorious." (*Sexton v. Super Ct.* (1997) 58 Cal.App.4th 1403, 1410.) It is also correct that a company, regardless of corporate form, cannot represent itself in civil litigation in California. (See *Clean Air Transp. Sys. v. San Mateo County Transit Dist.* (1988) 198 Cal. App. 3d 576, 578 ("[A] corporation is a distinct legal entity, separate from its shareholders and officers. The rights and liabilities of corporations are distinct from the persons composing it. Thus, a corporation cannot appear in court except through an agent."); *Ferruzzo v. Superior Court* (1980) 104 Cal. App. 3d 501, 503 ("The rule is clear in this state that, with the sole exception of small claims court, a corporation cannot act in propria persona in a California state court."); *Merco Constr. Engineers, Inc. v. Municipal Court* (1978)21 Cal. 3d 724, 727 ("the Legislature cannot constitutionally vest in a person not licensed to practice law the right to appear in a court of record in behalf of another person, including a corporate entity.") Thus, the answer filed while MD-Mart, Inc. did not have counsel is improper. However, MD-Mart, Inc. filed a substitution of counsel on June 21, 2024 identifying Joseph r. Kafka as counsel of record. The parties are therefore ordered to meet and confer prior to either filing a request for default or leave to file a responsive pleading consistent with California law. Court to prepare formal order.
5	19CV355396	Jane Doe vs Keith Crawford et al	Poor People's Radio's motion for summary judgment is DENIED. Its motion for summary adjudication is DENIED as to the first and second causes of action and GRANTED as to the third and fourth causes of action. Scroll to line 5 for complete ruling. Court to prepare formal order.
7	23CV422394	Zenaida Seid vs Lucian Naum et al	Plaintiff's motion to compel responses to request for production of documents and for sanctions is GRANTED. A notice of motion with this hearing date and time was served by electronic mail on April 26, 2024. No opposition was filed "[T]he failure to file an opposition creates an inference that the motion or demurrer is meritorious." (*Sexton v. Super Ct.* (1997) 58 Cal.App.4th 1403, 1410.) Further, Plaintiff served this discovery by electronic mail on April 19, 2024. To date, Defendant has served no responses. Accordingly, Defendant is ordered to produce verified, code compliant responses without objections and to pay $830 in sanctions within 20 days of service of the formal order, which formal order the Court will prepare.
9	19CV354451	State Farm Mutual Automobile Insurance Company vs Jordan Snoeberger	Plaintiff's motion to vacate dismissal and to enforce settlement agreement is GRANTED. A notice of motion with this hearing date and time was served by U.S. mail on Defendant and Defendant's counsel on April 2, 2024. No opposition was filed. "[T]he failure to file an opposition creates an inference that the motion or demurrer is meritorious." (*Sexton v. Super Ct.* (1997) 58 Cal.App.4th 1403, 1410.) The parties also stipulated to a payment plan that Defendant did not comply with. Defendant has made no payments. Pursuant to the parties' stipulation pursuant to Code of Civil Procedure section 664.6, the Court vacates the dismissal and enters judgment in favor of Plaintiff and against Defendant. These orders will be reflected in the minutes. Moving party to promptly submit form of judgment consistent with the parties' stipulation.

10	21CV384685	Jeremy Witt vs Sherry Ross et al	Louis S. Abronson's motion to withdraw as counsel for Jeremy Witt is GRANTED. Counsel explained the basis of the motion during a May 30, 2024 motion for sanctions and in the motion. The attorney client relationship has deteriorated. Moving party to submit form of order on the appropriate judicial counsel form. Counsel will be deemed relieved upon the filing of the proof of service of that order.
11	23CV412048	Aaron White vs STIHL INCORPORATED et al	Travis Gunn's motion to appear *pro hac vice* for Defendants STIHL Incorporated and Gardenland Center, Inc. is GRANTED. Court to use form of order on file.
12	2011-1-CV-212974	W. Dresser vs A. Hiramanek	Defendant's motion to compel is DENIED. First, it was not served. The Code of Civil Procedure, Rules of Court and Civil Local Rules require that the moving party serve a written notice of motion with the hearing date and time. (See Code Civ. Proc. §§1005(a), 1010.) A court lacks jurisdiction to hear a motion that has not been properly served, even if the non-moving party had some type of advanced notice. (See *Diaz v. Professional Community Mgmt.* (2017) 16 Cal.App.5th 1190, 1204-1205; *Five-O-Drill Co. v. Superior Court of Los Angeles County* (1930) 105 Cal. App. 232.) The motion is also untimely; thus, Defendant is ordered not to re-file it. **If Mr. Hiramanek intends to contest this ruling, he must appear for the hearing in person in Department 6. The Court will not hear argument from Mr. Hiramanek over the phone or through TEAMS.** The Court observes that Defendant has recently filed a flurry of facially deficient ex parte applications, this motion to compel, a motion to strike, and a motion for reconsideration and reserved hearing dates for summary judgment and other motions. The summary judgment deadline passed, and these other motions are without basis in law or fact. The Court accordingly vacates all remaining dates except for the mandatory settlement conference, trial assignment hearing, and trial date. Mr. Hiramanek is reminded that he may appear remotely—**with his camera on**—for the mandatory settlement conference and trial assignment hearing. However, Mr. Hiramanek is ordered to appear in person for trial. If he does not appear in person for trial, his answer may be stricken and default entered against him as a sanction for failing to comply with court orders. The Court will prepare a formal order.
13	22CV405064	Rossi, Hamerslough, Reischl & Chuck vs Rajani Kolli	Rossi, Hamerslough, Reischl & Chuck's motion to confirm arbitration award is GRANTED. A notice of motion with this hearing date and time was served by electronic mail on May 22, 2024. No opposition was filed. "[T]he failure to file an opposition creates an inference that the motion or demurrer is meritorious." (*Sexton v. Super Ct.* (1997) 58 Cal.App.4th 1403, 1410 .)The matter was arbitrated before the Honorable Jack Komar (Ret.). on February 14, 2024. Judge Komar issued an interim award on March 6, 2024 and a final award on April 25, 2024. Such award is properly confirmed, and judgment shall be entered conformance with the award pursuant to Code of Civil Procedure sections 1285, 1286, and 1287.4. Moving party to submit form of judgment. These rulings will be set forth in the minutes.
14	19CV343179	Elise Mitchell vs Grady Williams	Vacated.
15	19CV356936	CYTOBANK, INC. vs THE MCCLURE LAW FIRM, P.C. et al	Ward's motion for attorney fees is GRANTED, IN PART. Ward is awarded $214,064.25 in fees incurred to date and $5,745.00 for attorney's fees and costs awarded by the Court to Cytobank and deducted from Ward's interplead funds. Scroll to line 16 for complete ruling. Court to prepare formal order.

16-18	20CV367561	ZACHARY KOWITZ et al vs MICHAEL KOWITZ et al	The parties are ordered to appear for the debtor's examination. Plaintiffs Zachary Kowitz's Michael Daniel Kowitz's, and Bay Surplus Technology, Inc.'s motion for a finding that Defendant Michael David Kowitz is a vexatious litigant pursuant to Code of Civil Procedure section 391(b) is DENIED WITHOUT PREJUDICE. Plaintiffs combine filings made by Patricia and Michael David Kowitz to support their application, but they only seek to have Michael David Kowitz declared vexatious. Further, while the combined number of filings is great, and a pattern may be developing that will lead to one or both of Patricia and/or Michael David Kowitz being declared vexatious, vigorously challenging a jury verdict and trying to delay execution of judgment is not in itself vexatious. However, Plaintiffs may renew this motion if additional evidence develops. Defendants Patricia and Michael David Kowitz are ordered to appear in Department 6 at 9 am on August 1, 2024 and show cause why the property at 18439 Hillview Drive, Los Gatos, CA 95030 should not be sold to satisfy the judgment entered against them.
19-21	20CV371939	ANTRANIK ANTRANIK et al vs 7-ELEVEN STORE et al	Mohammed Pournaghband and Firooz Khandan's motion for attorneys' fees is DENIED; Plaintiffs' motion to tax costs is GRANTED as to Defendants' request for transcripts but otherwise DENIED; and Plaintiffs' motion for reconsideration is DENIED. Scroll to lines 20-22 for complete rulings. Court to prepare formal order.
23	23CV413284	Creditors Adjustment Bureau, Inc. vs LUIS JIMENEZ	Judgment debtor's claim of exemption is DENIED. There is no evidence that the levied funds are exempt, and bank accounts do not qualify as tools for ones business. There is also insufficient evidence of need. Court will prepare formal order.
24	24CV431624	GILBERTO GURROLA vs JOSEPH GIBERSON	Plaintiff's motion for leave to file a first amended complaint adding causes of action for willful misconduct and intentional infliction of severe emotional distress and to seek punitive damages is GRANTED. "It is a rare case in which 'a court will be justified in refusing a party leave to amend his pleadings so that he may properly present his case.' (*Guidery* v. *Green*, 95 Cal. 630, 633; *Marr* v. *Rhodes*, 131 Cal. 267, 270. If the motion to amend is timely made and the granting of the motion will not prejudice the opposing party, it is error to refuse permission to amend and where the refusal also results in a party being deprived of the right to assert a meritorious cause of action or a meritorious defense, it is not only error but an abuse of discretion. (*Nelson* v. *Superior Court*, 97 Cal.App.2d 78; *Estate of Herbst*, 26 Cal.App.2d 249; *Norton* v. *Bassett*, 158 Cal. 425, 427.)" (*Morgan v. Superior Court of Los Angeles County* (1959) 172 Cal. App. 2d 527, 530-531 (error for trial court to fail to give leave to amend). Here, the parties have not attended the initial case management conference. The request is therefore timely and will not prejudice Defendant, who is still able to able to challenge the amended pleading.

25	24CV432080	SERENITY MSO LLC et al vs PALO ALTO MIND BODY et al	Palo Alto Mind Body's and M Rameen Ghorieshi, MD's motions to quash deposition subpoena to Wells Fargo Bank and to Bennett H. Weinblatt and for sanctions is GRANTED without prejudice as to the subpoena to Wells Fargo for M Rameen Ghorieshi, MD personal financial records but otherwise DENIED. The parties' purported agreement allegedly involved profit splitting. Thus, records related to Palo Alto Mind Body's financial condition during the time of the parties' alleged agreements is likely to lead to the discovery of admissible evidence. There is no evidence in the record to support Defendants' undue burden argument with respect to these third parties. There is also a protective order in this case under which sensitive financial documents can be produced. However, there is currently no evidence before the Court to justify seeking Dr. Ghorieshi's personal financial records. Thus, that portion of Defendants' motion to quash is GRANTED without prejudice to Plaintiffs later seeking these records if discovery shows comingling of funds or other evidence to support the possibility of piercing the corporate veil. The Court finds both parties had substantial justification in bringing these matters to the Court for resolution and therefore requests for sanctions are DENIED. Court to prepare formal order.
26-27	24CV433722	Frank Bonzell et al vs Retirement Capital Strategies, Inc., a California Corporation et al	Defendant's motion to compel arbitration is GRANTED. Plaintiff's motion for trial preference is DENIED as moot. Scroll to line 26 for complete ruling. Court to prepare formal order.

Calendar Line 1
Case Name: *Alan Dougals Field v. Karen Field Siggins*
Case No.: 24CV431150

Before the Court is Defendant, Karen Field Siggins' demurrer to Plaintiff's complaint. Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

I. Background

According to the complaint, the parties' mother, Irene Field Capurso, passed away in 2020 from complications of Alzheimer's disease. Pursuant to her Living Trust Document amended in 2011, her assets were to be equally shared among her three children. (Complaint p.1 lines 22-24; p.2 lines 2-6.) Defendant became the successor trustee in July of 2017.

After Ms. Capurso's passing, Plaintiff and his now deceased brother learned that Defendant had withdrawn at least $21,500.00 in cash from the estate. They asked for an accounting and documentation of monies spent. However, Plaintiff refused to provide any receipts or documentation. (Complaint p. 10, lines 15-17; pp. 11, lines 4-6, 18-20.) Immediately after their request, Plaintiff obtained an "accountant lawyer" in bad faith to help her hide all unauthorized withdrawals of cash from their mother's estate. (Complaint p. 12, lines 6-14.)

Plaintiff initiated this action on February 20, 2024, alleging (1) recovery of unpaid inheritance money, (2) fraud, (3) intentional infliction of emotional distress, (4) negligent infliction of emotional distress, (5) punitive damages, and (6) other injunctive relief.

II. Legal Standard

"The party against whom a complaint or cross-complaint has been filed may object, by demurrer or answer as provided in [Code of Civil Procedure s]ection 430.30, to the pleading on any one or more of the following grounds: . . . (e) The pleading does not state facts sufficient to constitute a cause of action, (f) The pleading is uncertain." (Code Civ. Proc., § 430.10, subds. (e) & (f).) A demurrer may be utilized by "[t]he party against whom a complaint [ ] has been filed" to object to the legal sufficiency of the pleading as a whole, or to any "cause of action" stated therein, on one or more of the grounds enumerated by statute. (Code Civ. Proc., §§ 430.10, 430.50, subd. (a).)

The court treats a demurrer "as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law." (*Piccinini v. Cal. Emergency Management*

Agency (2014) 226 Cal.App.4th 685, 688, citing *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) "A demurrer tests only the legal sufficiency of the pleading. It admits the truth of all material factual allegations in the complaint; the question of plaintiff's ability to prove these allegations, or the possible difficulty in making such proof does not concern the reviewing court." (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 213-214 (*Committee on Children's Television*).) In ruling on a demurrer, courts may consider matters subject to judicial notice. (*Scott v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 743, 751.) Evidentiary facts found in exhibits attached to a complaint can be considered on demurrer. (*Frantz v. Blackwell* (1987) 189 Cal.App.3d 91, 94.)

Defendant demurs to each cause of action on the ground it fails to state a claim. (Code Civ. Proc., § 430.10, subd. (e).)

III. Defendant's Request for Judicial Notice

Defendant requests judicial notice of certain court documents and orders filed in the Santa Clara Superior Court case No. 22PR191873, titled In Re: The Trust of Irene Field of 1981, AKA Irene Capurso Living Trust dated January 6, 1982.

These documents may be judicially noticed pursuant to Evidence Code section 452(d), which permits judicial notice of the records in the pending action, or in any other action pending in the same court or any other court of record in the U.S. However, "although the existence of a document may be judicially noticeable, the truth of statements contained in the document and its proper interpretation are not subject to judicial notice if those matters are reasonably disputable." (*Fremont Indemnity Co. v. Fremont General Corp.* (2007) 148 Cal.App.4th 97, 113; see also *Arce v. Kaiser Found. Health Plan, Inc.* (2010) 181 Cal.App.4th 471, 482-484.) The Court can only take judicial notice of the truth of facts asserted in documents such as orders, findings of fact and conclusions of law, and judgment. (See, *Ramsden v. Western Union* (1977) 71 Cal.App.3d 873, 879.)

Accordingly, Defendant's request for judicial notice is GRANTED, IN PART.

IV. Plaintiff's "Answer to Demurrer"

Defendant objects to Plaintiff's Answer to Demurrer on the grounds that it consists entirely of ten exhibits for which Plaintiff has not sought (and could not obtain) judicial notice. Defendant's

objection is SUSTAINED. A request for judicial notice must be made in a separate document listing the specific items for which notice is requested and must comply with Rule 3.1306 (c). (California Rule of Court, Rule 3.113(l).) Plaintiff did neither. Moreover, the materials in Plaintiff's Answer to Demurrer are not subject to judicial notice.

Plaintiff's Answer to Demurrer also provides no substantive opposition to Defendant's demurrer. California Rules of Court, Rule 3.1113 (a) requires a memorandum that "contain[s] a statement of facts, a concise statement of the law, evidence and arguments relied on, and a discussion of the statutes, cases, and textbooks cited in support of the position advanced." (California Rules of Court, Rule 3.1113(b).) Rule 3.1113 rests on a policy-based allocation of resources, preventing the trial court from being cast as a tacit advocate for the opposing party's theories by freeing it from any obligation to comb the record and the law for factual and legal support that a party has failed to identify or provide. (*Quantum Cooking Concepts, Inc. v. LV Associates, Inc.* (2011) 197 Cal.App.4th 927, 934, [trial court was justified in denying post-trial motions for failure to provide adequate memorandum].)

In sum, Plaintiff failed to properly oppose Defendant's demurrer. "[T]he failure to file an opposition creates an inference that the motion or demurrer is meritorious." (*Sexton v. Super Ct.* (1997) 58 Cal.App.4th 1403, 1410.) Defendant's demurrer to Plaintiff's complaint is thus SUSTAINED WITH 20 DAYS LEAVE TO AMEND.

Plaintiff is self-represented. Self-represented litigants are entitled to the same, but no greater, consideration than other litigants and attorneys. (*County of Orange v. Smith* (2005) 132 Cal.App.4th 1434, 1444.) Self-represented litigants "are held to the same standards as attorneys" and must comply with the rules of civil procedure. (*Kobayashi v. Superior Court* (2009) 175 Cal.App.4th 536, 543; see also *Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 984-985.)

If Plaintiff decides to file an amended complaint, Plaintiff can only provide additional facts to support the claims already brought. Plaintiff may not add parties or causes of action without leave of court.

Calendar Line 5
Case Name: *Jane Doe v. Keith Crawford, et al.*
Case No.: 19CV355396

Before the Court is Defendant Poor Peoples' Radio Inc. d/b/a KPOO's ("Radio"), motion for summary judgment or in the alternative, summary adjudication against plaintiff Jane Doe. Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

I. BACKGROUND

This action arises out of defendant Keith Crawford's ("Crawford") alleged publication of Plaintiff's private information on his radio show, Give Life Save Life, which was broadcasted on Radio's station. (Complaint, ¶ 5.) Plaintiff was in a relationship with defendant Keith Crawford ("Crawford") in 2018. (Complaint, ¶ 13.) On July 6, 2018, Crawford physically assaulted Plaintiff and Crawford was arrested for assault on law enforcement. (*Ibid*.) The parties had been in an intimate relationship and this incident occurred after Plaintiff broke up with Crawford. (*Ibid*.) Prior to their relationship, Plaintiff contracted herpes simplex virus type 2. (Complaint, ¶ 15.) She disclosed this information to him in January 2019, when they discussed renewing their relationship. (*Ibid*.) At the time, she experienced an outbreak of intermittent virus symptoms after six years of dormancy. (*Ibid*.) Plaintiff and Crawford renewed their relationship and waited six months before they had sexual intercourse. (Complaint, ¶ 16.)

In March 2019, Crawford sent Plaintiff disparaging messages. (Complaint, ¶ 17.) On April 9, 2019, Plaintiff informed Crawford that they did not have a future together. (Complaint, ¶ 18.) Crawford continued to send messages varying from kind sentiments to accusatory and derogatory statements. (Complaint, ¶¶ 20-21.) On April 19, 2019, he threatened to disclose her medical condition on Give Life Save Life. (Complaint, ¶ 22.) The same day, he messaged several people information about Plaintiff, her medical condition, her contact information, and implied she transmitted herpes to him. (*Ibid*.) He continued to send derogatory messages to Plaintiff and her family members, such as her mother and son. (Complaint, ¶ 24.) On April 25, 2019, Plaintiff texted Crawford and informed him that he did not have permission to disclose her personal information to the public. (Complaint, ¶ 26.) The same day, he broadcasted an episode of his show and mentioned Plaintiff by name multiple times, revealed her health information, her city of residence, her age, and job title. (Complaint, ¶ 28.)

Plaintiff was discussed for seventeen minutes of the broadcast. (Complaint, ¶ 29.) That week, her LinkedIn page received a significant surge of interest. (Complaint, ¶ 34.) Crawford continued to contact Plaintiff's family members with accusations about her. (Complaint, ¶ 36.)

On September 12, 2019, Plaintiff filed her Complaint, asserting: (1) public disclosure of private information, (2) intentional infliction of emotional distress, (3) conspiracy, (4) aiding and abetting, (5) assault, (6) battery, and (7) defamation per se.[1]

On April 2, 2024, Radio filed the instant motion, which Plaintiff opposes.

II. REQUESTS FOR JUDICIAL NOTICE

A. Radio's Request

Radio requests judicial notice of:

(1) Judgment in favor of defendant Equilibrium Dynamics in this matter: Exhibit 6; and

(2) Judgment of dismissal after granting motion for summary judgment in for defendant Loma Kay Flowers: Exhibit 7.

Both exhibits are court records, thus judicial notice is proper. (See Evid. Code, § 452, subd. (d).) Radio's request for judicial notice is GRANTED.

B. Plaintiff's Request

Plaintiff requests judicial notice of the following facts:

(1) Radio's coverage areas published on its website: Exhibit A;

(2) The population of San Francisco and other counties in the Bay Area, as calculated by the U.S. Census Bureau and reporting government agencies: Exhibit B; and

(3) That Radio broadcasts to a population of the Bay Area (which consists of Alameda, Contra Costa, Marin, Napa, San Francisco, San Mateo, Santa Clara, Solano, and Sonoma), which totals about 7,150,739: Exhibit C.

The Court may take judicial notice of "facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy." (See Evid. Code, § 452, subd. (h).) The facts regarding Radio's coverage area, the population size *around the time of the events at issue*, and that Radio broadcast range covered the

[1] The causes of action for assault, battery, and defamation per se are only asserted against Crawford.

Bay Area are undisputed by the parties and capable of immediate and accurate determination, therefore, the Court will take judicial notice of them. Thus, Plaintiff's request for judicial notice is GRANTED.

III. LEGAL STANDARD

"A defendant seeking summary judgment must show that at least one element of the plaintiff's cause of action cannot be established, or that there is a complete defense to the cause of action. . . . The burden then shifts to the plaintiff to show there is a triable issue of material fact on that issue. [Citations.]" (*Alex R. Thomas & Co. v. Mut. Serv. Casualty Ins. Co.* (2002) 98 Cal.App.4th 66, 72); see also Code Civ. Proc., § 437c, subd. (p)(2).) The traditional method for a defendant to meet its burden on summary judgment is by "negat[ing] a necessary element of the plaintiff's case" or establishing a defense with its own evidence. (*Guz v. Bechtel Nat'l, Inc.* (2000) 24 Cal.4th 317, 334.) The defendant may also demonstrate that an essential element of plaintiff's claim cannot be established by "present[ing] evidence that the plaintiff does not possess, and cannot reasonably obtain, needed evidence--as through admissions by the plaintiff following extensive discovery to the effect that he has discovered nothing." (*Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 855 (*Aguilar*).)

These standards provide for a shifting burden of production; that is, the burden to make a prima facie showing of evidence sufficient to support the position of the party in question. (See *Aguilar*, *supra*, 25 Cal.4th at pp. 850-851.) The burden of persuasion remains with the moving party and is shaped by the ultimate burden of proof at trial. (*Ibid.*) "There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Id*. at p. 850.) The opposing party must produce substantial responsive evidence that would support such a finding; evidence that gives rise to no more than speculation is insufficient. (*Sangster v. Paetkau* (1998) 68 Cal.App.4th 151, 162-163.)

On summary judgment, "the moving party's declarations must be strictly construed and the opposing party's declaration liberally construed. [Citation.]" (*Hepp v. Lockheed-California Co*. (1978) 86 Cal.App.3d 714, 717 (*Hepp*); see *Johnson v. American Standard, Inc*. (2008) 43 Cal.4th 56, 64

(*Johnson*) [the evidence is viewed in the light most favorable to the opposing plaintiff; the court must "liberally construe plaintiff's evidentiary submissions and strictly scrutinize defendant's own evidence, in order to resolve any evidentiary doubts or ambiguities in plaintiff's favor"].) Summary judgment may not be granted by the court based on inferences reasonably deducible from the papers submitted, if such inferences are contradicted by others which raise a triable issue of fact. (*Hepp, supra,* 86 Cal.App.3d at pp. 717-718.)

Even if there are some triable issues in the case, the court has the power to summarily adjudicate that one or more causes of action has no merit, there is no affirmative defense to one or more causes of action, there is no merit to a claim for punitive damages (Civil Code section 3294), or one or more defendants either owed or did not owe a duty to the plaintiff or plaintiffs. (Code Civ. Proc., § 437c, subd. (f)(1).) Absent a stipulation approved by the court, "[a] motion for summary adjudication shall be granted only if it completely disposes of a cause of action, an affirmative defense, a claim for damages, or an issue of duty." (*Ibid.*)

Radio moves for summary adjudication as to each cause of action against it.

IV. PROCEDURAL ISSUE REGARDING THE SEPARATE STATEMENT

A motion for summary judgment must be accompanied by a separate statement of undisputed material facts. (See Cal. R. Ct. 3.1350(c)(2); Code Civ. Proc., § 437c, subd. (b)(1).) A separate statement in support of a motion for summary judgment or adjudication must separately identify: "(A) each cause of action, claim for damages…that is the subject of the motion; and (B) each supporting material fact claims to be without dispute with respect to the cause of action, claim for damages…" (Cal. R. Ct. 3.1350(d)(1).) "The supporting papers shall include a separate statement setting forth plainly and concisely all material facts that the moving party contends are disputed. Each of the material facts stated shall be followed by a reference to the supporting evidence. The failure to comply with this requirement of a separate statement may in the court's discretion constitute a sufficient ground for denying the motion." (Code Civ. Proc., § 437c, subd. (b)(1).)

Radio failed to submit a separate statement with its moving papers. (*United Community Church v. Garcin* (1991) 231 Cal.App.3d 327, 337 [it is the "golden rule" of summary judgment that all material facts must be set forth in the separate statement] (*United Community Church*).) Radio's

proof of service states it only served the notice of motion, memorandum of points and authorities ("MPA"), request for judicial notice, and counsel's declaration to Plaintiff. (See April 2, 2024, Proof of Service.) Plaintiff submitted a separate statement of undisputed facts in opposition to the motion, however, it appears to the Court that *Plaintiff* compiled *Radio's* undisputed facts based on Radio's MPA and evidence and then provided her responses to those facts. This is improper because it is the moving party's responsibility, in filing a motion for summary judgment, to identify the undisputed facts, not the responding party's. Radio does not address this issue in its reply, but it filed a separate statement with its reply. While the motion is deficient, it appears the parties are apprised of the facts upon which Radio bases this motion. Therefore, the Court will exercise its discretion and reach the merits of the motion.

V. ANALYSIS

A. Agency Relationship

Agency exists when a principal engages an agent to act on the principal's behalf and subject to its control. (*Van't Rood v. County of Santa Clara* (2003) 113 Cal.App.4th 549, 571 (*Van't Rood*).) The essential elements necessary to establish an agency relationship are "manifestation of consent by one person to another that the other shall act on his [or her] behalf and subject to his [or her] control, and consent by the other so to act." (*Ibid*.) Although the existence of an agency relationship is typically a question of fact, where the essential facts are not in dispute, the existence of agency becomes a matter of law. (*Id*. at p. 564; *Violette v. Shoup* (1993) 16 Cal.App.4th 611, 619.) An agency relationship can be established by agreement between the agent and the principal which is a true agency; or an agency can be based on ostensible authority which is some intentional conduct or neglect on the part of the alleged principal which creates a belief in the minds of third parties that an agency exists, and a reasonable reliance thereon by such third persons. (*Goldman v. Sunbridge Healthcare, LLC* (2013) 220 Cal.App.4th 1160, 1173.)

Radio asserts Crawford was a volunteer, he was a host for years, and he invited guests and listeners to discuss a variety of subjects on the air. Radio argues there was no agreement with Crawford, and it did not ratify his actions. However, these facts are not included in the separate

statement, and Radio does not provide any evidence in support of them.[2] Radio also contends prior misconduct by Crawford is required for Radio to be liable for his actions, but it fails to cite any authority to support this contention. (*People v. Dougherty* (1982) 138 Cal.App.3d 278, 282 [points asserted without supporting authority are waived] (*People v. Dougherty*).) Plaintiff contends Radio exercised control over Crawford by instituting policies for his show and use of the equipment and facilities. Radio's control over Crawford is also supported by the fact that Radio cancelled Crawford's show after it received the Complaint in this matter, and Parson's statement that he would have cancelled the show on the day of the incident if Radio had been informed of Crawford's intentions beforehand. (See Parson Decl., ¶¶ 3-6, 10.) Whether an agency relationship between Crawford and Radio existed is therefore a question of fact. (*Van't Rood, supra,* 113 Cal.App.4th at p. 564.)

B. Civil Code Section 48.5

Radio contends it is immune from liability under Civil Code section 48.5, which provides:

> The owner, licensee or operator of a visual or sound radio broadcasting station or network of stations, and the agents or employees of any such owner, licensee or operator, shall not be liable for any damages for any defamatory statement or matter published or utters in or as part of a visual or sound radio broadcast by one other than such owner, licensee or operator, or agent or employee thereof, *if it* shall be *alleged and proved* by such owner, licenses or operator, or agent or employee thereof, that such owner, licensee or operator, or such agent or employee, has *exercised due care to prevent* the publication or utterance of such statement or matter in such broadcast.

(Civ. Code, § 48.5, subd. (1) [emphasis added].)

Although Radio contends "had the plaintiff informed Radio of Crawford's intentions, the show would have been cancelled," Radio fails to provide any evidence to support this contention. It also

[2] While not cited in Radio's separate statement, it appears it relies on the declaration from Jerome Parson ("Parson"), the General Manager and Program Director of Radio at the time of the incident, but his declaration does not support Radio's contentions.

appears that Radio would be unable to provide any evidence that it exercised due care to prevent the broadcast of the statements such that Section 48.5 would apply here. (See MPA, p.6:5-6.) Thus, summary adjudication cannot be granted on this basis.

C. First Cause of Action: Public Disclosure of Private Facts

The elements of a public disclosure of private facts are (1) a public disclosure, (2) of a private fact, (3) which would be offensive and objectionable to the reasonable person, and (4) which is not of legitimate public concern. (*Shulman v. Group W Productions, Inc.* (1998) 18 Cal.4th 200, 214.)

Radio argues Crawford had already publicized the information to others, so it was not a private matter. Radio relies on *Moreno v. Hanford Sentinel, Inc.* (2009) 172 Cal.App.4th 1125, which involved an author's publication of an article to MySpace. (*Id*. at p. 1127.) The appellate court held there was no expectation of privacy with respect to the article because it was available to any person with a computer. (*Id*. at p. 1130.) This is distinguishable from the instant matter because Crawford's messages to his social circle are different from a publication to a social media site that is widely accessible. Radio fails to provide any evidence that the information entered the public domain prior to the publication by Crawford during his broadcast or any other argument as to this cause of action. Radio fails to meet its burden to show there is no triable issue of material fact, and its motion for summary adjudication as to the first cause of action is DENIED.

D. Second Cause of Action: Intentional Infliction of Emotional Distress

"The tort of intentional infliction of emotional distress is comprised of three elements: (1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff suffered severe or extreme emotional distress; and (3) the plaintiff's injuries were actually and proximately caused by the defendant's outrageous conduct." (*Cochran v. Cochran* (1998) 65 Cal.App.4th 488, 494; see also *Ross v. Creel Printing & Publishing Co., Inc.* (2002) 100 Cal.App.4th 736, 744 – 745; see also CACI, Nos. 1600 and 1602.)

Radio argues there is no evidence that it had personal animosity towards Plaintiff, but it fails to provide any authority that such evidence is required for an IIED claim. (*People v. Dougherty, supra*, 138 Cal.App.3d at p. 282.) Moreover, Radio's liability for this claim is based on the alleged agency

relationship between Radio and Crawford. As the Court stated above, whether such an agency relationship existed is a question of fact. Thus, the motion for summary adjudication of the second cause of action is DENIED.

D. Third Cause of Action: Conspiracy

Civil conspiracy is not an independent tort. (*Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 510-511.) Rather, it is a "'legal doctrine that imposes liability on persons who, although not actually committing a tort themselves, share with the immediate tortfeasor a common plan or design in its perpetration.' [Citation.]" (*Kidron v. Movie Acquisition Corp.* (1995) 40 Cal.App.4th 1571, 1581 (*Kidron*).) Liability for civil conspiracy requires three elements: (1) formation of the conspiracy (an agreement to commit wrongful acts); (2) operation of the conspiracy (commission of the wrongful acts); and (3) damage resulting from operation of the conspiracy. (*Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 47; see also CACI, No. 3600.)

"Because civil conspiracy is so easy to allege, plaintiffs have a weighty burden to prove it. [Citation.] They must show that each member of the conspiracy acted in concert and came to a mutual understanding to accomplish a common and unlawful plan, and that one or more of them committed an overt act to further it. [Citation.] It is not enough that the conspiring officers knew of an intended wrongful act, they had to agree—expressly or tacitly—to achieve it. Unless there is such a meeting of the minds, 'the independent acts of two or more wrongdoers do not amount to a conspiracy.'" (*Choate v. County of Orange* (2000) 86 Cal.App.4th 312, 333.)

Radio argues there is no evidence of an agreement between Radio and any other defendant to participate in the show and disclose Plaintiff's medical information. Parson's declaration states Radio was unaware of Crawford's intentions before the broadcast. (Parson Decl., ¶ 10.) Plaintiff fails to address this cause of action in her opposition; thus she waives the issue. (See *Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784.) Thus, the motion for summary adjudication as to the third cause of action is GRANTED.

E. Fourth Cause of Action: Aiding and Abetting

"'Liability may … be imposed on one who aids and abets the commission of an intentional tort if the person (a) knows the other's conduct constitutes a breach of duty and gives substantial assistance

or encouragement to the other to do act or (b) gives substantial assistance to the other in accomplishing a tortious result and the person's own conduct, separately considered, constitutes a breach of duty to the third person.' [Citation.]" (*IIG Wireless, Inc. v. Yi* (2018) 22 Cal.App.5th 630, 653–654; see also CACI, No. 3610.) "While aiding and abetting may not require a defendant to agree to join the wrongful conduct, it necessarily requires a defendant to reach a *conscious decision to participate* in tortious activity for the *purpose of assisting in performing a wrongful act*." (*Howard v. Superior Court* (1992) 2 Cal.App.4th 745, 749 [superseded by statute on another ground].)

Radio contends there is no evidence that Radio knew Crawford would disclose Plaintiff's medical information or encouraged him to do so. Radio did not know about Crawford's conduct before the broadcast. (See Parson Decl., ¶ 10.) While Plaintiff asserts Radio substantially assisted Crawford by broadcasting his statements, she does not provide any evidence of Radio's knowledge that Crawford's conduct breached a duty. Moreover, Plaintiff fails to provide any evidence of a *conscious decision* by Radio to participate in tortious activity for the purpose of assisting in performing a wrongful act nor does it appear Plaintiff can provide such evidence. (See *Howard, supra,* 2 Cal.App.4th at p. 749.) Thus, the motion for summary adjudication of the fourth cause of action is GRANTED.

Calendar Line 15
Case Name: *CYTOBANK, INC. vs THE MCCLURE LAW FIRM, P.C. et al*
Case No.: 19CV356936

Before the Court is Patricia Ward's motion for attorney fees. Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

I. Background

Patricia Ward hired Lori Costanzo to represent her in an employment action against Cytobank. Costanzo withdrew from that representation, recorded a lien for attorneys' fees she believed she was owed, and Ward later entered a settlement with Cytobank. Cytobank filed an action for interpleader, deposited the amount of the lien Costanzo obtained against Ward's recovery, and named Ward, the Costanzo Law Firm, and the McClure Law Firm as defendants. Ward initiated a fee arbitration, and the arbitrators found Costanzo was not entitled to fees. Ward had already paid the arbitration fee, and the arbitrators ordered that Ward be responsible for that fee.

Costanzo filed cross claims against Ward, David McClure (Ward's brother-in-law and attorney), and the McClure Law Firm. After being sent to a trial department but before trial commenced, Costanzo dismissed her cross-complaint without prejudice for all cross-defendants. Ward moved to set aside the dismissal with respect to her and to confirm the arbitration award, which motions the Court granted. The Court also granted David McClure, the McClure Law Firm, and Ward's costs of suit.

Ward now seeks $268,122.00 in attorney fees, comprised of:

$214,064.25 in fees incurred to date;

$42,812.85 lodestar enhancement multiplier;

$5,500.00 in anticipated fees for the reply and hearing on this motion; and

$5,745.00 for attorney's fees and costs awarded by the Court to Cytobank and deducted from Ward's interplead funds.

Costanzo argues Ward should receive no fees because such fees are discretionary under Business and Professions code section 6200 et. seq., the arbitrator's award precludes attorney fees, and it would violate public policy to permit Ward to receive fees given her alleged litigation conduct. Alternatively, Constanzo argues the fees sought should be substantially reduced.

II. Legal Standard and Analysis

First, Ward is unequivocally the prevailing party in this litigation. She won in the arbitration, Constanzo dismissed the action against her, and the Court confirmed the arbitration award. The Court has already found Ward to be the prevailing party in prior orders and thus will not belabor that issue again here.

Next, Ward is entitled to fees. Constanzo focuses on Business and Professions code sections 6200 et. seq. and the arbitration award but ignores the enforceable attorney fees provision in her own retainer agreement:

> 27. ATTORNEY FEES AND COST Should CLIENT dispute ATTORNEY'S statement for services, and ATTORNEY files suit in court, CLIENT will have the right to stay that suit by timely electing to arbitrate the dispute under California Business and Professions Code section 6200-6206, in which even ATTORNEY must submit the matter to such arbitration. **In the event either party is required to file suit under this Agreement the prevailing party shall be entitled to recover all ATTORNEY'S fees and costs reasonably incurred.** Provided, however, that if ATTORNEY files suit in court, CLIENT will have the right to stay that suit by timely electing to arbitrate the dispute under California Business and Professions Code section 6200-6206, in which event ATTORNEY must submit the matter to such arbitration. [Emphasis added.]

There can be no question that Constanzo and CLF sought fees under this agreement, and this provision makes clear Ward is entitled to all reasonably incurred attorney's fees. (Civ. Code §1717(a); *Profit Concepts Management, Inc. v. Griffith* (2008) 162 Cal.App.4th 950, 953.)

Finally, the majority of the fees sought are reasonable. The Court finds the hourly rates charged reasonable for this county and case type. The number of hours is also reasonable. Ward's counsel declares that fees related solely to the arbitration and for redundant work were already removed. Costanzo's and CLF's objections to Ward's declaration in support of this motion are not well taken and overruled. The information provided is sufficient for the Court to make a fee determination.

Costanzo's and CLF's argument that Ward's litigation conduct warrants reducing these fees is also unavailing. The Court is intimately familiar with the facts and history of this case and has presided over many hearings in the numerous contested motions before it. It is this Court's view that Costanzo and CLF aggressively pursued the interplead fees, choosing the path of litigation over compromise at every turn, including fighting over transcript costs. That was their right, but Ward necessarily had to respond to Costanzo's and CLF's choice, which increased fees for both parties. The Court does not find this case appropriate for a multiplier and declines to award fees not yet incurred.

Accordingly, the Court awards Ward the following fees: $214,064.25 in fees incurred to date and $5,745.00 for attorney's fees and costs awarded by the Court to Cytobank and deducted from Ward's interplead funds.

Calendar Lines 19-21
Case Name: *ANTRANIK ANTRANIK vs 7-ELEVEN STORE*
Case No.: 20CV371939

Before the Court are Mohammed Pournaghshband and Firooz Khandan's motion for attorneys' fees; Plaintiffs' motion to tax costs; and Plaintiffs' motion for reconsideration. Pursuant to California Rule of Court 3.1308, the Court issues its tentative rulings.

I. Background

This action arises out of an alleged altercation between Antranik and Defendant Sasan Pournaghshband at a 7-Eleven store in San Jose. Plaintiffs allege Sasan directed racial and religious epithets to Antranik and threatened violence towards Antranik and his family.

After substantial litigation, Honorable Carrie A. Zepeda presided over a jury trial on the matter, and a verdict was entered against Plaintiffs on December 8, 2023.

II. The Undersigned Court May Decide These Motions

Each motion before the Court concerns matters that touch on the trial. The undersigned Court did not preside over the trial in this action. However, Judge Zepeda has retired from the Santa Clara Superior Court since the trial. Accordingly, the undersigned Court may hear and issue orders regarding these post-trial motions. (See, e.g., Code Civ. Proc § 661; *Telefilm, Inc. v. Superior Court of Los Angeles County* (1949) 33 Cal. 2d 289 (The terms "inability" and "absence" in this section provide a comprehensive basis for disposition of new trial proceedings when the judge is unable to act, whether his disability is due to death or the happening of some event in life affecting continued performance of his judicial duties); *Lindquist v. Superior Court of Los Angeles County* (1949) (A judge's resignation from the superior court presents a clear case of inability to hear a motion for new trial, and the motion may be properly heard and determined by another judge in the same court).)

Fortunately, while the undersigned Court did not preside over the trial, it did preside over a great deal of the pre-trial proceedings in this matter. The Court will therefore address these motions on the merits.

III. Plaintiff's Motion for Reconsideration

Motions for reconsideration are generally governed by Code of Civil Procedure section 1008, which represents the Legislature's attempt to regulate what the Supreme Court has referred to as

"repetitive motions." (*Standard Microsystems Corp. v. Winbond Electronics Corp.* (2009) 179 Cal.App.4th 868, 885.) Section 1008, subdivision (a), "requires that any such motion be (1) filed within 10 days after service upon the party of written notice of entry of the order of which reconsideration is sought, (2) supported by new additional facts, circumstances or law, and (3) accompanied by an affidavit detailing the circumstances of the first motion and the respects in which the new motion differs from it." (*Id.*) The legislative intent was to restrict motions for reconsideration to circumstances where a party offers the court some fact or circumstance not previously considered, and some valid reason for not offering it earlier. (*Gilberd v. AC Transit* (1995) 32 Cal.App.4th 1494, 1500; see *Baldwin v. Home Sav. Of America* (1997) 59 Cal.App.4th 1192, 1198.) Thus, the burden under Section 1008 "is comparable to that of a party seeking a new trial on the ground of newly discovered evidence: the information must be such that the moving party could not, with reasonable diligence, have discovered or produced it at the trial." (*New York Times Co. v. Superior Court* (2005) 135 Cal.App.4th 206, 212-213.)

Plaintiffs ask the Court to reconsider Judge Zepeda's order denying a motion for new trial on the grounds that at the time of Judge Zepeda's order, Plaintiffs' California Business and Professions Code section 17200 claim remained undetermined, and that their motion for new trial was therefore premature. Plaintiffs contend that the case was not complete until Judge Zepeda ruled on the section 17200 claim on May 13, 2024, citing to *Cobb v. University of Southern California* 1996) 1140, 1144.

First, Judge Zepeda's order regarding Plaintiffs' request for a ruling on their section 17200 cause of action was issued on May 15, 2024. Her order denying Plaintiffs' motion for new trial was issued on that same date. In her section 17200 order, Judge Zepeda explains that by the time of trial, that claim was no longer in the case because Plaintiffs asserted it against 7-Eleven Corporation, 7-Eleven Store, and California State Lottery—all of whom Plaintiffs dismissed from the case long before trial. Thus, Plaintiffs' motion for new trial was not premature.

Next, Plaintiffs fail to demonstrate compliance with Code of Civil Procedure section 1008. Plaintiffs cite no new law or facts.

Accordingly, Plaintiffs' motion for reconsideration is DENIED.

Defendants' request for sanctions is also DENIED.

IV. Defendants' Motion for Attorneys' Fees Pursuant to Code of Civil Procedure §2033.420

Code of Civil Procedure section 2023.420 provides:

(a) If a party fails to admit the genuineness of any document or the truth of any matter when requested to do so under this chapter, and if the party requesting that admission thereafter proves the genuineness of that document or the truth of that matter, the party requesting the admission may move the court for an order requiring the party to whom the request was directed to pay the reasonable expenses incurred in making that proof, including reasonable attorney's fees.

(b) The court shall make this order unless it finds any of the following:

(1) An objection to the request was sustained or a response to it was waived under Section 2033.290.

(2) The admission sought was of no substantial importance.

(3) The party failing to make the admission had reasonable ground to believe that that party would prevail on the matter.

(4) There was other good reason for the failure to admit.

Based on the above, Defendants seek $143,563.50 in attorneys' fees for having to prove up the matters addressed in their requests for admissions to Plaintiffs, virtually all of which Plaintiffs denied. As Defendants achieved a complete defense verdict, it is Plaintiffs' burden to show an exception to the mandate in section 2023.420(b), which states "The court shall make this order unless it finds any of the following. . . ."

The only relevant exception here is that set forth in section 2023.420(b)(3). Defendants argue Plaintiffs cannot meet this exception because there was no reasonable grounds for Plaintiffs to believe that a jury would agree with their strained view of the facts, which view was based entirely on attorney argument rather than admissible evidence.

Whether " the party failing to make the admission had reasonable ground to believe that that party would prevail on the matter" appears to turn on the facts of particular cases. (See, e.g., *Miller v. American Greetings Corp.* (2008) 161 Cal. App. 4th 1055 (reversing trial court's fee grant where plaintiff's belief he could prove respondeat superior liability was reasonable even though trial court

granted summary judgment for defendant on that issue); *Grace v. Mansourian* (2015) 240 Cal. App. 4th 523 (fee award affirmed in personal injury action where no reasonable basis to deny plaintiff's ankle injury was the result of an accident).

Fees under this code section would not be appropriate here. This Court denied Defendants' summary judgment motion largely because of the existence of a police report that included a statement indicating that Defendant Sasan Pournaghshband had previously harassed customers and suffered from mental illness and that Defendant Khandan apologized for Defendant Pournaghshband's behavior that evening. Notably, Defendants did not object to the Court considering this police report—the admissibility of that police report only became the subject of discussion when the Court raised the hearsay problems with admitting a police report on its own motion. The parties The Court ultimately did consider the specific statements in the police report as admissions against interest. Thus, even setting aside the video issue, it cannot be said that there was **no** evidence or that Plaintiffs' beliefs that they could prevail at trial were unreasonable at the time they answered Defendants' requests for admissions.

Defendants do not break down their fees by particular requests for admission, instead seeking all fees incurred for having to defend the case. Thus, Defendants' motion for attorneys fees is DENIED.

V. Plaintiffs' Motion to Tax Costs

Plaintiffs argue (1) the Code of Civil Procedure section 998 offer was flawed and therefore Defendants are not entitled to expert costs and (2) certain of Defendants' claimed costs are not recoverable. Defendants concede they are not entitled to recover costs of hearing transcripts because such transcripts were not ordered by the Court to be prepared but otherwise oppose Plaintiffs' motion. The total costs Defendants seek is now $38,949.93.

The Court disagrees that the 998 offers were not Code compliant. The offers did not require Plaintiffs to sign the exemplar settlement agreement; they just required Plaintiffs to sign the acceptance in the space provided on the last page of the offers. It is undisputed that Plaintiffs never responded or even commented on the offers until they filed their motion to tax costs. The mere fact

that the settlement offers were of low dollar value does not mean they were made in bad faith; Plaintiffs cite no authority to the contrary.

Plaintiffs' challenges to individual costs are also not well taken. Defendants were entitled to deposit jury fees to secure their ability to move forward with a jury trial in the event Plaintiffs withdrew their jury demand and/or failed to comply with the requirements for a jury trial. Defendants were also not required to call their experts to be reimbursed for expert costs; Defendants were entitled to consult with experts to the extent reasonably necessary to the defense of the case, whether they called those experts or not. And travel to depositions is expressly permitted under the Code.

In sum, the Court is not persuaded by Plaintiffs' motion to tax costs, and except for the costs of transcripts, Plaintiffs' motion to tax costs is DENIED.

Calendar Lines 26-27
Case Name: *Frank Bonzell et al vs Retirement Capital Strategies, Inc., a California Corporation*
Case No.: 24CV433722

Before the Court is Defendant's motion to compel arbitration and Plaintiff's motion for trial preference. Pursuant to California Rule of Court 3.1308, the Court issues its tentative rulings.

I. Background

This is an action for elder financial abuse, breach of fiduciary duty, negligence, breach of contract, and declaratory relief. According to the First Amended Complaint ("FAC"), Plaintiffs Frank Bonzell and Carol Bonzell in their individual capacities and as Trustees of the Bonzell 1996 Living Trust seek damages against Retirement Capital strategies, Inc. ("RCS") based on RCS's alleged failure to recognize signs of financial elder abuse that Plaintiffs claim caused the Bonzells to lose some $1.2 million of their life savings.

The Bonzells used RCS as their financial managers since 2005. (Declaration of Frank Bonzell, ¶ 2.) By 2018, the Bonzells had approximately one million dollars in retirement savings with RCS, and they had an established relationship with them. (Bonzell Decl., ¶ 4.) In June 2018, the Bonzells signed an Investment Advisory Agreement ("IAA"). The Bonzells received the IAA by mail, signed it, then returned it by mail to RCS. Accordingly, RCS did not discuss the IAA with Bonzells, and there is no evidence that they had questions about or changes to the IAA. Mr. Bonzell swears that he does not recall signing the IAA and has no copy of it in his files. (Bonzell Decl., ¶ 14.)

The IAA the Bonzells signed contains the following arbitration provision:

> 14. Arbitration. Subject to the conditions and exceptions noted below, and to the extent not inconsistent with applicable law, in the event of any dispute pertaining to ADVISER's services under this Agreement that cannot be resolved by mediation, both ADVISER and CLIENT agree to submit the dispute to arbitration in accordance with the auspices and rules of the American Arbitration Association ("AAA"), provided that the AAA accepts jurisdiction. ADVISER and CLIENT understand that such arbitration shall be final and binding, and that by agreeing to arbitration, both ADVISER and CLIENT are waiving their respective rights to seek

> remedies in court, including the right to a jury trial. CLIENT acknowledges that client has had a reasonable opportunity to review and consider this arbitration provision prior to the execution of this Agreement. CLIENT acknowledges and agrees that in the specific event of non-payment of any portion of *Advisor Compensation* pursuant to paragraph 2 of this Agreement, ADVISER, in addition to the aforementioned arbitration remedy, shall be free to pursue all other legal remedies available to it under law, and shall be entitled to reimbursement of reasonable attorney's fees and other costs of collection.

Other language in the IAA states that CLIENT has authority to enter the IAA, carefully reviewed the IAA, had an opportunity to discuss the IAA terms with the ADVISOR, and fully understands the service to be provided by RSC and the associated risks.

II. Legal Standard and Analysis for Petition to Compel Arbitration

In a motion to compel arbitration, the Court must determine "(1) whether there is a valid agreement to arbitrate between the parties; and (2) whether the dispute in question falls within the scope of that arbitration agreement." (*Bruni v. Didion* (2008) 160 Cal. App. 4th 1272, 1283 (citations omitted).) "The petitioner bears the burden of proving the existence of a valid arbitration agreement by a preponderance of the evidence, and a party opposing the petition bears the burden of proving by a preponderance of the evidence any fact necessary to its defense. [Citation.] In these summary proceedings, the trial court sits as a trier of fact, weighing all the affidavits, declarations, and other documentary evidence, as well as oral testimony received at the court's discretion, to reach a final determination. [Citation.]" (*Bruni*, 160 Cal. App. 4th at 1282 (citations omitted).)

Even if the Court finds the Parties agreed to arbitrate these claims, the agreement is unenforceable if it is unconscionable. (*Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83.) Unconscionability consists of both procedural and substantive elements. The prevailing view is that both procedural and substantive unconscionability must be present, but the two elements of unconscionability need not be present to the same degree. A sliding scale is invoked such that the more substantively oppressive the contract term the less evidence of the procedural

unconscionability is required to conclude that the contract provision is unenforceable, and vice versa. (*Armendariz,* 24 Cal.4th at 114.) The procedural element tests the circumstances of contract negotiation and formation and focuses on "oppression" or "surprise" due to unequal bargaining power. (See *Armendariz,* 24 Cal.4th at 114.) "Oppression" occurs when a contract involves lack of negotiation and meaningful choice, and "surprise" occurs where the alleged unconscionable provision is hidden within a printed form. (*Pinnacle Museum Tower Ass'n v. Pinnacle Mkt.Dev. (US), LLC* (2012) 55 Cal.4th 223, 247, citing *Morris v. Redwood Empire Bancorp* (2005) 128 Cal.App.4th 1305, 1317; *Tiri v. Lucky Chances, Inc.* (2014) 226 Cal.App.4th 231; *Serafin v. Balco Properties Ltd., LLC* (2015) 235 Cal.App.4th 165, 179.) Substantive unconscionability relates to the fairness of the terms of the arbitration agreement and assesses whether they are overly harsh or one-sided. (*Armendariz, supra*, 24 Cal.4th at p. 114; *24 Hour Fitness, Inc. v. Superior Court* (1998) 66 Cal.App.4th 1199, 1213.)

Here, the Court is troubled by the clause that permits RSC to seek redress in court for a client's failure to pay fees. While the attorneys fee provision in this clause is mutual by operation of law pursuant to Civil Code section 1717, the fact remains that RSC can sue a client in court if the client fails to pay fees, but the client cannot sue RSC in court if the client does not believe it should pay RSC fees because of RSC's breach. This is one sided.

However, there does not appear to be procedural unconscionability here. While Mr. Bonzell swears under oath that he does not remember signing the IAA, he does not claim the signature on that document is not his. Not remembering the agreement is insufficient to create an issue of fact as to whether the Bonzells entered the IAA that includes the arbitration clause. (See *Ramirez v. Golden Queen Mining Co., LLC* 102 (2024) Cal. App. 5th 821.) According to Mr. Bonzell, the Bonzells also had a trusting, long term relationship with RCS. There is no evidence the Bonzells had questions about the IAA or requested that changes be made to the document. The arbitration clause is clearly called out in the short agreement—it is not buried and hard to see. In sum, there do not appear to be any facts to support the argument that the Bonzells signed the IAA under duress or otherwise without an opportunity to discuss and potentially make changes to the agreement if they had asked.

Accordingly, Defendant's petition to compel arbitration is GRANTED. The initial case management conference will remain as set.

Plaintiff's motion for trial preference is DENIED as moot.