SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 3
Honorable William J. Monahan, Presiding

Allison Croft, Courtroom Clerk
191 North First Street, San Jose, CA 95113
Telephone: (408) 882-2130

DATE: 2/13/2024 TIME: 9:00 A.M.

TO CONTEST THE RULING: Before 4:00 p.m. 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 and contest the ruling
(California Rule of Court 3.1308(a)(1) and Local Rule 8.E.)

TO APPEAR AT THE HEARING: The Court strongly prefers in person appearances. If you must appear virtually, please use video. To access the link, click on the below link or copy and paste into your internet browser and scroll down to **Department 3**.
https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml

TO SET YOUR NEXT HEARING DATE: You no longer need to file a blank notice of motion to obtain a hearing date. Phone lines are now open for you to call and reserve a date before you file your motion. If moving papers are not filed within 5 business days of reserving the date, the date will be released for use in other cases. Where to call for your hearing date: 408-882-2430 When you can call: Monday to Friday, 8:30 am to 12:30 pm

FINAL ORDERS: The prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.) **Please Note:** Any proposed orders must be submitted with the Judicial Council Form EFS-020 Proposed Order (Cover Sheet). Please include the date, time, dept. and line number.

COURT REPORTERS: The Court no longer provides official court reporters. If any party wants a court reporter, the appropriate form must be submitted. See court website for policy and forms.

LINE #	CASE #	CASE TITLE	RULING
LINE 1	20CV366698	Lee Harris vs Joseph Nader et al	Hearing: Order of Examination against Def Norma Nader APPEAR.

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LINE 2	20CV366698	Lee Harris vs Joseph Nader et al	Hearing: Order of Examination against Def Joseph Nader, individually & dba Greenlight Motors APPEAR.
LINE 3	20CV366698	Lee Harris vs Joseph Nader et al	Motion: Vacate Judgment or to construe judgment for damages by Plts Norma Nader, Elias Nader and Rene Nader (pro per) APPEAR.
LINE 4	23CV420692	Andre LaForge et al vs Matthew Leal	Hearing: Demurrer **FAC filed 1/25/24** to the Complaint by def Matthew Leal (pro per) OFF CALENDAR. The demurrer is off calendar as a fist amended complaint ("FAC") was filed on 2/25/2024.
LINE 5	23CV423441	Christopher Fronczek vs Brian Farber et al	Hearing: Demurrer to the complaint of plt Chris Fronczek by Defs Debbie Bowers, Biodot, and ATS Automation Tooling Ctrl click (or scroll down) on Line 5 for tentative ruling. The court will prepare the order.

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DATE: 2/13/2024 TIME: 9:00 A.M.

LINE 6	20CV374088	Michael Prozan et al vs Acuity Management Company, LLC et al	Motion: Compel Plaintiffs Michael W. Prozan (in pro per) and My General Counsel PC ("Plaintiffs") motion to compel defendants Acuity Management Company, LLC, Acuity Ventures II, LLC, and Acuity Ventures III, LP (collectively "Defendants") to provide further response to Request for Production of Documents ("RPD"), set one, Nos. 1-7, and for monetary sanctions against Defendants. Plaintiffs' request for judicial notice is unopposed and GRANTED. Plaintiff's motion to compel is unopposed and GRANTED. Code-compliant further responses, without objections, are due within 20 days of order. However, the request for monetary sanctions is DENIED. The amount requested is not supported by the declaration of Michael Prozan in support of this motion.

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DATE: 2/13/2024 TIME: 9:00 A.M.

LINE 7	22CV407150	Metup S.r.L., an Italian Company vs PubMatic, Inc., a California Corporation	Motion: Compel Plaintiff Metup S.r.L., an Italian Company ("Plaintiff")'s motion to compel defendant Pubmatic, Inc ("Defendant") to Provide Further Responses to Request for Production of Documents ("RPD") set one, Nos. 1-8 and 11-16 and for monetary sanctions. Unopposed and GRANTED. Code compliant further responses are due within 20 days of order. However, the request for monetary sanctions is DENIED. The $6,900 amount requested is not supported by the declaration of Bret J. Lehman in support of this motion. He states in paragraph 23 "Counsel for Plaintiff anticipates it will expend 9.5 hours and $5,700 in order to obtain further responses through this motion." However, his declaration does not state the hourly rate, time spent, or provide any breakdown of the $5,700.
LINE 8	23CV411660	JULIAN MORGA GOPAR et al vs GENERAL MOTORS LLC, a Delaware Limited Liability Company,	Motion: Compel further responses to production of documents, set one and sanctions by Plaintiff APPEAR.
LINE 9	23CV417837	ERICK GONZALES vs SECURITAS SECURITY SERVICES USA, INC., et al	Hearing: Motion hearing to compel arbitration by def Securitas Security Services USA, Inc. Ctrl Click (or scroll down) on Line 9 for tentative ruling. The court will prepare the order.

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COUNTY OF SANTA CLARA

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DATE: 2/13/2024 TIME: 9:00 A.M.

LINE 10	17CV311664	Thuy Pham vs An Nguyen et al	Hearing: Motion hearing for attorney fees by Def Olivia Nguyen Ctrl click (or scroll down) on Line 10 for tentative ruling. The court will prepare the order.
LINE 11	2010-1-CV-162877	Citibank (South Dakota) N.A. vs C. Guevara	Motion: Set aside judgment and judgment renewal and dismiss action without prejudice by Plaintiff Unopposed and GRANTED.
LINE 12			

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Calendar Line 1

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Calendar Line 5
Case Name: *Christopher Fronczek v. Brian Farber, et al.*
Case No.: 23-CV-423441

Demurrer to the Complaint by Defendants Debbie Bowers, BioDot, Inc., and ATS Automation Tooling Systems

Factual and Procedural Background

This is an employment action involving sexual assault and other claims brought by plaintiff Christopher Fronczek ("Plaintiff") against defendants Brian Farber ("Farber"), Debbie Bowers ("Bowers"), BioDot, Inc. ("BioDot"), and ATS Automation Tooling Systems[1] ("ATS") (collectively, "Defendants").

According to the complaint, BioDot designs and manufactures precision liquid dispensing and material-handling systems used by corporate customers to manufacture diagnostic tests. (Complaint at ¶ 2.) ATS is a multi-national conglomerate that builds automation systems for many industries, including medical devices, pharmaceuticals, telecommunications, semiconductor, fiber optics, automotive, computers, solar energy and consumer products. (Id. at ¶ 3.) ATS fully-owns, operates, and controls BioDot. (Ibid.)

In May 2016, Plaintiff was hired by BioDot as an Applications Scientist/Laboratory Specialist and began working there in August 2016. (Complaint at ¶ 13.) Plaintiff's job responsibilities included: (1) supporting the development of customer applications; (2) working closely with R&D in the development of new products; (3) designing and managing test plans for new products and core materials; (4) working closely with the marketing team in providing technical literature; (5) giving technical presentations at conferences and trade shows; (6) supporting and training customers in the field; (7) managing scientists and training internal personnel; (8) writing technical documents and user manuals; and (9) managing the company's applications lab. (Id. at ¶ 16.)

In September 2021, Plaintiff and his then-supervisor, Farber, attended a business trip in Atlanta, Georgia. (Complaint at ¶ 20.) During the trip, Plaintiff alleges Farber sexually assaulted him causing him to suffer physical injuries and extreme emotional distress. (Id. at ¶¶ 29-39, 43.)

Shortly after Plaintiff complained to BioDot about Farber's assault, the company commenced an "investigation" into Plaintiff's complaint. (Complaint at ¶ 55.) Plaintiff however alleges the "investigation" was nothing more than a whitewash to give BioDot and Farber the opportunity to build up their defenses. (Id. at ¶ 56.) For example, nobody from BioDot or ATS ever told Plaintiff (the party who had reported and complained of the assault) Farber's version of events or gave Plaintiff an opportunity to respond to Farber's allegations. (Id. at ¶ 61.)

Once the "investigation" into his complaint was complete, Bowers, Plaintiff's direct supervisor, and BioDot immediately intensified their scrutiny of Plaintiff and commenced a systematic campaign to manage him out of the company. (Complaint at ¶ 76.) In addition,

[1] According to the moving papers, ATS is now known as ATS Corporation. (See Notice of Motion at p. 2.)

Bowers began imposing more duties on Plaintiff in hopes of making him fail or quit the company. (Id. at ¶ 80.) Nevertheless, Plaintiff completed all his assigned tasks competently and timely. (Id. at ¶ 81.)

On May 17, 2022, just six months following the "sham investigation" of Plaintiff's reported assault, BioDot and Bowers placed Plaintiff on a 30-day Performance Improvement Plan ("PIP"). (Complaint at ¶ 106.) Plaintiff alleges the criticisms contained in the PIP were all unfounded, trumped up and intended to create a false paper trail to support his dismissal. (Id. at ¶ 107.) But, on June 2, 2022, about halfway through the 30-day PIP, BioDot, at Bowers' direction, terminated Plaintiff's employment. (Id. at ¶ 108.)

On September 18, 2023, Plaintiff submitted a complaint to the Department of Fair Employment and Housing for sexual harassment and retaliation and obtained an immediate right-to-sue notice. (Complaint at ¶ 111.)

On September 25, 2023, Plaintiff filed a complaint against Defendants alleging the following causes of action:

- First Cause of Action: Sexual Harassment in Violation of FEHA[2] [against Farber, BioDot, and ATS];
- Second Cause of Action: Assault [against Farber, BioDot, and ATS];
- Third Cause of Action: Battery [against Farber, BioDot, and ATS];
- Fourth Cause of Action: Whistleblower Retaliation – Labor Code, § 1102.5 [against BioDot and ATS];
- Fifth Cause of Action: FEHA Retaliation [against BioDot and ATS];
- Sixth Cause of Action: Failure to Prevent Harassment and Retaliation in Violation of FEHA [against BioDot and ATS];
- Seventh Cause of Action: Defamation [against Bowers, BioDot, and ATS];
- Eighth Cause of Action: Intentional Infliction of Emotional Distress [against all Defendants];
- Ninth Cause of Action: Wrongful Termination in Violation of Public Policy [against BioDot and ATS];
- Tenth Cause of Action: Violation of Labor Code, § 203 [against BioDot].[3]

On December 11, 2023, defendant Farber filed an answer generally and specifically denying allegations of the complaint and asserting affirmative defenses.

On December 19, 2023, defendants Bowers, BioDot, and ATS (collectively, "Moving Defendants") filed the motion presently before the court, a demurrer to the complaint. Plaintiff filed written opposition. Moving Defendants filed reply papers.

A case management conference is set for March 5, 2024.

Demurrer to the Complaint

[2] FEHA refers to the Fair Employment and Housing Act.

[3] The tenth cause of action is mistakenly labeled as the eleventh cause of action in the body of the complaint. (See Complaint at p. 26.)

Moving Defendants argue the seventh cause of action for defamation is barred by the one-year statute of limitations under Code of Civil Procedure section 340, subdivision (c).

Untimely Opposition

As a preliminary matter, it appears Plaintiff filed and served an untimely opposition to the demurrer.

Code of Civil Procedure section 1005, subdivision (b), requires all opposing papers to be filed and served at least nine court days before the hearing. No paper may be rejected for filing on the ground that it was untimely submitted for filing. (Cal. Rules of Court, Rule 3.1300(d).) If the court, in its discretion, refuses to consider a late filed paper, the minutes or order must indicate. (Ibid.)

Here, Defendants filed the instant demurrer on December 19, 2023. The hearing on the motion is scheduled for February 13, 2024. Thus, opposition must be filed no later than January 30, 2024 to be considered timely.[4] Plaintiff however did not file and serve his opposition until January 31, 2024, one day beyond the deadline imposed by the rules of court. Nevertheless, Moving Defendants timely filed and served reply papers addressing the substantive merits of the opposition. The court therefore will consider the opposition on its merits as there appears to be only minimal prejudice to Moving Defendants. (See *Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, 806 (*Fox*) [courts have a policy favoring disposition of cases on the merits rather than on procedural grounds]; see also *Kapitanski v. Von's Grocery Co.* (1983) 146 Cal.App.3d 29, 32-33 ["Cognizant of the strong policy favoring the disposition of cases on their merits…judges frequently consider documents which have been untimely filed."].) The court admonishes Plaintiff's counsel to comply with court rules and procedures with respect to future filings.

Legal Standard

"In reviewing the sufficiency of a complaint against a general demurer, we are guided by long settled rules. 'We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. We also consider matters which may be judicially noticed.' " (*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.)

"The reviewing court gives the complaint a reasonable interpretation, and treats the demurrer as admitting all material facts properly pleaded. The court does not, however, assume the truth of contentions, deductions or conclusions of law. … [I]t is error for a trial court to sustain a demurrer when the plaintiff has stated a cause of action under any possible

[4] This deadline accounts for the court holiday on Monday February 12, 2024.

legal theory. And it is an abuse of discretion to sustain a demurrer without leave to amend if the plaintiff shows there is a reasonable possibility any defect identified by the defendant can be cured by amendment." (*Gregory v. Albertson's, Inc.* (2002) 104 Cal.App.4th 845, 850.)

Statute of Limitations

A statute of limitations prescribes the period "beyond which a plaintiff may not bring a cause of action. [Citations.]" (*Fox, supra,* 35 Cal.4th at p. 806.) It "strikes a balance among conflicting interests. If it is unfair to bar a plaintiff from recovering on a meritorious claim, it is also unfair to require a defendant to defend against possibly false allegations concerning long-forgotten events, when important evidence may no longer be available." (*Pooshs v. Philip Morris USA, Inc.* (2011) 51 Cal.4th 788, 797.)

"A plaintiff must bring a claim within the limitations period after accrual of the cause of action. In other words, statutes of limitation do not begin to run until a cause of action accrues. Generally speaking, a cause of action accrues at the time when the cause of action is complete with all its elements." (*V.C. v. Los Angeles Unified School Dist.* (2006) 139 Cal.App.4th 499, 509-510, internal citations and quotation marks omitted.)

Although the statute of limitations is a factual issue, it can be subject to demurrer if the pleading discloses that the statute of limitations has expired regarding one or more causes of action. (*Fuller v. First Franklin Financial Corp.* (2013) 216 Cal.App.4th 955, 962.) If a demurrer demonstrates that a pleading is untimely on its face, it becomes the plaintiff's burden "even at the pleading stage" to establish an exception to the limitations period. (*Aryeh v. Cannon Business Solutions, Inc.* (2013) 55 Cal.4th 1185, 1197.)

A court may sustain a demurrer on the ground of failure to state sufficient facts if "the complaint shows on its face the statute [of limitations] bars the action." (*E-Fab, Inc. v. Accountants, Inc. Services* (2007) 153 Cal.App.4th 1308, 1315 (*E-Fab, Inc.*).) A demurrer is not sustainable if there is only a possibility the cause of action is time-barred; the statute of limitations defense must be clearly and affirmatively apparent from the allegations in the pleading. (*Id.* at pp. 1315-1316.)

When evaluating whether a claim is time-barred, a court must determine (1) which statute of limitations applies and (2) when the claim accrued. (*E-Fab, Inc., supra,* 153 Cal.App.4th at p. 1316.)

Analysis

Moving Defendants argue the seventh cause of action for defamation is barred by the one-year statute of limitations under Code of Civil Procedure section 340, subdivision (c). "In common with other statutory limitations of the period within which an action may be brought, this statute serves to protect potential defendants from stale claims and to encourage plaintiffs to be diligent. Such provisions, by creating limits on the period during which a person's conduct may engender litigation and liability, promote predictability and stability." (*Shively v. Bozanich* (2003) 31 Cal.4th 1230, 1246 (*Shively*).)

"In a claim for defamation, as with other tort claims, the period of limitations commences when the cause of action accrues." (*Shively, supra,* 31 Cal.4th at p. 1246.) In

general, a cause of action in tort accrues at the time of injury and thus a cause of action for defamation accrues at the time the defamatory statement is "published." (*Id.* at p. 1247.) "[P]ublication occurs when the defendant communicates the defamatory statement to a person other than the person being defamed." (*Ibid*.)

Here, Plaintiff alleges defendant Bowers needlessly and intentionally made defamatory oral statements about him to numerous persons, including coworkers and Plaintiff's supervisors. (Complaint at ¶ 165.) The facts alleged in support of the defamation claim are set forth in paragraph 110 of the complaint which provides:

> "On the day she terminated Plaintiff's employment, Bowers called an all-hands meeting while Plaintiff was being escorted by BioDot's Controller to gather his belongings and leave the building. Plaintiff was informed by multiple sources that during the all-hands meeting, speaking about Plaintiff, Bowers said words to the effect of, 'He's not my friend. He's not BioDot's friend. So he's not your friend.' She also announced that Plaintiff was unstable and a potential danger to BioDot and its employees, and that BioDot would therefore be newly-hiring armed security guards to protect the employees from Plaintiff. One or more armed security guards were, in fact, present on site for nearly a month." (Complaint at ¶ 110.)

As stated above, the alleged statements occurred on June 2, 2022, the day of Plaintiff's termination and accrual date for the defamation claim. Since Plaintiff did not file this action until September 25, 2023, beyond the one-year limitations period, the defamation cause of action appears to be time-barred.

In opposition, Plaintiff contends the one-year limitations period is tolled by the doctrine of equitable tolling.

"The equitable tolling of statutes of limitations is a judicially created, nonstatutory doctrine. [Citations.] It is 'designed to prevent unjust and technical forfeitures of the right to a trial on the merits when the purpose of the statute of limitations—timely notice to the defendant of the plaintiff's claims—has been satisfied.' [Citation.] Where applicable, the doctrine will 'suspend or extend a statute of limitations as necessary to ensure fundamental practicality and fairness.' [Citation.]" (*McDonald v. Antelope Valley Community College Dist.* (2008) 45 Cal.4th 88, 99 (*McDonald*).)

"Broadly speaking, the doctrine applies ' "[w]hen an injured person has several legal remedies and, reasonably and in good faith, pursues one." ' [Citations.] Thus, it may apply where one action stands to lessen the harm that is the subject of a potential second action; where administrative remedies must be exhausted before a second action can proceed; or where a first action, embarked upon in good faith, is found to be defective for some reason. [Citation.]" (*McDonald, supra,* 45 Cal.4th at p. 100.)

"The purpose of equitable tolling is to 'ease[] the pressure on parties "concurrently to seek redress in two separate forums with the attendant danger of conflicting decisions on the same issue." ' [Citation.] It is intended to benefit the court system 'by reducing the costs associated with a duplicative filing requirement, in many instances rendering later court proceedings either easier and cheaper to resolve or wholly unnecessary.' [Citation.]" (*Long v. Forty Niners Football Co., LLC* (2019) 33 Cal.App.5th 550, 555 (*Long*).)

"A plaintiff seeking the benefit of equitable tolling must show three elements: ' "timely notice, and lack of prejudice, to the defendant, and reasonable and good faith conduct on the part of the plaintiff." ' [Citation.] Where a claim is time-barred on its face, the plaintiff must specifically plead facts that would support equitable tolling. [Citations.]" (*Long, supra,* 33 Cal.App.5th at p. 555; see *In re Marriage of Zimmerman* (2010) 183 Cal.App.4th 900, 912 [the party invoking equitable tolling bears the burden of proving its applicability].)

Here, the operative pleading does not include facts to support the doctrine of equitable tolling to overcome the statute of limitations defense raised on demurrer. Instead, by way of this opposition, Plaintiff intends to file a first amended complaint ("FAC") incorporating facts to establish equitable tolling. In reply, Defendants argue the doctrine of equitable tolling is not applicable to the defamation claim. (See Reply at pp. 2-6.) But, to the extent that Moving Defendants dispute allegations of equitable tolling, they can do so in a subsequent pleading motion for demurrer or judgment on the pleadings to the FAC. Thus, the demurrer is sustainable on this ground but Plaintiff will be afforded leave to amend to file a FAC.

Accordingly, the demurrer to the complaint is SUSTAINED WITH 20 DAYS' LEAVE TO AMEND on the ground that the pleading is time-barred by the one-year statute of limitations. (See *City of Stockton v. Super. Ct.* (2007) 42 Cal.4th 730, 747 [if the plaintiff has not had an opportunity to amend the pleading in response to a motion challenging the sufficiency of the allegations, leave to amend is liberally allowed as a matter of fairness, unless the pleading shows on its face that it is incapable of amendment].)

Disposition

The demurrer to the complaint is SUSTAINED WITH 20 DAYS' LEAVE TO AMEND on the ground that the pleading is time-barred by the one-year statute of limitations.

The court will prepare the Order.

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Calendar line 9
Case Name: *Erick Gonzales vs Securitas Security Services USA, Inc*., et al.
Case No.: 23CV417837

Defendant Securitas Security Services USA, Inc. (Defendant)'s motion to compel arbitration against plaintiff Erick Gonzales ("Plaintiff") for an order compelling Plaintiff to arbitrate his claims and staying all proceedings related to this action until arbitration is complete is GRANTED.

Federal and State Law Strongly Favor Enforcement of Arbitration Agreements

Federal and California law strongly favor the enforceability of arbitration agreements and require that – where parties have agreed to arbitrate – they must do so in lieu of litigating in court. (*Buckeye Cheek Cashing, Inc. v. Cardegna* (2006) 546 U.S. 440, 443; *Moses H. Cone Mem. Hospital v. Mercury Constr. Corp.* (1983) 460 U.S. 1, 24-25; *Harris v. Tap Worldwide, LLC* (2016) 248 Cal.App.4th 373, 380 ["California law favors enforcement of valid arbitration agreements."]; the United States Arbitration Act, commonly referred to as the Federal Arbitration Act or "FAA"; California Arbitration Act, CCP § 1280 et seq., "CAA".) In almost identical language, each Act makes arbitration agreements valid, irrevocable, and enforceable except on grounds that exist for revocation of any type of contract generally. (Code Civ. Proc., § 1281; 9 U.S.C. § 2; *Serpa v. California Surety Investigations, Inc.* (2013) 215 Cal.App.4th 695, 701.)

The FAA

The FAA creates a strong presumption in favor of arbitration. (*Nguyen v. Applied Med. Res. Corp.* (2016) 4 Cal.App.5th 232, 245.) Its main purpose is to "ensur[e] that private arbitration agreements are enforced according to their terms" and it "preempts any state law rule that "stand[s] as an obstacle to the accomplishment of the FAA's objectives." (*Nguyen, supra*, 4 Cal.App.5th at p. 246, quoting *Carbajal v. CWPSC* (2016) 245 Cal.App.4th 227, 238.) The FAA applies to contracts in the employment context where the employment affects interstate commerce. (*Carmax Auto Superstores Cal. LLC v. Hernandez* (9th Cir. 2015) 94 F.Supp.3d 1078, 1099.)

The FAA provides that "[a] written provision in any … contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract … shall be valid, irrevocable, and enforceable, save upon grounds as exist at law or in equity for the revocation of any contract." (9 U.S.C. § 2.) The phrase "involving commerce" is the "functional equivalent of affecting commerce," which is "a term of art that

ordinarily signals the broadest permissible exercise of Congress's commerce clause power." (*Nguyen, supra,* 4 Cal.App.5th at p. 246 (citations omitted).) The minimal nexus to interstate commerce required by the FAA exists here.

Under the FAA, the basic role for this Court is to determine whether the movant has shown that: (1) a valid arbitration agreement exists and, if so, (2) the arbitration agreement encompasses the claims at issue. (*Kilgore v. KeyBank, N.A.* (9th Cir. 2012) 673 F.3d 947, 955-56.) The party opposing arbitration must demonstrate that the arbitration agreement is invalid. (*See Green Tree Fin. Corp. v. Randolph* (2000) 531 U.S. 79, 91-92.) Doubts as to whether Plaintiff's claims are subject to arbitration must be resolved in favor of arbitration. (*See Moses H. Cone Mem. Hospital v. Mercury Constr. Corp.* (1983) 460 U.S. 1, 24-25; *A&T Tech., Inc. v. Communication Workers of Am.* (1986) 475 U.S. 643, 650.)

The CAA

Code of Civil Procedure section 1281.2, subdivision (c), is among the CAA's procedural provisions that may be enforced by California courts even with respect to arbitration contracts subject to the FAA's substantive rules. (See *Volt, supra,* 489 U.S. at pp. 470, 477-479 [application of section 1281.2 to stay arbitration would not undermine the goals and policies of, and is not preempted by, the FAA in a case where the parties have agreed that their arbitration agreement will be governed by California law].)

The CAA requires courts to enforce arbitration clauses where one party has shown the existence of an agreement to arbitrate that encompasses the dispute in question, unless the party opposing arbitration demonstrates that the petitioner waived the right to compel arbitration, or that grounds exist for revocation of the agreement. (*See* Code Civ. Proc., § 1281.2; *see generally St. Agnes Medical Center v. PacifiCare of California* (2003) 31 Cal.4th 1187.) The CAA states in relevant part:

> On petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party thereto refuses to arbitrate such controversy, the court **shall order** the petitioner and the respondent to arbitrate the controversy if it determines that an agreement to arbitrate the controversy exists, unless it determines that: (a) [t]he right to compel arbitration has been waived by the petitioner; or (b) [g]rounds exist for the revocation of the agreement.

(Code Civ. Proc., § 1281.2 (emphasis added).)

Burden on Motion to Compel Arbitration

The party seeking arbitration has the burden of proving the existence of a valid

arbitration agreement by a preponderance of the evidence, while a party opposing the petition bears the burden of proving by a preponderance of the evidence any fact necessary to its defense. The trial court "sits as the trier of fact, weighing all the affidavits, declarations, and other documentary evidence, and any oral testimony the court may receive at its discretion, to reach a final determination." (*Ruiz v. Moss Bros. Auto Group, Inc*. (2014) 232 Cal.App.4th 836, 842; *Gamboa v. Northeast Community Clinic* (2021) 72 Cal.App.5th 158, 164-165.)

Here, Defendant has met its burden of proving the existence of a valid arbitration agreement with Plaintiff. Plaintiff received and signed the Dispute Resolution Agreement ("DRA" or "Arbitration Agreement") twice (electronically by DocuSign on 6/25/2022 when he applied and in person on 8/16/2022 when he was hired by Defendant). The court finds the evidence submitted by Defendant more persuasive than Plaintiff's declaration. Plaintiff's declaration also claims that he is not proficient in reading English, but this is plainly belied by the record. The court notes that in addition to the evidence submitted by Defendant, Plaintiff's declaration in opposition to this motion was in English. The Arbitration Agreement by its terms covers all the claims in Plaintiff's complaint.

Once the moving party establishes the existence of the arbitration agreement, the burden shifts to the party opposing arbitration to establish the factual basis for any defense to the enforcement of the arbitration agreement. (*Rosenthal v. Great W. Fin. Sec. Corp.* (1996) 14 Cal.4th 394, 413; *Condee v. Longwood Management Corp.* (2001) 88 Cal.App.4th 215, 219.) Plaintiff's opposition raises the defense of unconscionability.

Unconscionability

The party opposing arbitration bears the burden of proving any defense, such as unconscionability. (*Harris, supra,* 248 Cal.App.4th at 380-81; *Pinnacle Museum Tower Ass'n, supra,* 55 Cal.4th at 236.) Unconscionability is lack of meaningful choice by one party, plus contact terms unreasonably favorable to the other. (*Baltazar v. Forever 21, Inc.* (2016) 62 Cal.4th 1237, 1243.) The burden to prove a defense is a heavy one, because the law favors arbitration. (*Grand Prospect Partners, L.P. v. Ross Dress for Less, Inc.* (2015) 232 Cal.App.4th 1332, 1347; *Titolo v. Cano* (2007) 157 Cal.App.4th 310, 316.)

To establish a defense to enforcement of the parties' arbitration agreement based on unconscionability, Plaintiff bears the burden of demonstrating "both a procedural and a substantive element, the former focusing on oppression or surprise due to unequal bargaining power, the latter on overly harsh or one side results." (*Baltazar, supra,* 62 Cal.4th at 1243, citing *Sonic-Calabasas A, Inc. v. Moreno* (2013) 57 Cal.4th 1109, 133 [emphasis added].) "The

prevailing view is that [procedural and substantive unconscionability] must both be present in order for a court to exercise its discretion to refuse to enforce a contract or clause under the doctrine of unconscionability. But they need not be present in the same degree…. [T]he more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa." (*Baltazar, supra,* 62 Cal.4th at 1244, citing *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 114.)

Any doubt about whether the language of an arbitration agreement covers a particular dispute is resolved in favor of arbitration. (*Erickson, Arbuthnot, McCarthy, Kearney & Walsh, Inc. v. 100 Oak Street* (1983) 35 Cal.3d 312, 320; *Moses H. Cone Memorial Hosp. v. Mercury Const. Corp.* (1983) 460 U.S. 1, 24-25; *see also Pearson Dental Supplies, Inc. v. Sup. Ct.* (2010) 48 Cal.4th 665, 682 [holding that arbitration agreements should be interpreted, whenever possible, in manner consistent with parties' intent and to make them valid rather than void].)

Procedural Unconscionability

Procedural unconscionability is present when the way an agreement is negotiated involves (i) oppression and/or (ii) surprise. (*Armendariz, supra,* 24 Cal.4th at 114.) "[There are degrees of procedural unconscionability. At one end of the spectrum are contracts that have been freely negotiated by roughly equal parties, in which there is no procedural unconscionability. ...Contracts of adhesion involve surprise or other sharp practices lie on the other end of the spectrum. (*Baltazar, supra,* 62 Cal.4th 1237, 1244.) Court's "must be particularly attuned to claims that employers with superior bargaining power have imposed one-sided, substantively unconscionable terms as part of an arbitration agreement." (*Armendariz, supra,* 24 Cal.4th at 115.) "Where an adhesive contract is oppressive, surprise need not be shown to establish procedural unconscionability. [Citation.]" (*Bakersfield College v. California Community College Athletic Assn.* (2019) 41 Cal.App.5th 753, 764 [internal quotations omitted].) "'When the weaker party is presented the clause and told to 'take it or leave it' *without the opportunity for meaningful negotiation,* oppression, and therefore procedural unconscionability, are present.' [Citation.]" *(Id.,* at 762 [emphasis added].)

Oppression

"Oppression arises from an inequality of bargaining power that results in no real negotiation and an absence of meaningful choice." (*Flores v. Transamerica HomeFirst, Inc.* (2001) 93 Cal.App.4th 846, 853.) "An adhesive contract is standardized, generally on a

preprinted form, and offered by the party with superior bargaining power 'on a take-it-or-leave-it basis.' [Citations]" (*OTO, L.L.C. v. Kho* (2019) 8 Cal.5th 111, 126.)

"Analysis of unconscionability begins with an inquiry into whether the contract was a contract of adhesion--i.e., a standardized contract, imposed upon the subscribing party without an opportunity to negotiate the terms. (*Armendariz, supra*, 24 Cal. 4th at pp. 113-114; [Citations].) A finding of a contract of adhesion is essentially a finding of procedural unconscionability. [Citations]." (*Flores, supra,* 93 Cal.App.4th at 853.)

> "The circumstances relevant to establishing oppression include, but are not limited to (1) the amount of time the party is given to consider the proposed contract; (2) the amount and type of pressure exerted on the party to sign the proposed contract; (3) the length of the proposed contract and the length and complexity of the challenged provision; (4) the education and experience of the party; and (5) whether the party's review of the proposed contract was aided by an attorney." (*Grand Prospect Partners, L.P. v. Ross Dress for Less, Inc.* (2015) 232 Cal.App.4th 1332, 1348, fn. omitted.) With respect to *preemployment* arbitration contracts, we have observed that "the economic pressure exerted by employers on all but the most sought-after employees may be particularly acute, for the arbitration agreement stands between the employee and necessary employment, and few employees are in a position to refuse a job because of an arbitration requirement." (*Armendariz, supra*, 24 Cal.4th at p. 115.)

(*OTO, L.L.C. v. Kho* (2019) 8 Cal.5th 111, 126-127.)

Surprise

"Surprise involves the extent to which the supposedly agreed-upon terms are hidden in a prolix printed form drafted by the party seeking to enforce them. [Citation.]" (*Flores, supra,* 93 Cal.App.4th at 853.)

> "Unfair surprise results from misleading bargaining conduct or other circumstances indicating that a party's consent was not an informed choice. [Citations.]" ([(*Sanchez v. Western Pizza Enterprises, Inc.* (2009) 172 Cal.App.4th 154,] at p. 173, fn. omitted.) "'[T]here are degrees of procedural unconscionability. At one end of the spectrum are contracts that have been freely negotiated by roughly equal parties, in which there is no procedural unconscionability. … Contracts of adhesion that involve surprise or other sharp practices lie on the other end of the spectrum.'" (*Baltazar v. Forever 21, Inc.* (2016) 62 Cal.4th 1237, 1244.)

(*Penilla v. Westmont Corp.* (2016) 3 Cal.App.5th 205, 214.)

The court finds there was no persuasive evidence of surprise, duress, or manipulation. Plaintiff received and signed the Arbitration Agreement twice (electronically by DocuSign when he applied on 6/25/2022 and in person on 8/16/2022 when he was hired by Defendant). The court finds the evidence submitted by Defendant more persuasive than Plaintiff's declaration. Plaintiff' also claims that he is not proficient in reading English, but this is plainly

belied by the record. The court notes that in addition to the persuasive evidence submitted by Defendant, Plaintiff's declaration in opposition to this motion was in English.

Considering all the facts and circumstances, this court finds a low degree of procedural unconscionability due to the adhesive nature of the agreement in the employment context. "Therefore, only a high degree of substantive unconscionability would render the agreement unconscionable. (See, e.g., *Ramirez v. Charter Communications, Inc.* (2022) 75 Cal.App.5th 365, 373, review granted June 1, 2022, S273802 ["When, as here, the degree of procedural unconscionability is low, the agreement must be enforced unless the degree of substantive unconscionability is high"].)" (*Alberto v. Cambrian Homecare* (2023) 91 Cal.App.5th 482, 490.)

The Opposition Fails to Establish Substantive Unconscionability

The opposition's argument for substantive unconscionability is a single assertion that the JAMS arbitration rules are not attached to the DRA. Rather, the DRA includes a link to where the JAMS arbitration rules can be accessed on the internet, and further states that copies can be requested from Human Resources. (LaLonde Decl., Exh. A, ¶ 4.)

The opposition relies on three older cases – *Harper v. Ultimo* (2003) 113 Cal.App.4th 1402; *Fitz v. NCR Corp.* (2004) 118 Cal.App.4th 702; and *Zullo v. Superior Ct.* (2011) 197 Cal.App.4th 477. This is unpersuasive, because the analysis in those cases was superseded by the California Supreme Court's later holding in *Baltazar, supra,* 62 Cal.4th 1237.

> Baltazar's argument accordingly might have force if her unconscionability challenge concerned some element of the AAA rules of which she had been unaware when she signed the arbitration agreement. But her challenge to the enforcement of the agreement has nothing to do with the AAA rules; her challenge concerns only matters that were clearly delineated in the agreement she signed. Forever 21's failure to attach the AAA rules therefore does not affect our consideration of Baltazar's claims of substantive unconscionability.

Baltazar, 62 Cal.4th at 1246; see also *Da Loc Ngu v. Applied Med. Res. Corp*. (2016) 4 Cal.App.5th 232, 249 ["*Baltazar* removed the nonprovision of the AAA rules as a basis for increasing the procedural unconscionability level"].)

Plaintiff's opposition fails to prove any substantive unconscionability. The opposition failed to meet its burden of establishing a defense of unconscionability, so the Arbitration Agreement must be enforced.

Conclusion

Defendant's motion to compel arbitration against Plaintiff for an order compelling Plaintiff to arbitrate his claims and staying all proceedings related to this action until arbitration is complete is GRANTED.

The court will prepare the order.

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Calendar line 10
Pham vs Nguyen, et al
Case No. 17-CV-3111664

Good cause appearing, defendant Olivia Nguyen ("Nguyen")'s motion pursuant to the mandatory fee-shifting provisions of Code of Civil Procedure ("CCP") section 425.16(c) for an award of fees and costs incurred in connection with bringing her successful anti-SLAPP Special Motion to Strike ("anti SLAPP motion") is GRANTED against Plaintiff Thury Pham ("Plaintiff") in the reasonable amount of **$105,612.50** attorneys' fees plus costs of **$1,5660.40** for a total of **$121,272.90.**

Nguyen is the "prevailing defendant under CCP section 425.16(c), which mandates that "a prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs." (CCP § 425.16(c).) On November 8, 2023, the Court issued an order granting Nguyen's anti-SLAPP motion with respect to six of the seven counts contained in Plaintiff's First Amended Complaint. By this order, Nguyen achieved a substantial benefit by bringing the anti-SLAPP motion and is therefore entitled to an award of attorney's fees and costs. (CCP § 425.16(c); *Mann v Quality Old Time Service, Inc.* (2006) 139 Cal.App.4th 328, 340 (*Mann*).)

The prevailing defendant in an anti-SLAPP motion "shall be entitled" to recover attorney's fees and costs incurred with the motion. (CCP § 425.16(c).) "[A]ny SLAPP defendant who brings a successful motion to strike is entitled to mandatory attorney fees." (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1131.) Such an award includes attorney's fees and costs incurred on any appeal. (*Evans v. Unkow* (1995) 38 Cal.App.4th 1490, 1499.)

"[A] party who partially prevails on an anti-SLAPP motion must generally be considered a prevailing party unless the results of the motion were so insignificant that the party did not achieve any practical benefit from bringing the motion." (*Mann, supra,* 139 Cal.App.4th at 340.) Typically, only those fees and costs incurred in connection with the successful portion of the anti-SLAPP motion may be recovered, but the court has discretion to determine the appropriate amount of fees and costs to be awarded in such a situation. (See *Jackson v. Yarbray* (2009) 179 Cal.App.4th 75, 82; *Mann, supra,* 139 Cal.App.4th at 340.)

When a partially successful defendant "successfully narrowed the scope of the lawsuit, limiting discovery, reducing potential recoverable damages, and altering the settlement posture of the case", that defendant is the prevailing party entitled to attorney's fees. (*Mann , supra,* 139 Cal.App.4th 328, 340.)

Here, Nguyen's anti-SLAPP motion substantially narrowed the scope of the lawsuit, limited discovery, reduced the potential recoverable damages, and altered the settlement posture of the case. After her anti-SLAPP motion, only one claim remains against Nguyen. Nguyen is the prevailing party entitled to an award of attorney's fees and costs under CCP section 425.16(c).

In this case, because Nguyen only partially prevailed on their anti-SLAPP motion, there are numerous factors to be considered in determining her right to fees and costs. Those factors were discussed at length in *Mann, supra*, 139 Cal.App.4th 328, 244-345:

> An award of attorney fees to a partially prevailing defendant under section 425.16, subdivision (c) thus involves competing public policies: (1) the public policy to discourage meritless SLAPP claims by compelling a SLAPP plaintiff to bear a defendant's litigation costs incurred to eliminate the claim from the lawsuit; and (2) the public policy to provide a plaintiff who has facially valid claims to exercise his or her constitutional petition rights by filing a complaint and litigating those claims in court. (§§ 425.16, 425.17; see *Ketchum, supra*, 24 Cal.4th at p. 1131.) In balancing these policies, we conclude a defendant should not be entitled to obtain *as a matter of right* his or her entire attorney fees incurred on successful and unsuccessful claims merely because the attorney work on those claims was overlapping. Instead, the court should first determine the lodestar amount for the hours expended on the successful claims, and, if the work on the successful and unsuccessful causes of action was overlapping, the court should then consider the defendant's relative success on the motion in achieving his or her objective, and reduce the amount if appropriate.
>
> This analysis includes factors such as the extent to which the defendant's litigation posture was advanced by the motion, whether the same factual allegations remain to be litigated, whether discovery and motion practice have been narrowed, and the extent to which future litigation expenses and strategy were impacted by the motion. The fees awarded to a defendant who was only partially successful on an anti-SLAPP motion should be commensurate with the extent to which the motion changed the nature and character of the lawsuit in a practical way. The court should also consider any other applicable relevant factors, such as the experience and abilities of the attorney and the novelty and difficulty of the issues, to adjust the lodestar amount as appropriate. (See *Ketchum, supra*, 24 Cal.4th at p. 1132.)

(*Mann, supra* 139 Cal.App.4th at 344-345.)

Plaintiff argues that because the claims for violation of Family Code section 2040, violation of court orders, and constructive trust were disposed of on demurrer, Nguyen is not entitled to recover any attorney's fees relating to these claims.

First, it must be noted that the billing entries submitted in Exhibit B, excluded any charges related to Nguyen's demurrer to the complaint. (Buss Supp. Decl. ¶ 2.) Those were excluded by redaction. (*Ibid*.)

Secondly, Ms. Nguyen moved to strike those claims in her original motion to strike. (Buus Supp. Decl., ¶ 3, Exhibit F.) Thereafter, Plaintiff conceded the invalidity of those claims in her briefs in opposition to the demurrer and the motion to strike, as stated in the Court's ruling on those motions. (See Opp. to Motion, Ex. 5, pp. 10, 13-14.) Since the Court initially found that the motion to strike did not satisfy the first prong of the Anti-SLAPP motion, it did not address the factual merits of those claims. Instead, noting Plaintiff's concessions, the Court sustained the demurrer as to those claims and did not have to address them at any point in time with respect to the motion to strike.

But the result is that Ms. Nguyen moved to strike those claims in her original anti-SLAPP motion, and they were effectively abandoned by the Plaintiff. The court agrees there is no reason to reduce any award of attorney's fees incurred as to those claims.

Plaintiff claims the bills are vague and should be reduced by 48.5 hours for block billing. In *Christian Research Institute v. Alnor* (2008) 165 Cal.App.4th 1315, the court explained the danger of block billing at page 1325:

> "[B]lock billing 'obscured the nature of some of the work claimed,' further damaging counsel's credibility. Block billing, while not objectionable per se in our view, exacerbated the vagueness of counsel's fee request, a risky choice since the burden of proving entitlement to fees rests on the moving party. [Citation.]

"The law is clear, however, that an award of attorney fees may be based on counsel's declarations, without production of detailed time records. [Citations.]" (*Raining Data Corp. v. Barrenechea* (2009) 175 Cal.App.4th 1363, 1375.) Second the time records contained in Exhibit B have a "presumption of credibility." (*Horsford v. Board of Trustees of California State University* (2005) 132 Cal.App.4th 359, 396.) As the *Horsford* court said: "We think the verified time statements of the attorneys, as officers of the court, are entitled to credence in the absence of a clear indication the records are erroneous." (*Id*.)

Here, the time records in Exhibit B are detailed and clear, contain very little block billing, and were supported by counsel's declaration that the time spent was "reasonable and necessary". (Decl. Buus filed 12/14/2023, ¶ 7.) As previously noted, Nguyen's counsel has redacted entries related to her demurrer. (Buss Supp. Decl. ¶ 2.)

Plaintiff claims that 1.6 hours appear to be either administrative, duplicative, or unnecessary task that should be excluded and that 18.80 hours could not be determined if connected to the anti-SLAPP motion and should be excluded. The court agrees to this 20.4-hour reduction requested by the Plaintiff.

Plaintiff claims that the 120 hours on the appeal were excessive but provided no evidence of what would be reasonable.

Plaintiff also requested that the court review Exhibit B to determine whether the time requested was excessive and whether a lower rate should be applied.

The court is not persuaded by Plaintiff's arguments that the issues were not difficult or that Nguyen's attorneys should have been more efficient due to their experience. To the contrary, this case involves a complicated fact pattern and legal issues that were not run-of the mill (i.e., claims under the Voidable Transaction Act, and for aiding and abetting tort, and creditor's suit.)

Trial courts have discretion to decide which of the hours expended by the attorneys was reasonably spent on litigation. (*Hammond v. Agran* (2002) 99 Cal.App.4th 115, 133, disapproved on other grounds in *Conservatorship of Whitley* (2010) 50 Cal.4th 1206, 1226.) "However, the predicate of *any* attorney fee award … is the necessity and usefulness of the conduct for which compensation is sought." (*Thayer v. Wells Fargo Bank* (2001) 92 Cal.App.4th 819, 846.)

As attested in paragraph 7 of the Declaration of William L Buss in support of this motion, the amounts reflected in the detailed billings in Exhibit B were actually incurred in

connection with the motion to strike and were reasonable and necessary. Other than the 20.4-hour reduction discussed above, Plaintiff has not shown otherwise.

Nguyen's objection to Plaintiff's Exhibit 8 and a part of Exhibit 10 that contains informal settlement negotiations under Evidence Code 1152 is SUSTAINED.

Plaintiff argues that the rate of $595 is excessive but fails to present any evidence showing the prevailing rate for similar work in the community where the court is located is something lower than that. As the court explained in *569 East County Boulevard LLC v. Backcountry Against the Dump, Inc.* (2016) 6 Cal.App.5th 426, 437:

> The courts repeatedly have stated that the trial court is in the best position to value the services rendered by the attorneys in his or her courtroom (see, e.g., *Ketchum, supra*, 24 Cal.4th at p. 1132), and this includes the determination of the hourly rate that will be used in the lodestar calculus. (See, e.g., *Syers Properties III, Inc. v. Rankin* (2014) 226 Cal.App.4th 691, 700–703.) In making its calculation, the court may rely on its own knowledge and familiarity with the legal market, as well as the experience, skill, and reputation of the attorney requesting fees (*Heritage Pacific Financial, LLC v. Monroy* (2013) 215 Cal.App.4th 972, 1009), the difficulty or complexity of the litigation to which that skill was applied [Citations.] and affidavits from other attorneys regarding prevailing fees in the community and rate determinations in other cases. (*Heritage*, at p. 1009.)

(*569 East County Boulevard LLC , supra*, 6 Cal.App.5th at 437.)

The court finds that the time spent of [229.2 hours minus the 20.4 hour reduction discussed above equals] 208.8 hours on the detailed time sheet (attached as Exhibit B to William L. Buss Declaration filed 12/14/2023) was reasonable and necessary in connection with the anti-SLAPP motion, including the initial appeal.

The court finds that the hourly rate of $595 requested by Nguyen's counsel was reasonable for similar work in Santa Clara County based on the experience, skill and reputation of the attorneys' requesting fees and the difficulty and complexity of the litigation to which that skill was applied.

However, in balancing the two competing public policies discussed in *Mann, supra*, 139 Cal.App.4th 328, 244-345, the court concludes Nguyen should not be entitled to obtain *as a matter of right* her entire attorney fees incurred on successful and unsuccessful claims merely because the attorney work on those claims was overlapping.

Instead, the court first determined the lodestar amount for the hours expended on the successful claims, and, since the work on the successful and unsuccessful causes of action was overlapping, the court then considered Nguyen's relative success on the motion in achieving her objective and finds that 15 percent reduction (of the 208.8 hours) is appropriate. [208.8 x .15 equals 31.3 hours.] [208.8 minus 31.3 equals 177.5 hours.]

Accordingly, the court awarded Nguyen her attorneys' fees of 177.5 hours times $595 per hour equals $105,612.50.

The court also awarded Nguyen her costs requested in the amount of 1,566.40.

The court disagrees with Plaintiff's argument that she is not entitled to the costs of filing the first appeal because the court of appeal ordered each side to bear their own costs. The method of awarding costs on appeal is different from awarding costs as the prevailing party under CCP section 425.16(c).

The court will prepare the order.

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