

**SUPERIOR COURT, STATE OF CALIFORNIA  
COUNTY OF SANTA CLARA**

**Department 1, Honorable Le Jacqueline Duong, Presiding**  
Mai Jansson, Courtroom Clerk

191 North First Street, San Jose, CA 95113  
Telephone 408.882-2120

**To contest the ruling, call (408) 808-6856 before 4:00 P.M.**

**PROBATE LAW AND MOTION TENTATIVE RULINGS**  
**DATE: September 6, 2024/ September 10, 2024 TIME: :30 P.M.**

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LINE #	CASE #	CASE TITLE	RULING
<a href="#">LINE 1</a>	21PR191331	Cleston and Geraldine Fisher Trust u/a/d 6/27/94	Click on <a href="#">LINE 1</a> or scroll down for attached Tentative Ruling.
<a href="#">LINE 2</a>	21PR191331	Cleston and Geraldine Fisher Trust u/a/d 6/27/94	Click on <a href="#">LINE 2</a> or scroll down for attached Tentative Ruling.
<a href="#">LINE 3</a>			Click on <a href="#">LINE 3</a> or scroll down for attached Tentative Ruling.
<a href="#">LINE 4</a>			

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**PROBATE LAW AND MOTION TENTATIVE RULINGS**

<a href="#">LINE 5</a>			
<a href="#">LINE 6</a>			

Line 1

**Case Name:** *The Cleston and Geraldine Fisher Trust*

**Case No.:** 21PR191331

**Hearing date, time, and department:** September 10, 2024 at 1:30 p.m. in Department 1

## INTRODUCTION

In 1994, settlors Cleston and Geraldine Fisher, husband and wife, executed the Cleston and Geraldine Fisher Trust (“the trust”). Cleston passed away in 2008.<sup>1</sup> On the death of the first settlor, the trust split into two subtrusts, the survivor’s trust and the residual trust. Geraldine (“Decedent” or “Geraldine”) passed away in 2021.

On October 27, 2021, Petitioner and beneficiary Brenda Gossman (“Petitioner”) filed a Verified Petition (“the petition”) seeking declaratory relief, an accounting, a constructive trust, and damages associated with a trust distribution that she alleges Respondent Rene Bolivar (“Respondent” or “Bolivar”) procured through a purported second amendment to the survivor’s trust (“the second amendment”). According to the allegations in the petition, after Cleston’s death, Respondent, the settlors’ financial advisor, was involved in preparing the second amendment which provided that he would become the trustee upon the death of the surviving settlor and that he would be a beneficiary of the survivor’s trust. The petition alleges, inter alia, that Decedent lacked the capacity to draft the second amendment, that Respondent unduly influenced her, and that Respondent converted trust assets.

On July 12, 2023, Petitioner filed a verified amended petition against Respondent and also naming Lena Bolivar (“Lena”), Respondent’s wife, and First Allied Securities, Inc. (“First Allied”), Respondent’s employer, as respondents. Petitioner’s amended petition alleged causes of action for (1) declaratory relief finding residual trust modification void, (2) declaratory relief regarding disposition of survivor’s trust, (3) undue influence (against Bolivar and First Allied), (4) financial elder abuse (against Bolivar, Lena, and First Allied), (5) lack of capacity under Probate Code sections 810 through 812 (against Bolivar), (6) lack of capacity under Probate Code section 6100.5 (against Bolivar and Lena), (7) breach of fiduciary duty as financial advisor (against Bolivar and First Allied), (8) intentional interference with expected inheritance (against Bolivar, Lena, and First Allied), (9) accounting (against Bolivar only), (10) conversion (against Bolivar and First Allied), (11) constructive trust (against Bolivar only), (12) fraud (against Bolivar only), (13) professional negligence (against Bolivar and First Allied), (14) negligence (against Respondent), (15) negligence (against First Allied), (16) negligent supervision or retention of employee (against First Allied), (17) aiding and abetting breach of fiduciary duty (against First Allied), (18) aiding and abetting fraud (against First Allied), (19) aiding and abetting breach of fiduciary duty (against Lena), (20) aiding and abetting fraud (against Lena).

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<sup>1</sup> Because some of the individuals involved in this case share the same last name, the court will refer to them by their first names. No disrespect is intended.

Before her death, from at least 2012 to 2021, Geraldine made periodic payments to Respondent's wife, Lena Bolivar, which Respondent alleges were paid to assist Lena financially due to Lena's failing health. Geraldine passed away on May 13, 2021.

After Geraldine's death, Respondent became the trustee pursuant to the amended trust instrument. In that capacity, he made distributions to himself as a beneficiary.<sup>2</sup> He also made distributions to the other beneficiaries.

In a written order dated May 9, 2023 and filed May 11, 2023, the court suspended Respondent as trustee and appointed Russell Marshall to serve as trustee while this litigation is pending or pending further order of the court.

Currently before the court are (1) First Allied's motion for summary judgment or summary adjudication and (2) Petitioner's motion for summary adjudication. Petitioner and the Bolivars opposed First Allied's motion and First Allied filed a single reply. The Bolivars and First Allied opposed Petitioner's motion and Petitioner filed two separate replies, one for each opposition.

## **DISCUSSION**

### **I. Legal Background**

Any party may move for summary judgment. (Code of Civ. Proc., § 437c, subd. (a))<sup>3</sup>; *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843 (*Aguilar*.) The motion "shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code of Civ. Proc., 437c, subd. (c); *Aguilar, supra*, at p. 843.) The object of the summary judgment procedure is "to cut through the parties pleading" to determine whether trial is necessary to resolve the dispute. (*Aguilar, supra*, at p. 843.) Summary adjudication works the same way, except it acts on specific causes of action or affirmative defenses, rather than on the entire complaint. (§ 437c, subd. (f).) ... Motions for summary adjudication proceed in all procedural respects as a motion for summary judgment.'" (*Hartline v. Kaiser Foundation Hospitals* (2005) 132 Cal.App.4th 458, 464.)

"A plaintiff or cross-complainant has met his or her burden of showing that there is no defense to a cause of action if that party has proved each element of the cause of action entitling the party to judgment on the cause of action. Once the plaintiff or cross-complainant has met that burden, the burden shifts to the defendant or cross-defendant to show that a triable issue of one or more material facts exists as to the cause of action or a defense thereto. The defendant or cross-defendant shall not rely upon the allegations or denials of its pleadings to show that a triable issue of material fact exists but, instead, shall set forth the specific facts showing that a triable issue of material fact exists as to the cause of action or a defense thereto." (§ 437c, subd. (p)(1).)

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<sup>2</sup> Under the terms of the second amendment, which is of disputed validity, Respondent is a beneficiary entitled to 85% of the survivor's trust assets.

<sup>3</sup> All further undesignated statutory references are to the Code of Civil Procedure.

“A defendant or cross-defendant has met his or her burden of showing that a cause of action has no merit if the party has shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established, or that there is a complete defense to the cause of action. Once the defendant or cross-defendant has met that burden, the burden shifts to the plaintiff or cross-complainant to show that a triable issue of one or more material facts exists as to the cause of action or a defense thereto. The plaintiff or cross-complainant shall not rely upon the allegations or denials of its pleadings to show that a triable issue of material fact exists but, instead, shall set forth the specific facts showing that a triable issue of material fact exists as to the cause of action or a defense thereto.” (§ 437c, subd. (p)(2).)

“A defendant seeking summary judgment must show that at least one element of the 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.” (*Alex R. Thomas & Co. v. Mutual Service Casualty Ins. Co.* (2002) 98 Cal.App.4th 66, 72, internal citations omitted; emphasis added.)

When a defendant moves for summary judgment, “its declarations and evidence must either establish a complete defense to plaintiff’s action or demonstrate the absence of an essential element of plaintiff’s case. If plaintiff does not counter with opposing declarations showing there are triable issues of fact with respect to that defense or an essential element of its case, the summary judgment must be granted.” (*Gray v. America West Airlines, Inc.* (1989) 209 Cal.App.3d 76, 81.)

If the moving party makes the necessary initial showing, the burden of production shifts to the opposing party to make a prima facie showing of the existence of a triable issue of material fact. (Code of Civ. Proc., 437c, subd. (c); *Aguilar, supra*, 25 Cal.4th at p. 850.) A triable issue of material fact exists “if, and only if, the evidence would allow of reasonable trier of fact to find the underlying facts in favor of the party opposing the motion in accordance with the applicable standard of proof.” (*Aguilar, supra*, at p. 850, fn. omitted.) If the party opposing summary judgment presents evidence demonstrating the existence of a disputed material fact, the motion must be denied. (*Id.* at p. 843.)

Throughout the process, the trial court “must consider all of the evidence and all of the inferences drawn therefrom.” (*Aguilar, supra*, 25 Cal.4th at p. 856.) The moving party’s evidence is strictly construed, while the opponent’s is liberally construed. (*Id.* at p. 843.)

## **II. The Parties’ Evidentiary Objections**

The parties have made evidentiary objections in their responsive separate statements but this is improper. Written evidentiary objections must be made in a separate document and must not be re-stated or re-argued in the separate statement. (Cal. Rules of Court, rule 3.1354(b).)

Accordingly, the court declines to rule on *all* evidentiary objections based on this defect. (*Hodjat v. State Farm Mutual Automobile Ins. Co.* (2012) 211 Cal.App.4th 1, 8 [court may decline to rule on evidentiary objections improperly made in the separate statement].)

## **III. First Allied’s Motion**

First Allied moves for summary judgment or, in the alternative, summary adjudication. It contends (1) It is not vicariously liable for Bolivar's conduct because he was an independent contractor and, even if he were an employee, his actions were outside the scope of his employment; (2) As to all of Petitioner's claims, there is no evidence that it negligently supervised Bolivar, that it converted the property, or that it aided and abetted Bolivar's conduct; and (3) Punitive damages are improper as there is no evidence of its malice, oppression, or fraud.

### **A. Vicarious Liability**

First Allied argues that Petitioner's theory that it is vicariously liable for Bolivar's actions applies to the third cause of action for undue influence, the fourth cause of action for financial elder abuse, the seventh cause of action for breach of fiduciary duty, the eighth cause of action for intentional interference with expected inheritance, and the thirteenth cause of action for professional negligence.

First Allied first contends that it is not liable for Bolivar's torts because he was an independent contractor. It relies on *Bostrom v. County of San Bernardino* (1995) 35 Cal.App.4th 1654, which provides "it is the general rule (although subject to numerous exceptions) that an employer can be held vicariously liable for torts of its employee, but not for torts of an independent contractor. [Citation.]" (*Id.* at pp. 1665-1666.) However, as Petitioner correctly points out, the evidence First Allied provides in support of this assertion does not show that Bolivar was an independent contractor for the entire time he was employed by First Allied. Bolivar testified that he was employed by First Allied from 2007 to 2011. (First Allied's Compendium of Evidence, Exhibit A ("Bolivar Deposition"), pp. 68, 389.) First Allied also provides a written independent contractor agreement but it was not signed by Bolivar until 2011. (*Id.* at Ex. G, Bates stamp FASI\_008003.)<sup>4</sup> Additionally, in response to Petitioner's Separate Statement of Disputed Facts, First Allied indicated that it did not dispute that Bolivar acted as its employee or agent. (First Allied's Response to Petitioner's Separate Statement of Additional Facts at ¶ 5.) Accordingly, the court finds that First Allied has not met its burden at the first step of the summary judgment analysis as to the argument that it is not vicariously liable for Bolivar's torts because he was an independent contractor.

First Allied further argues that regardless of whether Bolivar was an employee, an agent, or an independent contractor, Bolivar was not acting within the scope of his employment when he accepted the checks from Decedent.

"Although an employee's willful, malicious, and even criminal torts may fall within the scope of employment, an employer is not strictly liable for all actions of its employees during working hours. [Citation.] For the employer to be liable for an intentional tort, the employee's act must have a causal nexus to the employee's work. [Citation.] Courts have used various terms to describe this causal nexus: the incident leading to the injury must be an outgrowth of the employment; the risk of tortious injury must be inherent in the working environment; the

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<sup>4</sup> Notably, Bolivar opposes the motion for summary judgment on the ground that, *inter alia*, he was an employee of First Allied pursuant to Corporations Code section 25004, subdivision (b). However, the court need not address this argument as it has determined that First Allied has not met its burden of showing that Bolivar was an independent contractor at the first step of the summary judgment analysis.

risk must be typical or broadly incidental to the employer's business; the tort was a generally foreseeable consequence of the employer's business. [Citation.]" (*Montague v. AMN Healthcare, Inc.* (2014) 223 Cal.App.4th 1515, 1521 (*Montague*), internal citations and quotation marks omitted.)

" 'The fact that an employee is not engaged in the ultimate object of his employment at the time of his wrongful act does not preclude attribution of liability to an employer. [Citation.] ... However, that is not to say, that employers are strictly liable for all actions of their employees during working hours. If an employee substantially deviates from his duties for personal purposes, the employer is not vicariously liable for the employee's actions.' [Citation.]" (*Montague, supra*, 223 Cal.App.4th at p. 1522.)

In short, "[t]he conduct of an employee falls within the scope of his or her employment if the conduct either (1) is required by or incidental to the employee's duties, or (2) it is reasonably foreseeable in light of the employer's business. [Citations.]" (*Montague, supra*, 223 Cal.App.4th at p. 1521.) " 'The nexus required for respondeat superior liability—that the tort be engendered by or arise from the work—is to be distinguished from "but for" causation. That the employment brought tortfeasor and victim together in time and place is not enough.' [Citation.]" (*Id.* at p. 1523.)

In determining whether an act occurred in the scope of employment, the court "considers whether the conduct benefited the employer, whether it was authorized or directed by the employer, the reasonable expectations of the employer, the amount of freedom the employee has to perform the duties of the job, the type of work the employee was hired to do, the nature of the conduct involved, and the time and place of the accident, among other things." (*Tognazzini v. San Luis Coastal Unified School Dist.* (2001) 86 Cal.App.4th 1053, 1058.)

"Minor deviations for personal or private purposes do not bring the employee outside the course and scope of employment. [Citations.] On the other hand, if an employee substantially or materially deviates from his duties for personal purposes, the doctrine of respondeat superior will not be invoked to hold the employer liable for the employee's torts. [Citations.] [¶] The distinction between minor deviations and major or substantial departures from employment depends upon whether the conduct engaged in was foreseeable as that term is used in the context of respondeat superior. The test of foreseeability is whether in the particular business setting involved, the employee's conduct ' "is not so unusual or startling that it would seem unfair to include the loss resulting from it among other costs of the employer's business." [Citation.].' [Citation.]" (*Avila v. Standard Oil Co.* (1985) 167 Cal.App.3d 441, 448, internal quotation marks omitted.) After-hours' social activities and recreational pursuits are ordinarily deemed deviations from employment. (*Boynton v. McKales* (1956) 139 Cal.2d 777, 789.)

Here, according to Petitioner's first amended petition, the actions Bolivar is alleged to have taken include inducing Decedent to change the trust to name Bolivar as trustee and as a beneficiary of the trust, making health care decisions for Decedent, and making or causing distributions to be made from the trust.

First Allied asserts that Bolivar was a registered representative and his job duties included providing investment advice to clients. Bolivar does not dispute this characterization. (See Rene and Lena Bolivar's Response to First Allied's Separate Statement at Undisputed

Material Fact (“UMF”) 6.) Petitioner contends that this definition was disputed by Bolivar’s supervisor, David Prushan, who testified that a registered representative is a financial advisor for his clients and did not limit Bolivar’s role to only providing investment advice. (See Petitioner’s Response to First Allied’s Separate Statement at UMF 6.) In any event, it is clear that Bolivar’s role with First Allied was to provide financial advice to clients.

First Allied contends that Bolivar developed a friendship with Decedent outside of their professional relationship and exerted undue influence over her through that friendship. It further argues that Decedent was Bolivar’s client before Bolivar began to work at First Allied. Finally, it asserts that Bolivar’s actions were meant to serve only himself and were prohibited by its policies and the rules of the Financial Industry Regulatory Authority (FINRA) and thus Bolivar’s actions did not occur in the scope of his employment.

Bolivar argues that his actions occurred in the scope of his employment with First Allied *because* they were prohibited by First Allied’s policies and his conduct fell within “the regular supervision coverage of [First Allied’s] policies.” (Bolivar Opposition to First Allied’s Motion at p. 14:20-23.) Neither First Allied nor Bolivar point to any authority addressing whether the tortfeasor’s failure to comply with the employer’s policies cuts for or against a finding that the tort occurred in the scope of the tortfeasor’s employment.

In *Myers v. Trendwest Resorts, Inc.* (2007) 148 Cal.App.4th 1403, 1432, the Court of Appeal held that the defendant’s sexual harassment conduct was outside the scope of employment as a matter of law because it was “motivated by personal reasons unrelated to his job duties and in violation of the employer’s sexual harassment policy.” The Court of Appeal further found that the Fair Employment and Housing Act already imposed liability on the employer for sexual harassing conduct of employees and thus, imposing common law tort liability was unnecessary to further the respondeat superior policy justifications, namely, “(1) to prevent recurrence of the tortious conduct; (2) to give greater assurance of compensation for the victim; and (3) to ensure that the victim’s losses will be equitably borne by those who benefit from the enterprise that gave rise to the injury.” (*Ibid.*) Thus, it appears that the fact that First Allied’s policies prohibit Bolivar’s conduct is a point in favor of finding that vicarious liability does not apply.

Petitioner argues that Bolivar’s actions were within the scope of his employment because Bolivar provided poor investment advice as the cash allocation in the trust’s portfolio was inconsistent with the residual trust’s objective of growth with high risk tolerance. However, as First Allied points out, such an argument is outside the scope of what is pled in Petitioner’s amended petition. A motion for summary judgment or adjudication “is limited to addressing those issues or theories of liability raised in plaintiff’s complaint.” (*Caldwell v. A.R.B., Inc.* (1986) 176 Cal.App.3d 1028, 1034.) Thus, arguments related to the suitability of the investments in the trust portfolio with First Allied cannot be grounds to deny the motion.

First Allied is correct that “[a]n act serving only the employee’s personal interest is less likely to arise from or be engendered by the employment than an act that, even if misguided, was intended to serve the employer in some way.” (*Lisa M. v. Henry Mayo Newhall Memorial Hospital* (1995) 12 Cal.4th 291, 298.) It is clear that the primary intention of the gifts and changes to the trust was to benefit the Bolivars. The Bolivars’ receipt of the funds clearly benefitted them as it is undisputed that they spent the money on food and other personal living expenses.



Petitioner asserts that Bolivar's actions also benefitted First Allied because they received payment of fees when Decedent completed transactions benefitting Bolivar. First Allied does not dispute that it approved transfers from the trust accounts it held to trust accounts with Bank of the West, but it contends that the checks Decedent wrote to Lena Bolivar were paid from Bank of the West. (First Allied's Response to Petitioner's Separate Statement of Additional Facts at ¶ 26; see Petitioner's Exhibit K filed July 23, 2024<sup>5</sup>.) It also does not dispute that it received fees from Bolivar's activities. (See *id.* at ¶¶ 65-66.) Thus, it appears that First Allied may have received a benefit from Bolivar's actions with respect to Decedent.

Neither party provides evidence regarding exactly when or how Bolivar allegedly unduly influenced Decedent, resulting in the gifts of trust funds and the changes to the trust. Thus, it is not clear whether these actions occurred during work hours or whether Bolivar used his position as a financial advisor to accomplish these results. First Allied has presented evidence that Bolivar and Decedent were friends and that he spoke to her and visited her outside the context of his employment. (See Deposition of Rene Bolivar at p. 133 [Bolivar would take Decedent out to lunch and on errands, such as to the DMV or to get a smog check].)

Nonetheless, the court finds that Bolivar's actions are of the type that could be expected to occur in his position as a financial advisor. It does not escape the court's notice that First Allied had the authority to supervise Bolivar in order to ensure that he did not take such actions. It required that Bolivar attest whether he was a trustee or a beneficiary on any client account. (See First Allied's UMF 13.) It also required that Bolivar make a monthly report regarding whether he had received gifts from clients or to acknowledge that no such gifts were received. (First Allied's UMF 15.) FINRA rule 3110 requires that First Allied maintain such policies and procedures. But, Petitioner presents evidence that Bolivar was "written up" for failing to keep records of gifts from clients. (Declaration of Arielle Goren in Opposition to First Allied's Motion, Exhibit 2 (Deposition of David Prushan), p. 58:9-12.) Nonetheless, First Allied does not contend that it investigated into Bolivar's conduct. Failure to investigate an employee's potential misconduct can be considered a ratification of that conduct for the purposes of vicarious liability for an employee's actions. (*Samantha B. v. Aurora Vista Del Mar, LLC* (2022) 77 Cal.App.5th 85, 109 [jury could have reasonably found that employer ratified employee's conduct in failing to investigate].)

The court finds that there is a triable issue of fact as to First Allied's vicarious liability for Bolivar's actions. Accordingly, the motion is DENIED as to the third cause of action for undue influence, the fourth cause of action for financial elder abuse, the seventh cause of action for breach of fiduciary duty, the eighth cause of action for intentional interference with expected inheritance, and the thirteenth cause of action for professional negligence.

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<sup>5</sup> In support of her motion for summary judgment, Petitioner filed the declaration of Kenyon Meyer. One of the exhibits to be attached was Exhibit K, which lists the distributions from the trust to the Bolivars. The exhibit was separated into three parts but part three was initially filed with the court twice and parts one and two were not filed at that time. On July 23, 2024, Petitioner filed a notice of errata and filed parts one and two and part three as two separate filings with the court.

## B. Negligent Supervision

First Allied alleges that Petitioner's negligent supervision claim must fail because First Allied was not aware of any behavior on the part of Bolivar that would pose a risk to Decedent. It contends that it could not have been aware that Bolivar would befriend Decedent and conceal the nature of his relationship with her from First Allied.

“ ‘An employer may be liable to a third person for the employer's negligence in hiring or retaining an employee who is incompetent or unfit. [Citation.]’ [Citation.] ‘Liability for negligent hiring ... is based upon the reasoning that if an enterprise hires individuals with characteristics which might pose a danger to customers or other employees, the enterprise should bear the loss caused by the wrongdoing of its incompetent or unfit employees.’ [Citation.] Negligence liability will be imposed on an employer if it ‘knew or should have known that hiring the employee created a particular risk or hazard and that particular harm materializes.’ [Citation.]” (*Phillips v. TLC Plumbing, Inc.* (2009) 172 Cal.App.4th 1133, 1139; see also *Z.V. v. County of Riverside* (2015) 238 Cal.App.4th 889, 902 [“To establish negligent supervision, a plaintiff must show that a person in a supervisory position over the actor had prior knowledge of the actor's propensity to do the bad act”].)

The Bolivars and Petitioner both assert that First Allied knew or should have known that he was terminated from his previous employment for “violation of firm policies and procedures with respect to using photocopied signatures on customer forms and failing to obtain required client signed paperwork.” They rely on a form U5, which indicates that Bolivar was terminated on November 27, 2007 for using photocopied client signatures and not obtaining appropriate signatures for mutual fund switching transactions. (See Bolivars' Compendium of Evidence in Opposition to First Allied's Motion at Exhibit A.) Despite awareness of this circumstance, Petitioner and the Bolivars contends that First Allied took no action to further supervise Rene Bolivar or look into his conduct with respect to vulnerable clients.

First Allied does not dispute that it was aware of the information contained in the U5 form but it contends that Bolivar's actions forming the basis of Petitioner's claims in this case are distinguishable from his prior actions of photocopying client signatures for transactions. In other words, it asserts that it was not on notice of the risk of the specific conduct that allegedly occurred in this case such that it can be held liable for negligent hiring and supervision.

In *Doe v. Capital Cities* (1996) 50 Cal.App.4th 1038, 1054-1055 (*Capital Cities*), on which First Allied relies, the Court of Appeal held that the plaintiff failed to allege sufficient facts to state a claim for negligent hiring. The “Plaintiff alleged that [employer] ABC knew or should have known that ‘[Defendant] Marshall engaged in the purchase and use of serious, mind-altering illegal drugs, that defendant Marshall used his position at ABC to gain sexual favors . . . .’” (*Id.* at p. 1054.) The court explained, “Given the harm that plaintiff suffered--a brutal sexual assault after having been surreptitiously drugged--the pleading allegations are insufficient to allege a cause of action. ABC's knowledge that Marshall personally used ‘serious mind-altering drugs’ does not equate with knowledge that he would surreptitiously use drugs to place a prospective employee into a situation of helplessness before violently assaulting him. Nor does ABC's knowledge that Marshall used his position ‘to gain sexual favors’ have material relevance to this matter. Use of the word ‘gain’ is consistent with the quid pro quo form of sexual harassment but that is not the basis of plaintiff's claim. . . .

[K]nowledge that Marshall used his position of authority to extract or to coerce sexual favors is not knowledge that he would first drug and then attack a potential employee. In the context of negligent hiring, those are qualitatively different situations. In sum, the cornerstone of a negligent hiring theory is the risk that the employee will act in a certain way and the employee does act in that way. Plaintiff has failed to allege those necessary facts.” (*Id.* at pp. 1054-1055; see also *Roman Catholic Bishop v. Superior Court* (1996) 42 Cal.App.4th 1556, 1565 [no prior knowledge of potential for harm where defendant who committed sexual assault on minor had no prior criminal history or had previous history of sexual relations with minors].)

This case is distinguishable from *Capital Cities*. Here, the conduct of using photocopied signatures is sufficiently similar to the conduct alleged in this case to support a claim of negligent supervision. While the court is unaware of whether the photocopied signatures were used to achieve any benefit for Bolivar like the gifts he received in this case, such an action evidences Bolivar’s disregard for the policies and procedures in place to protect clients and prevent issues like those that allegedly occurred in this case from occurring. The court recognizes the clear potential for abuse that comes with using photocopied signatures rather than receiving the express consent of the client for each transaction. This same disregard for the FINRA rules and First Allied’s own policies and procedures allowed Bolivar to befriend a client and receive gifts from her for years while he was employed by First Allied. Bolivar’s supervisor was also aware that Bolivar had failed to submit his gift attestations as discussed above, yet First Allied allowed Bolivar to remain working on the trust accounts without confirming that he had received no gifts. The court finds that First Allied has not met its burden of showing that there is no triable issue of material fact as to the sixteenth cause of action.

Accordingly, summary adjudication is DENIED as to the sixteenth cause of action (negligent supervision).<sup>6</sup>

### **C. Aiding and Abetting**

First Allied also asserts that Petitioner’s aiding and abetting causes of action fail because there is no evidence that First Allied knew of Petitioner’s conduct or that it assisted or encouraged his behavior. The petition alleges aiding and abetting breach of fiduciary duty against First Allied (seventeenth cause of action) and aiding and abetting fraud against First Allied (eighteenth cause of action).

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<sup>6</sup> Petitioner also contends that, in 2009, Bolivar transferred a Merrill Lynch account to First Allied. The form used to transfer the account bore Cleston’s signature, but, at that time, Cleston had been deceased for nearly a year. But, Petitioner does not raise any claim based on this transfer in the petition and, in fact, does not mention it in the petition at all. “To create a triable issue of material fact, the opposition evidence must be directed to issues raised by the pleadings. [Citation.] If the opposing party’s evidence would show some factual assertion, legal theory, defense or claim not yet pleaded, that party should seek leave to amend the pleadings before the hearing on the summary judgment motion.” [Citations.]” (*Aleksick v. 7-Eleven, Inc.* (2012) 205 Cal.App.4th 1176, 1186.) The court has not considered the 2009 transfer or the alleged unsuitability of the investments in the trust account in reaching its conclusion as to this cause of action.

“The elements of a claim for aiding and abetting a breach of fiduciary duty are: (1) a third party’s breach of fiduciary duties owed to plaintiff; (2) defendant’s actual knowledge of that breach of fiduciary duties; (3) substantial assistance or encouragement by defendant to the third party’s breach; and (4) defendant’s conduct was a substantial factor in causing harm to plaintiff. [Citations.]” (*Nasrawi v. Buck Consultants LLC* (2014) 231 Cal.App.4th 328, 343 (*Nasrawi*).)

With respect to aiding and abetting fraud, “[l]iability may also 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 so 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.” (*Saunders v. Superior Court* (1994) 27 Cal. App. 4th 832, 846.) In order to state a claim for fraud, a plaintiff must plead and prove the following elements: “(1) misrepresentation (false representation, concealment, or nondisclosure); (2) knowledge of falsity (or scienter); (3) intent to defraud, i.e., to induce reliance; (4) justifiable reliance; and (5) resulting damage.” (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638.)

First Allied argues that Bolivar did not disclose or actively concealed his actions from it by failing to disclose the gifts from Decedent and the fact that he had been named a trustee and beneficiary in the amended version of the trust. It also maintains that Decedent addressed her checks to Lena, rather than Bolivar and that the checks were mailed to the Bolivar residence rather than to First Allied. Thus, it contends it did not have the requisite knowledge to support a claim for aiding and abetting.

Petitioner does not dispute that Bolivar never told anyone at First Allied that he and Lena were receiving gifts from Decedent. (Petitioner’s Response to First Allied’s Separate Statement at UMF 35.) Petitioner also does not dispute that Bolivar did not inform First Allied of the changes to the trust at any time prior to Decedent’s death. (*Id.* at UMF 48.) First Allied also contends that there is no evidence that it knew of the second amendment to the trust prior to Decedent’s death. (*Id.* at UMF 52.) Petitioner disputes this but only on the ground that Bolivar himself knew about the changes to the trust and that knowledge is imputed to First Allied. (*Ibid.*) As the knowledge required for aiding and abetting is actual knowledge, (see, e.g., *Nasrawi*, *supra*, 231 Cal.App.4th at p. 343), this argument is unavailing. The court finds that First Allied has met its burden at the first step of the summary adjudication inquiry by providing evidence that it did not have actual knowledge of Bolivar’s conduct.

In opposition,<sup>7</sup> Petitioner again raises issues regarding the suitability of the trust’s investments and the transfer of the Merrill Lynch account to First Allied but the court has already found that these issues are outside the scope of Petitioner’s amended petition.

Petitioner also argues that First Allied knew that Bolivar was violating its policies but it took no action to restrict Bolivar’s conduct or to protect the trust accounts. Ignoring these signs of potential wrongdoing when First Allied had a duty to supervise Bolivar may be sufficient to meet the knowledge requirement for aiding and abetting. (See *Henry v. Lehman Commer. Paper, Inc. (In re First Alliance Mortg. Co.)* (9th Cir. 2006) 471 F.3d 977, 999.) Accordingly,

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<sup>7</sup> Bolivar does not make any opposition arguments expressly related to aiding and abetting.

the court finds that there is a triable issue of material fact as to whether First Allied had the requisite knowledge for aiding and abetting a breach of fiduciary duty.

As to the substantial assistance or encouragement element, First Allied's alleged failure to take proper precautions to supervise Bolivar allowed him to remain on Decedent's account. First Allied approved transfers of trust funds, allowing Bolivar to ultimately obtain them. "[E]ven 'ordinary business transactions' a bank performs for a customer can satisfy the substantial assistance element of an aiding and abetting claim if the bank actually knew those transactions were assisting the customer in committing a specific tort." (*Casey v. U.S. Bank Nat. Assn.* (2005) 127 Cal.App.4th 1138, 1145 (*Casey*)). The court finds that there is a triable issue of fact as to whether First Allied substantially assisted or encouraged Bolivar's conduct.

The motion is DENIED as to the aiding and abetting causes of action.

#### **D. Conversion**

"As it has developed in California, the tort [of conversion] comprises three elements: '(a) plaintiff's ownership or right to possession of personal property, (b) defendant's disposition of property in a manner inconsistent with plaintiff's property rights, and (c) resulting damages.' [Citations.] Notably absent from this formula is any element of wrongful intent or motive; in California, conversion is a 'strict liability tort.' [Citations.]" (*Voris v. Lampert* (2019) 7 Cal.5th 1141, 1150.)

First Allied contends that it cannot be liable for conversion (tenth cause of action) because there is no evidence that it converted trust funds or aided Bolivar in doing so. First Allied points out that it merely approved transfer of the funds from the trust account it held to Decedent's trust account with Bank of the West and the checks to Lena Bolivar were written from the Bank of the West trust account.

Petitioner argues that Decedent wrote checks from the trust accounts and then gave those checks to Lena.<sup>8</sup> She maintains that Bolivar was prohibited from receiving the funds as an agent of First Allied and that First Allied contributed to the conversion by approving the movement of the funds. The court finds First Allied's arguments more persuasive as to the checks. It must be noted that there is no evidence that First Allied converted the funds itself. Although the funds were ultimately received by the Bolivars, when First Allied approved the transfers, the funds remained trust funds as they were transferred from one trust bank account to another. (See *Voris v. Lampert, supra*, 7 Cal.5th at p. 1158 [a claim for conversion requires "that the defendant have intentionally done the act depriving the plaintiff of his or her rightful possession"].) As to aiding and abetting, First Allied persuasively argues that, once the funds left the trust account at First Allied, it no longer had any ability to control what happened with those funds.

Petitioner also contends that conversion occurred when Bolivar, acting as trustee, transferred the funds from the trust account to his own account after Decedent's death. First Allied contends that, while Bolivar violated both First Allied's internal policies and FINRA Rule 3241 in acting as trustee, Petitioner has cited no authority for the proposition that it is unlawful for a financial advisor to act as a trustee or beneficiary on a trust such it should not

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<sup>8</sup> The Bolivars do not directly address the conversion claim in their opposition.

have responded to Bolivar as acting trustee. However, First Allied was aware that Bolivar was recently employed by it, that Decedent had passed away, and that Bolivar was named trustee. First Allied was aware that its policies and FINRA rules prevented Bolivar from serving as trustee or beneficiary, at least while acting as a financial advisor. As discussed above, Bolivar's conduct was foreseeable and as discussed above ordinary business transactions can support an aiding and abetting theory of liability. (See *Casey, supra*, 127 Cal.App.4th at p. 1145.)

The motion is DENIED as to the conversion cause of action.

### **E. Negligence**

First Allied also argues that there is no evidence that it acted negligently for the purposes of Petitioner's professional negligence cause of action (thirteenth cause of action). However, the court finds that there is a triable issue of fact as to whether First Allied acted negligently for the reasons discussed above in connection with the vicarious liability and aiding and abetting arguments. The motion is DENIED as to the professional negligence claim.

### **F. Punitive Damages**

Under the punitive damages statute, Civil Code section 3294, " 'Malice' means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others. (Civ. Code, § 3294, subd. (c)(1).) " 'Oppression' means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights." (Civ. Code, § 3294, subd. (c)(2).) "Despicable conduct," has been described as conduct that is "so vile, base, contemptible, miserable, wretched or loathsome that it would be looked down upon and despised by ordinary decent people." (*Mock v. Michigan Millers Mutual Ins. Co.* (1992) 4 Cal.App.4th 306, 331.) "Such conduct has been described as '[having] the character of outrage frequently associated with crime.' [Citation.]" (*Tomaselli v. Transamerica Ins. Co.* (1994) 25 Cal.App.4th 1269, 1287.) "Consequently, to establish malice, 'it is not sufficient to show only that the defendant's conduct was negligent, grossly negligent or even reckless.' [Citation.]" (*Bell v. Sharp Cabrillo Hosp.* (1989) 212 Cal.App.3d 1034, 1044.)

Civil Code section 3294, subdivision (b) provides, "An employer shall not be liable for damages pursuant to subdivision (a), based upon acts of an employee of the employer, unless the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice. With respect to a corporate employer, the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation."

"California has traditionally allowed punitive damages to be assessed against an employer (or principal) for the acts of an employee (or agent) only where the circumstances indicate that the employer himself was guilty of fraud, oppression, or malice." (*College Hospital Inc. v. Superior Court* (1994) 8 Cal.4th 704, 723.) "[I]n performing, ratifying, or approving the malicious conduct, the agent must be acting as the organization's representative, not in some other capacity." (*Ibid.*)

In *College Hospital Inc. v. Superior Court* (1994) 8 Cal.4th 704, 723, the California Supreme Court provided the following examples of conduct sufficient to justify punitive damages on the part of a corporate employer: “*Pusateri v. E. F. Hutton & Co.* (1986) 180 Cal.App.3d 247, 253-255 [branch manager fails to intervene in stockbroker’s known flagrant mishandling of account]; *Grimshaw v. Ford Motor Co.* (1981) 119 Cal.App.3d 757, 812-814 [auto executives fail to correct known potentially lethal design defect in car]; *Nolin v. National Convenience Stores, Inc.* (1979) 95 Cal.App.3d 279, 288-289 [store supervisor refuses to correct known highly dangerous condition on premises]; *Hartman v. Shell Oil Co.* (1977) 68 Cal.App.3d 240, 248-250 [oil company representatives commit fraud against service station operator].)

In opposition, Petitioner points to the fact that First Allied was aware of Bolivar’s prior termination for photocopying client signatures, its failure to adequately supervise Bolivar despite their knowledge of his prior termination, and its approval of the transfer of the Merrill Lynch account using forms bearing Cleston’s signature after its death as conduct sufficient to support an award of punitive damages. They also contend that First Allied facilitated the disbursement of the funds from the trust account and ultimately to the Bolivars and that a representative from First Allied’s operations department assisted Bolivar in completing the transfer of the trust funds to his own account after he purported to assume the role of trustee despite the fact that Decedent’s social security number “did not match identification with the new account.”

The Bolivars also oppose First Allied’s motion to the extent it seeks summary adjudication as to the punitive damages request. They assert that First Allied acted with malice in approving the transfer Bolivar requested of funds from the trust account to his personal account after they learned of his appointment as trustee after Decedent’s death. Specifically, relying on *Twomey v. Mitchum, Jones & Templeton, Inc.* (1968) 262 Cal.App.2d 690, 708-709, they contend that First Allied owed the trusts the utmost duty of good faith and that the action of transferring the funds violated FINRA rule 3241.<sup>9</sup>

First Allied does not directly respond to these arguments. Instead, it reiterates its arguments that the causes of action in the petition fail. However, because the court has found that some of the causes of action raised in the petition survive the motion for summary judgment or summary adjudication, the court finds that there is a triable issue of material fact as to First Allied’s liability for punitive damages. The motion is DENIED to the extent it seeks summary adjudication of Petitioner’s request for punitive damages.

## **G. Conclusion**

First Allied’s motion for summary judgment or summary adjudication is DENIED in its entirety.

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<sup>9</sup> The Bolivars also term First Allied’s conduct negligent and reckless. But, as mentioned above, negligent or even reckless conduct is insufficient to support an award of punitive damages. (*Bell v. Sharp Cabrillo Hosp.*, *supra*, 212 Cal.App.3d at p. 1044.) Accordingly, to the extent First Allied’s conduct was negligent or reckless, this is insufficient to support an award of punitive damages.

#### **IV. Petitioner's Motion**

Petitioner moves for summary adjudication of five issues: (1) Rene Bolivar never became a beneficiary of the Survivor's Trust because the Second Amendment did not alter the Survivor's Trust's beneficiary; (2) First Allied and Rene Bolivar owed the Fisher Trusts fiduciary duties; (3) The court should grant Petitioner's thirteenth cause of action for professional negligence against Respondents Rene Bolivar and First Allied Securities, Inc.; (4) Lena Bolivar aided and abetted Rene Bolivar's breach of his fiduciary duties; and (5) Rene Bolivar is liable because Mrs. Fisher paid the Bolivars in violation of the terms of the Trust Agreement.

##### **A. First Issue: Validity of the Second Amendment**

Petitioner contends that she is entitled to summary adjudication as to the first and second causes of action in her amended petition on the ground that the Second Amendment executed by Decedent is invalid. The first cause of action requests declaratory relief finding that any modification to the residual trust is void and the second requests declaratory relief regarding disposition of the survivor's trust.

Petitioner asserts that article III(A) of the trust provides that, on the death of the deceased spouse (Cleston), the trust estate would be divided into the Residual Trust and the Survivor's Trust. At that time, pursuant to article X(B) of the trust instrument, the Residual Trust would be irrevocable and not subject to amendment by the surviving spouse. Article V(C) of the trust provides that, on the death of the surviving spouse (Decedent), the trustee "shall distribute the remaining balance of the Survivor's Trust, if any, including principal and accrued or undistributed income, to such one or more persons and entities, including the Surviving Spouse's own estate and on such terms and conditions, either outright or in trust, and in such proportion, as the Surviving Spouse shall appoint by a Will or Codicil specifically referring to and exercising this power of appointment." Article VII provides, "On the Surviving Spouse's death, the Trustees shall add to Residual Trust any portion of the Survivor's Trust, if any, not effectively disposed of as hereinabove provided, to follow the disposition of the Residual Trust in all respects as herein provided." Petitioner contends that this language requires that any amendment or changes to the distribution made by Decedent must be made via power of appointment and Decedent did not have the authority to make the changes to the trust she purported to make after the death of Cleston.

Petitioner argues that article VIII of the trust instrument sets forth the beneficiaries of the residual trust and that Decedent could not make amendments to article VIII as she purported to do after Cleston's death. Article VIII does not explicitly refer to the residual trust but Petitioner contends that because article VII requires that any remaining portion of the survivor's trust be added to the residual trust, the sole beneficiary of the survivor's trust, outside of any bequests made pursuant to the power of appointment, is the residual trust itself.

The Bolivars and First Allied argue that Decedent had the authority to amend the trust under the terms of the trust.<sup>10</sup> Article X(B) provides "On the death of the Deceased Spouse, the

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<sup>10</sup> Petitioner argues that First Allied lacks standing to make argument regarding the terms of the trust as it is not a beneficiary or otherwise interested person. But, the court need



Surviving Spouse shall have the power to amend, revoke or terminate the Survivor's Trust, but the Residual Trust may not be amended, revoked or terminated." The same section provides, "Revocation and amendment shall be made in the manner provided in Paragraphs A and C of this Article X."

"In construing trust instruments, as in the construction and interpretation of all documents, the duty of the court is to first ascertain and then, if possible, give effect to the intent of the maker. The interpretation of a written instrument, even though it involves what might properly be called questions of fact, is essentially a judicial function to be exercised according to the generally accepted canons of interpretation so that the purposes of the instrument may be given effect." (*Gardenhire v. Superior Court* (2005) 127 Cal.App.4th 882, 888, internal quotation marks and citations omitted.) Thus, "[t]he interpretation of a written instrument, including a ... declaration of trust, presents a question of law unless interpretation turns on the competence or credibility of extrinsic evidence or a conflict therein." [Citations.] (*Ike v. Doolittle* (1998) 61 Cal.App.4th 51, 74.)

The court finds that Decedent was not required to use a power of appointment to modify the terms of the trust after Cleston's death. While it is clear that article V(C) allowed Decedent to name beneficiaries pursuant to the power of appointment, article X(B) also gave Decedent the power to unilaterally amend the terms of the survivor's trust. Nothing in article X of the trust instrument required Decedent to amend the survivor's trust via a power of appointment.

Petitioner also contends that the amendments Decedent attempted to make purported to amend both the survivor's trust, which Decedent could amend pursuant to the terms of the trust and the residual trust, which Decedent could no longer amend after Cleston's death pursuant to article X(B). She contends that the effect of article VII of the trust is that the sole beneficiary of the survivor's trust is the residual trust because all items remaining in the survivor's trust upon the death of the surviving settlor would be transferred to the residual trust under the terms of article VII, which Decedent did not amend after Cleston's death.

The second amendment included the following language, "The Surviving Settlor hereby further amends Article VIII 'DISTRIBUTION ON DEATH' of the trust with respective [sic] to the Surviving Spouse's estate in its entirety and it is replaced with the following languages [sic]:

On the death of the Surviving Settlor, the trustee shall make the following distribution for the Survivor's Trust, also known as the Geraldine A. Fisher Survivor's Trust: A. Specific Gifts: None at the time this amendment is made. B. Residue: 1) One share consisting of eighty-five (85%) percent of the trust estate shall be distributed to RENE A. BOLIVAR. If he is predeceased, to his wife, Lena Bolivar. 2) One share consisting of fifteen (15%) percent of the trust estate shall be divided equally among the following: Randall H. Fisher (Cleston's brother), Brenda Gossman (Cleston's niece), Patricia Graves (Cleston's niece), Jacqueline J. Brown (Geraldine's sister), Sandra J. Moretti (Geraldine's sister) and Penelope J. Fleming (Geraldine's sister). Should any of the preceding beneficiaries predecease Geraldine A. Fisher, his/her respective share shall be divided among his/her living issue, by right of representation." (Formatting omitted.)

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not decide this issue as the Bolivars' opposition raises the arguments First Allied make against summary adjudication of the first two causes of action.

It appears to the court that this language is meant to change the distribution with respect to survivor's trust only. Although the court understands Petitioner's argument that article VIII was not amendable after Cleston's death because the residual trust could not be amended at that time, as mentioned above, article VIII does not expressly refer to the residual trust and the trust instrument does not expressly provide that Decedent lacked the authority to amend article VIII. Decedent had the authority to amend the survivor's trust after Cleston's death pursuant to the terms of article X(B).

"The primary duty of a court in construing a trust is to give effect to the settlor's intentions. [Citations.]" (*Barefoot v. Jennings* (2020) 8 Cal.5th 822, 826.) The court finds that there is a triable issue of fact as to Decedent's intent to amend the survivor's trust. The motion is DENIED as to the first and second causes of action.

The court declines to address the Bolivars' opposition arguments regarding Decedent's capacity to amend the trust as Petitioner did not raise any issue as to Decedent's capacity in the motion.

#### **B. Second Issue: Bolivar and First Allied Owed Fiduciary Duties to the Fisher Trusts**

As to issue 2, Bolivar and Lena concede that Bolivar and First Allied owed fiduciary duties to the Fisher Trusts. First Allied also concedes that a duty exists but alleges that duty is limited to the management of the Trust accounts and the agreed-upon investment advisory and brokerage services First Allied provided to the Trusts.

The motion is GRANTED as to the second issue. The court finds that Bolivar and First Allied owed a fiduciary duty to the Fisher Trusts. However, the court makes no ruling on the *scope* of the duty owed by Bolivar and First Allied as such a finding was not requested in the motion for summary adjudication.

#### **C. Third Issue**

Petitioner has withdrawn the third issue from the court's consideration.

#### **D. Fourth Issue: Lena Bolivar Aided and Abetted Rene Bolivar**

Petitioner contends that Lena aided and abetted Bolivar's breach of fiduciary duty by receiving and cashing the checks from Decedent. She asserts that the Bolivars' conduct in accepting the payments from Decedent violated FINRA rule 3220, which provides, "No member or person associated with a member shall, directly or indirectly, ...permit to be given anything, of value, including gratuities, in excess of one hundred dollars per individual per year to any person...or representative of another person where such payment or gratuity is in relation to the business of the employer of the recipient of the payment or gratuity." She further contends that accepting the payments violated First Allied's policies. These arguments speak to the nineteenth cause of action.

Petitioner and the Bolivars<sup>11</sup> agree that “[t]he elements of a claim for aiding and abetting a breach of fiduciary duty are: (1) a third party’s breach of fiduciary duties owed to plaintiff; (2) defendant’s actual knowledge of that breach of fiduciary duties; (3) substantial assistance or encouragement by defendant to the third party’s breach; and (4) defendant’s conduct was a substantial factor in causing harm to plaintiff. [Citations.]” (*Nasrawi, supra*, 231 Cal.App.4th at p. 343.)

Lena contends that she was not aware of the policies or the FINRA rule providing that financial advisors may not receive such gifts from clients. Petitioner counters that Lena was aware of the “primary wrong” that occurred,

“California has adopted the common law rule for subjecting a defendant to liability for aiding and abetting a tort. 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 so 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. [Citations.] [Citation.] ... [L]iability for aiding and abetting depends on proof the defendant had actual knowledge of the specific primary wrong the defendant substantially assisted. [Citation.]” (*American Master Lease LLC v. Idanta Partners, Ltd.* (2014) 225 Cal.App.4th 1451, 1475 (*AML*), internal quotation marks and citations omitted.) In *AML*, the Court of Appeal held that the trial court did not err in ruling that the defendants could be liable for aiding and abetting a breach of fiduciary duty where the plaintiff “pleaded and proved that *defendants had actual knowledge of the fiduciary duties Andrews, Runnels, and Franklin owed to AML*, that defendants provided the three fiduciaries with substantial assistance in breaching their duties, and that defendants’ conduct resulted in unjust enrichment.” (*Id.* at pp. 1477-1478.) This suggests that the defendant must have actual knowledge of the fiduciary duty owed, not merely the action constituting the violation of that duty.

In *Casey, supra*, 127 Cal.App.4th at p. 1145, the court explained, “California courts have long held that liability for aiding and abetting depends on proof the defendant had actual knowledge of the specific primary wrong the defendant substantially assisted.” The court held that “even ‘ordinary business transactions’ a bank performs for a customer can satisfy the substantial assistance element of an aiding and abetting claim if the bank *actually knew those transactions were assisting the customer in committing a specific tort*. Knowledge is the crucial element.” (*Ibid.*)

“ ‘In the civil arena, an aider and abettor is called a cotortfeasor. To be held liable as a cotortfeasor, a defendant must have knowledge and intent. ... A defendant can be held liable as a cotortfeasor on the basis of acting in concert only if he or she knew that a tort had been, or was to be, committed, and acted with the intent of facilitating the commission of that tort.’ [Citation.] Of course, a defendant can only aid and abet another’s tort if the defendant knows what ‘that tort’ is. ... [T]he defendant must have acted to aid the primary tortfeasor ‘with knowledge of the object to be attained.’ [Citation.]” (*Casey, supra*, 127 Cal.App.4th at p. 1146, italics omitted.) This too suggests that the aider and abettor must be aware of the fiduciary duty that was violated in order to be held liable for the breach.

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<sup>11</sup> First Allied does not oppose the fourth or fifth issues raised in Petitioner’s motion for summary adjudication.

Lena testified that she did not know that it would violate First Allied's policies for her to receive the checks from Decedent. (Lena Bolivar Deposition Testimony, p. 128:8-10.) She also testified that she did not know how FINRA regulated Rene Bolivar's profession. (*Id.*, p. 130:19-22.) She also stated that she did not know the "specifics of the regulations" in the financial advisor field. (*Id.*, p. 133:9-13.)

Petitioner contends that Lena was aware that the financial industry is highly regulated and that Lena was aware that her own company prohibited her from receiving gifts from vendors. But, Lena was not in the position of a fiduciary with respect to the trust and Petitioner cites to no authority indicating that Lena had a duty to investigate into Rene Bolivar's fiduciary duties that may have existed. The court finds that there exists a triable issue of material fact as to whether Lena had the requisite knowledge to aid and abet Bolivar. The motion is DENIED as to the fourth issue.

#### **E. Fifth Issue: Rene Bolivar is Liable Because Decedent Paid the Bolivars in Violation of the Terms of the Trust**

Petitioner's final contention on summary adjudication is that Bolivar is liable for breaches of trust committed by Decedent under Probate Code section 16403 ("section 16403"). Section 16403, subdivision (b)(3), on which Petitioner relies, provides, "A successor trustee is liable to the beneficiary for breach of trust involving acts or omissions of a predecessor trustee in any of the following circumstances: . . . Where the successor trustee neglects to take reasonable steps to redress a breach of trust committed by the predecessor trustee in a case where the successor trustee knows or has information from which the successor trustee reasonably should have known of the predecessor trustee's breach." Petitioner contends that because the beneficiary of the trust during Decedent's lifetime was Decedent herself, Decedent, as trustee, could not distribute trust funds to the Bolivars, who were not beneficiaries. After Bolivar became trustee pursuant to the terms of the trust as amended after Cleston's death, Petitioner argues, Bolivar took no action to redress this breach of trust.

But, Petitioner does not explain to which causes of action this argument applies. Section 437c, subdivision (f)(1) provides, "A party may move for summary adjudication as to one or more causes of action within an action, one or more affirmative defenses, one or more claims for damages, or one or more issues of duty, if the party contends that the cause of action has no merit, that there is no affirmative defense to the cause of action, that there is no merit to an affirmative defense as to any cause of action, that there is no merit to a claim for damages, as specified in Section 3294 of the Civil Code, or that one or more defendants either owed or did not owe a duty to the plaintiff or plaintiffs. 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."

"Prior to the 1990 amendment to the summary adjudication statute, parties could seek summary adjudication on any issues raised in a case. The 1990 amendment limited summary adjudication motions to a cause of action, an affirmative defense, a claim for punitive damages, or an issue of duty. (Stats. 1990, ch. 1561, § 2, p. 7330.)" (*Paramount Petroleum Corp. v. Superior Court* (2014) 227 Cal.App.4th 226, 241-242, fn. omitted.) This issue is not framed as an issue of duty and, as mentioned above, Petitioner does not explain to which causes of action

this issue applies. Thus, it is a request to adjudicate a general issue in the case and not one that falls under the mandate of section 437c. The motion is DENIED as to the fifth issue.<sup>12</sup>

## **F. Conclusion**

Petitioner's motion for summary adjudication is GRANTED IN PART AND DENIED IN PART. The motion is GRANTED as to issue two. The court finds that Bolivar and First Allied owed a fiduciary duty to the Fisher Trusts. However, the court makes no ruling on the *scope* of the duty owed by Bolivar and First Allied. The motion is DENIED in all other respects.

## **CONCLUSION**

First Allied's motion for summary judgment or summary adjudication is DENIED in its entirety.

Petitioner's motion for summary adjudication is GRANTED IN PART AND DENIED IN PART. The motion is GRANTED as to issue two. The court finds that Bolivar and First Allied owed a fiduciary duty to the Fisher Trusts. However, the court makes no ruling on the *scope* of the duty owed by Bolivar and First Allied. The motion is DENIED in all other respects.

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<sup>12</sup> The court notes that, although both First Allied and Petitioner frame their arguments in terms of "issues", in all other cases, the issues were framed as issues of duty or the court could tell from the parties' briefing to which causes of action the issues referred. The court only invokes this principle only as to Petitioner's fifth issue because it cannot determine to which causes of action the issue applies. (See *Quantum Cooking Concepts, Inc. v. LV Assocs., Inc.* (2011) 197 Cal.App.4th 927, 934 [stating that the trial court is not required to "comb the record" for arguments "a party has failed to identify or provide"].)

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